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Displaced Persons and International Human Rights with reference to Rwanda and Cambodia

Hideko Toma

Department of Politics, Faculty of Social Sciences

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For my teacher in life, Daisaku Ikeda, the founder of Soka Gakkai International.

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ABSTRACT

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DISPLACED PERSONS AND INTERNATIONAL HUMAN RIGHTS WITH REFERENCE TO RWANDA AND CAMBODIA

by Hideko Toma

This thesis examines the issue of displaced persons in the context of international human rights. Displaced persons have attracted sympathy throughout the world partly due to the intensive media coverage and partly due to the humanitarian nature of the problem. The thesis addresses one central question: how can we eradicate the miseries of displaced persons?

The first part of the thesis examines the existence and definitions of displaced persons. Much of the literature indicates that the issue of human rights is of fundamental importance when considering displaced persons. In order to understand the complex problems of displaced persons in the contemporary international arena the second part of the thesis explores the tension between human rights norms and the claims of state sovereignty. It analyses the concepts of basic human rights and the legal sovereignty of states. But the concepts themselves are not unchanging. This section is therefore followed by an examination of the evolution of human rights in the context of state sovereignty since the early 20th century. It reveals that non-governmental organisations (NGOs) have played an important role in influencing the evolution of human rights, in particular, since 1945. There are, however, problems in creating a society founded on human rights within a state by NGOs and the international regime. Responsibility and accountability become obscure due to a large number of participants involved.

The third part of the thesis presents an account of field studies conducted in Rwandan and Cambodian in the belief that a global analysis must be rooted in concrete experience. The two cases highlight two main points. First, human rights can be violated not only by oppressive states but also a breakdown of states. Second, the institutions of good governance are as important as humanitarian aid/outside intervention because the United Nations (UN) and NGOs often lose sight of the people whom they are supposed to be helping in the first place.

Although the development of international human rights law and the rise of NGOs have played a significant role by going beyond the barriers of states, they are not sufficient to bring about tangible change. If we cannot place our confidence in international law nor NGOs, where can we turn to? The thesis addresses a need to increase awareness of human rights among ordinary citizens. But to do so requires a shared value, a fundamental value which is prior to all other values. Human rights rest upon the foundation of peace. The right to life in the name of the right to live in peace is, therefore, the most basic human right. This basic right is based on dignity of life. It is inherent to all people, and nothing can substitute for it. The thesis concludes by stating that dignity of life must be a shared value in order to eradicate the sufferings of displaced persons.

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CHAPTER 1

INTRODUCTION

Displaced persons are a group as old as human society. Flight into exile, and granting of asylum to strangers in need are practices found throughout history. In early modern Europe, the first massive flow of displaced persons may be the group of about 150,000 Jews who were forced to leave Spain in 1492 for their refusal to convert to Christianity. Some fled to France, from which Jews had been officially expelled in 1394; others moved to the Low Countries. Many also went to Portugal from which, in a few years, they were expelled. In the end, most of the Jews settled among the Muslim states of North Africa and the Middle East which welcomed them for their wealth and skills and where they established the communities of their own kind. From the perspective of Christian Europe in the late fifteenth century, the Jews were not, however, considered as `innocent victims' of religious persecution. They were perceived to be guilty of resisting the legitimate acts of their sovereign states and they deserved their unhappy fate.[1]

The term, `refugee' originated in France, where it was recorded in the context of granting asylum and assistance to foreigners escaping persecution in 1573. This date indicates the arrival of Calvinists from the Low Countries. The successive waves of migrants were fleeing from the Low Countries, where, in spite of the fact that the Reformation had gained considerable support, the Spanish rulers were trying to repress religious dissent.

In the early 17th century, France had achieved a relatively peaceful coexistence between a Catholic majority and a Calvinist minority based on the Edict of Nantes enacted in 1598 after four decades of civil war. The edict institutionalised a political compromise between Catholic and Calvinist nobles. Although Catholicism was reestablished as the state religion, Protestants achieved political autonomy in their fortified cities where they had their own courts of law and military forces. In order to ensure coexistence, Henry IV, a Calvinist noble who had converted to Catholicism as a condition of assuming the crown, took on the Calvinist Duc de Sully as his chief minister. However, the

Protestants' autonomy was increasingly seen as anomalous by the Catholic rulers. As a result, religious conformity was imposed on the Calvinist aristocracy in the late 1620s, and Calvinist towns such as La Rochelle were shorn of their defensive walls and deprived of their political autonomy. When Louis XIV seized power in 1661, he tried to eliminate Calvinism from France to achieve what he believed to be a unified polity. The revocation of the Edict of Nantes by Louis XIV on 8 October, 1685 was, therefore, the result of decades of attempts to undermine the Calvinist community by making it impossible for people to be born, work, marry, or die as Calvinists. As a result, between 1685 and 1688, about 40,000 people escaped each year. The total numbers fleeing is estimated at 200,000 between 1681 and 1720, one-fourth of the Calvinist population, the most affluent part of the community. Many went to Britain, the Netherlands, Switzerland and Brandenburg-Prussia. The three-fourths who remained behind in France continued to live quietly going about their secular affairs while some converted to Catholicism.[2]

The English word `refugee' derived from the French. It was used for the first time in reference to these Huguenots, the persecuted Calvinists who fled to Britain from France immediately before and after the revocation of the Edict of Nantes. It is said that what made the Huguenots into refugees provides a historical model of the classic type of refugees, one which is still relevant as enshrined in the present statutory definition.

First, the Huguenots feared persecution on account of membership in a religious organisation targeted by the governmental authorities of their country. Second, they left the country of origin as a result of the fear of persecution. Moreover, what made the Huguenots qualify as `refugees' was not only persecution by Louis XIV but also the recognition by other countries' political authorities that they were people who deserved and needed asylum.[3] For example, the Huguenots were welcome in states where some form of Protestantism had been established as the official religion or where fellow members had gained significant power. Iberian Jews were still, however, considered to deserve their ill fate in the perspective of Christian Europe at that time.

Nicholas Van Hear states that the `origins' of a field of refugee studies was the publication of a special issue of the **International Migration Review** in 1981, edited by Barry Stein and Silvano Tomasi. In their Forward, they said that the volume sought to `provoke new thinking and promote a comprehensive, historical, interdisciplinary and comparative perspective which focuses on the consistencies and patterns in refugee experience'.[4] Since then, there has been a fundamental change in the nature of the refugee regime, that is in the national and international body of institutions, law, policy and practice. This change may be explained not only by increasing numbers of refugees but also by the way in which the regime defines and looks at the possible causes that generates them. The term `refugee' as we now use it in the study of forced migration is still a contested issue among practitioners, academics, and politicians. Some believe that the role of the United Nations High Commissioner for Refugees (UNHCR) or other agencies that form what may loosely be called the refugee or humanitarian regime, should be to deal only with `refugees' as defined under the present statutory definition. Others argue that the regime should take up a wider approach that encompasses potential refugees or people in refugee-like situations such as internally displaced persons and other victims of human rights abuses, as well as former refugees such as returnees. The former approach may be called `traditionalists' or `fundamentalists' and the latter `holists' or `messianic'.[5] At the national level, the former approach is used while the latter is taken by the international refugee regime as the numbers of displaced persons increase.

The present thesis takes the latter approach by examining displaced persons from the perception of human rights with reference to Cambodia and Rwanda in 1994. One of the characteristics of the latter part of this century is, without doubt, the consolidation of global interdependence as the determinant feature of relations between different regions of the world. Many economic, political, environmental and other questions can only be explained from this point of view. In the same way, only from such a global perspective can the future reasonably be planned. The increasing numbers of refugees and internally displaced persons is one such question. There are an estimated 18 - 20 million refugees and 20 - 22 million internally displaced persons.

LITERATURE REVIEW

Although some earlier publications are included, the literature review of refugees and internally displaced persons is based primarily on materials published since 1989, when a change in the geo-political order took place. When the communist order collapsed in the late 1980s, the persistence of old inter- and intra-state rivalries and regional schisms, the deterioration of material conditions of living for a greater part of humanity, and growing religious and ethnic tension, together with increasing evidence of decay and cracks in the internal glue binding elements of states together, all highlighted the reemergence of displaced persons as a major source of concern for international institutions, governments and non-governmental organisations. By 1989, it was becoming increasingly clear that refugees and internally displaced persons could no longer be approached from an episodic, fragmented, country-specific perspective.[6] The global context is needed to understand what is happening in the problem of forced displacement. The year of 1989, therefore, marked a new stage in the recent history of forced migration studies.

The list of such studies is varied, though not large. First, there are general works and reviews, which provide a background to the development and reception of displaced persons flows, or compare and contrast general situations of countries. Such works include: the edited collection by Joly and Cohen (1989),[7] Zolberg (1989),[8] Loescher (1992),[9] Ferris (1993),[10] and Black and Robinson (1993).[11] Within such general works, two themes deserve attention, namely the historical background to refugee movements and theoretical discussions. With regard to the former, the original Geneva Convention definition of a refugee specifically referred to refugees in Europe after the Second World War; this historical context of flight in Europe provides a background for the development of the wider `international refugee regime'. In addition to an historical perspective, however, it is also important to place refugees in a theoretical context. A helpful classification is provided by Ferris (1993), who identifies five approaches which characterise the majority of research. These approaches are: humanitarian/emergency;

foreign policy/security approaches; human rights; development; and international systems. Each one emphasises a particular group of circumstances. [12] In addition to such general theoretical issues, a further important question to address in the literature on refugee studies concerns how a refugee is now defined. This is an area which is particularly complex. In spite of the original Geneva Convention definition, many categories and statuses have been developed in different countries for people moving in different refugee-like situations, such that a simple legal definition of a refugee is often inadequate. This is why the literature of refugees often deals with or touches upon the question of internally displaced persons, who live in refugee-like situations within their country of origin.

An initial distinction can be made between various categories of refugees defined by their legal status in their host country. First, there are categories of `asylum-seekers' and `refugees' which arise from the fact that requests for refugee status are processed individually. The processing of claims takes time, often several years. There is also the use of temporary stay permits which can be renewed depending on changing conditions in the country of origin. Such statuses have been particularly important in dealing with refugees from the former Yugoslavia, where most governments prefer to grant temporary residence for humanitarian reasons rather than full refugee status (ECRE, 1993[13]). Alternatively, a more generalised, as opposed to individualised, definition of refugee status is made by Joly (1992)[14] who identifies five kinds of refugee. These are: convention refugees, who fall under the Geneva Convention; mandate refugees whose refugee status is recognised by UNHCR but not by the host governments; humanitarian refugees who are granted the right to stay on humanitarian grounds but who receive less than full refugee status; de facto refugees, who are refugees in practice, but do not seek refugee status because they have other forms of status, or because they fear contact with the authorities; and refugees in orbit who move between different countries in search of more permanent status.

Many authors (Zolberg, 1989[15]; Loescher, 1992[16]; Hailbronner, 1993[17]) try to classify different kinds of forced migrants, in terms of the causes that forced them to leave their

homes. They are classified as political, economic, social, religious, natural disasters, development projects, foreign intervention, human rights abuses, and violence. The above authors reconsider the concept of a refugee derived from the Geneva Convention, and add factors other than persecution that have provoked the forced displacement of millions of people in recent decades. For example, Zolberg suggests the idea, now well accepted, that refugees should be considered as those who are forced to abandon their countries of origin due to life-threatening violence. Violence includes both immediate physical violence and coercive circumstances that have similarly threatening effects. 'Life' in this context includes both biological existence and social existence, and the basic material and organisational conditions necessary to maintain them (Zolberg, 1989).

Another problem in defining refugees is that many departures of people from their homes are precipitated by the combined effects of the causes stated above. The case of migrants and refugees coming from Eastern and Central Europe demonstrates this difficulty. For example, asylum-seekers are those people who leave their country of origin at a time of substantial political change, when there is a general improvement in the civil and political rights situations but simultaneously a collapse of the economic and social system (Hailbronner, 1993). As one can see from the above discussion, the issue of the causes of refugees is linked to the question of the definition of refugees.

Turning to the geographical origin of refugees, they can be extremely varied. For example in the period since 1956, the movement of east Europeans to Germany; movement from Hungary to Austria; from Poland to Sweden and Italy; from Poland and Romanian to France; from Bulgaria and Romanian to the Czech Republic and Slovak; from Somalia and Albania to Italy; from East Timor, Angola and Mozambique to Portugal (Lopes, 1991[18]). It is not only the geographical proximity that is important in the case of movement but also the cultural links between Portugal, Italy and France with their former colonies (Lopes, 1991). The case of France is especially clear at this point because of the presence of refugees and asylum-seekers from former French Indochina who have entered France since 1975.

It is in the area of the analysis of changing asylum policies that probably the largest volume of work has been produced on refugees. In practice, western governments have adopted a restrictive policy by rigorously applying the letter of the 1951 Geneva Convention. As a result, the states which proclaim themselves in favour of tolerance, human rights and the rights of minorities, remain almost closed to those arriving because of intolerance and the violation of their rights. Even Spain, Greece and Italy that had been known as being relatively open towards migrants in general became dramatically restrictive in accepting refugees (Black, 1993).[19]

In contrast to the wide literature on asylum policy, the study on the settlement and integration of refugees is relatively scarce. There has been little systematic study of the settlement process (Joly, 1992). The settlement process in practice is translated into policies for the reception of refugees that, as Bach notes, `legal frameworks continue to assume that many newcomers are only temporarily resident in the host country, and governments remain attracted to incentive schemes, to entice immigrant groups to return home (Bach, 1989).[20] A number of individual studies do, however, exist, generally centred on a community of refugees from one country moving to another, and especially concerning refugees from Vietnam and elsewhere in Southeast Asia arriving in Western Europe during the late 1970s and early 1980s (Robles, 1989[21]; Meijer, 1990[22]). From the literature on the settlement and integration of refugees, one can note that governments are seldom willing to assume responsibility for refugee flows that do not directly affect their political interests. This affects, in turn, national policies towards refugee integration as well as asylum (Ferris, 1993).[23]

There are studies of integration based on individual aspects; in the case of employment (Bethlentalvy, 1987[24]; Bui Hanh Nghi, 1988[25]); rented housing market (Black, 1992[26]); unaccompanied minors (Jockenhovel-Schieke, 1990[27]) and the problems in the field of health (Hondius and van Willigen, 1989[28]). These problems also help to explain the psychological problems among some refugee groups (van Willigen, 1991[29]).

As stated above, the literature of refugees often deals with the question of internally displaced persons. In addition, since the mid-1990s the literature devoted specifically to the issue of internally displaced persons has emerged. Some writers examine the debate of internally displaced persons strictly from a legal perspective (Beyani, 1994[30]; Plender, 1996[31], Nanda, 1996[32]) while the others explain the phenomena of internally displaced persons from practical, political and legal perspectives (Deng,1993[33]; Cohen and Cuendo[34], 1995; Bennett, 1998[35]).

In summary, the literature review reveals a lack of studies in a global context, while on the other hand, any global analysis must be rooted in concrete experiences. Literature that treats the question of forced displacement in its totality is rare: those studies that are concerned with the explanation of the background to the phenomena of forced migration lack a global context, while case studies often suffer from a lack of reference to general circumstances including legal and political contexts.

It is this perceived gap in our knowledge of the forced migration study in the global context accompanied by case studies that this thesis seeks to fill by focusing on two sets of issues: the existence, and definitions, of refugees and internally displaced persons on the one hand and human rights and state sovereignty on the other with reference to Rwanda and Cambodia.

METHODOLOGY OF RESEARCH

I have used: primary sources (UN and other documents from national and international agencies, national and international Non-Governmental Organisations (NGOs)); secondary sources (books, journal articles); case studies. These primary and secondary sources have been used to develop a framework of analysis: institutions of good governance are as important as humanitarian aid/outside intervention in deciding how effectively refugees/internally displaced persons will be dealt with. Then, the case studies were planned to explore this framework and to test its relevance.

The literature as to research methods in social science have been reviewed (C. Hakim, 1987[36]; J. Platt 1988[37]; R. K. Yin, 1989[38] and 1993[39]; H. Rose, 1991[40]). Research methods can be based on single- or multiple-studies. Further, four main research methods have been considered and analysed for the purpose of this thesis: grounded theory; quasi-experimental; case study method; ethnography method. As a result of the examination of theoretical framework developed in this thesis, multiple-studies and an ethnography method were selected. The reasons for the selection will be explained below.

A series of field trips were undertaken which are incorporated into two studies, Rwanda and Cambodia. The selection of cases is deliberate in the belief that they would clearly illuminate the theoretical analyses made in the present thesis. Such an approach is called `opportunistic' by D. Buchanan, D. Boddy and J. McCalman (1988)[41]. In fact, C. Hakim takes the view that `convenience samples are not acceptable in research'. Howard Rose, however, states that in practice opportunism is probably valid for certain types of study, providing the approach adopted is made explicit.[42] Robert Yin states that two or more cases should be included within the same study precisely because a researcher predicts that similar results (replications) will be found. Furthermore, Yin argues that a replication logic is the only logic for multiple studies. [43]

A broader view is taken by J. Platt who suggests that a method for analysing events arises from a logic of diversity. Diversity ensures that the different types of illustration may be found through multiple studies. This method justifies the use of multiple studies which are intended to be descriptive and which are not oriented towards specific theoretical propositions.[44]

Together with this diversity approach, the type of multiple-studies in this thesis is conceived as essentially descriptive in nature, which presents a contemporary phenomenon within its real-life context. The other types of studies such as the exploratory and exemplary forms are considered inappropriate for the purpose of this thesis. This is because the former is suitable for a pilot study by defining the questions

and hypotheses of a subsequent study. And the latter is useful for explaining cause-effect relationships to determine which causes produced which effects. [45]

As stated above, there are four main research methods: 1) grounded theory, 2) quasi-experimental, 3) case study method, and 4) an ethnography method. First, the grounded theory method is concerned with the discovery of theory from data. [46] That is, after data collection, the researcher generates categories which fit the data until the researcher feels assured about their meaning and importance. Then, the researcher attempts to formulate more general expressions of these categories. At this stage, the researcher explores the connections between categories and their generality. As a result of data collection and theoretical reflection, the emerging theory is tested once again in the field.[47] It is, however, said that while lip-service is paid to grounded theory method, its use in practice is much less. It is rare to find evidence of that interplay of data collection and analysis which is at the heart of the grounded theory method.[48] Second, the quasi-experimental method relies heavily on quantitative data collection to emulate scientific methods through the use of control group designs or time-series designs. This method has, for example, dominated the era of federal policy evaluations in the United States of the mid to late-1960s.[49] The third research approach is the case study method which is characterised as 1) defining specific questions of study ahead of time, 2) developing hypotheses, collecting empirical data, and drawing conclusions based on the analysis of such data, 3) carrying out field work focusing on evidence deemed relevant in a time-limited fashion. It must be clarified that the case study method is different from case studies. It is one of research methods used in case studies. Fourthly, similar to the case study method, the ethnography method is characterised as 1) gaining a close-up of detailed description of the real world, 2) claiming that all evidence is relative and therefore cannot be independent of a researcher; this favours participant observation as the main mode of data collection, 3) encouraging fieldwork to continue for long periods of time and in an unstructured manner, so that the regularities and rituals of everyday life can surface in a natural fashion.[50] While the ethnography method assumes multiple realities, the other three methods believe that there is only a single objective reality and it can be investigated by following the traditional rules of scientific inquiry.[51]

The studies of Rwanda and Cambodia follow the ethnography method for the following reasons: the studies in this thesis 1) do not necessarily assume a single objective reality, 2) are more interested in theory- building than theory-testing, 3) consider the context as essential part of phenomenon to be studied, and 4) use data which are mostly qualitative.[52] The ethnography method suites the purpose of these studies of the relationships of displaced people, human rights and state sovereignty.

Participant observation was used for the data collection technique. This participatory technique, however, involves potential problems of invalidity and bias. [53] To overcome such problems, triangulation was used in dealing with data. That is, using information from interviews, documents and my own observations. With such converging evidence, the conclusion of the study has more validity. An important aspect of triangulation is to ask the same question of different sources of evidence. If all sources point to the same answer, data is successfully triangulated.[54]

In fact, the participatory method of research afforded me the opportunity to examine the dynamics of the relationships among displaced people, locals, NGOs and the UNHCR, in order to understand what really happens to displaced people. Furthermore, the fieldwork may be called a longitudinal, as opposed to a snapshot, study as both Rwanda and Cambodia are placed in the context of history.

PRESENTATION OF THESIS

Chapter 2 begins by examining the inception of the 1951 Geneva Convention from the two perspectives. First, it looks at the political circumstances in which the present definition came into existence and the legal issues surrounding them. This is taken as the beginning of the main analysis of the thesis because the definition affects the ways in which displaced persons are treated. The way in which displaced persons are defined and treated is a matter of national and international law, so again the definition is the important issue within the law. Second, in order to analyse the global implications of the

1951 Convention, Chapter 2 examines the regional legal instruments in Africa and Central America in 1969 and 1984 in order to accommodate the situations of displaced persons in their regions. This may reflect, however, the unwillingness on the part of wealthy states to accept refugees in their own countries. Moreover, even if the universally accepted definition of refugee is expanded, the definition is interpreted through the domestic law of each state, with the result that in practice the definition tends to be applied restrictively. So, even if the definition is expanded, domestic implementation always allows states to manipulate the definition to suit their own interests.

Chapter 3 deals with the relation between refugees and human rights by considering state formation, the law on nationality and the legal relations between refugees and human rights. They all share the common ground that it is the responsibility on the part of states to protect the human rights of their citizens. The examination reveals that in the political and legal perspectives, there is a trend to perceive the cause of refugees as the violation of human rights on the part of states of origin. The refugee and human rights issues are, therefore, closely related.

Chapter 4 considers the issue of internally displaced persons because the way in which they are defined and treated by the international community, has an important effect on refugees. The chapter begins by looking at how the UN has, in practice, dealt with internally displaced persons. It also examines the problem of defining internally displaced persons and the debate over whether there should be any legal protection. The growing numbers of internally displaced persons have played a major role in positioning human rights at the heart of the issues of both refugees and internally displaced persons. The essential question to be addressed is, therefore, the human rights issue. Here lie two related and fundamental concepts: of human rights and of state sovereignty. Refugees and internally displaced persons are essentially a matter of human rights, and these in turn are moulded, and frequently constrained, by notions of state sovereignty.

Chapter 5 explores basic human rights. As the previous chapter indicated, the problems of refugees and internally displaced persons must be set in the context of human rights and state sovereignty. That is, as the issue of human rights plays a major role in international and national law, tension between human rights and state sovereignty increases. Human rights are, however, still open to interpretation. In order to understand fully the context within which the issue of human rights and state sovereignty is being analysed, the following two chapters examine the characteristics and development of both concepts. This chapter concentrates on human rights. It begins by looking at the categorisations of human rights followed by the debate over `basic rights'. This enabled us to have a clearer view of their interrelationships that would help us understand further the relation between human rights and state sovereignty. It revealed that there are different ways to categorise human rights. The issue of basic rights was also examined in order to extract a short core of `basic rights' from the long list of human rights. There were different accounts of `basic rights'. Some even pose a question of if there are any basic rights at all. All human rights are, however, grounded on the foundation of peace. I argue that the right to life must be seen not just within the framework of states but beyond them: this is the most basic human right in the age of nuclear weapons.

Chapter 6 investigates the legal sovereignty of states. This thesis argues that the essential linkage between refugees and internally displaced persons is grounded in human rights. Human rights, for their part, are claims against states, arguably, against international society as a whole. As the previous chapter has made it clear, however, international efforts to protect human rights are often countered by the claim of states to sovereignty. This position can have adverse effects on rights-claimants, especially for internally displaced persons as they remain within the borders of their own countries. Understanding the complex problems of displaced persons in the contemporary international arena rests essentially on exploring the tension between human rights norms and the claims of state sovereignty. It is with the claims of state sovereignty that this chapter is concerned. The chapter includes the definition of sovereignty in national and international law, individual versus states, primacy of national law, primacy of international law, and negative and relative legal sovereignty. In the context of this

thesis' concern with displaced persons and human rights, the chapter finds the arguments of Kelsen the most persuasive. His claims are that the expression: `a state is sovereign', is irrelevant. It must be replaced by the term `the primacy of national law'. This position allows a degree of interaction between the state-centred and international law perspectives. This in turn allows the problems of how displaced persons and their rights may be protected to be considered without being blocked completely by the claim of states for absolute autonomy on the grounds of state sovereignty. Moreover, `state sovereignty' assumes an existence of central authority in a state. But what should be the ground rules to deal with a situation where the state apparatus has broken down, as is the case of parts in Africa? In this case, it can be argued that primacy of international law prevails.

Chapter 7 describes the evolution of human rights in the context of state sovereignty. The purpose of this thesis is to examine the situation of displaced persons in the context of international human rights. This requires both a definition of human rights and a realisation that the concept of state sovereignty can place limits on the ability of an international regime. But the concepts to define universal human rights have been evolving since the early years of the 20th century. It is that evolution, as opposed to theoretical definitions, with which the present chapter is concerned. The chapter explores the developments of human rights in the twentieth century: before 1920; in the aftermath of World War I and after 1945; the Declaration of Human Rights in 1948; the rise of NGOs and the civil society in the 1990s; human rights and state sovereignty in the 1990s; tribunals and the establishment of the international criminal court of justice in 1998; good governance with regards to international efforts for creating the society founded on human rights within a state. Because of the revolutionary developments of human rights after 1945, international law now considers not only states but also individuals as the subjects of international law. This implies that human rights must be regarded as international and global. The chapter recognises, however, that there are also practical problems as to international efforts for creating the society founded on human rights within a state. Responsibility and accountability often become obscure due to a large number of participants involved in such efforts. It concludes by stating that human

rights and state sovereignty still exist in a state of tension, but that this tension must not prevent human rights mechanisms from trying to meet the difficult situations posed by forced migration.

Chapter 8 and 9 present the accounts of the field studies of Rwanda and Cambodia in the belief that the global analysis must be rooted in concrete experiences. Chapter 8 shows the violence of a state against its own citizens in Rwanda that amounted to the crime of genocide. The ethnic massacre was not the result of acts committed by two ethnic groups which the state of Rwanda could not control, as is often argued by the media. It was the result, rather, of the conscious practices of a highly centralised state. It is placed in the background of an analysis of the country in both colonial and immediate post-colonial times, and the state violence that occurred in that country in 1994. The study is also set in the context of Johan Galtung's works on the concept of state violence. Such a perspective considers the issue of how a state with an authoritarian system of social control imposed from above deteriorated to the point of the extreme violence in situations where states deny the obligations implied in sovereignty to provide protection and good government to all their citizens. It was the state that violated the right to life of Rwandans in the name of state sovereignty. The lesson to be drawn from Rwanda is that our society needs a philosophy which clearly states that people's lives are more important and more sacred than states, religions and even a monothelitic God.

Chapter 9 explains the study of Cambodia by showing that human rights can be violated not only by oppressive states but also a breakdown of states. The Rwandan study has revealed that the right to life in the name of right to live in peace, was violated by the state in the name of state sovereignty. A second study, Cambodia was chosen in order to show that this basic right can be violated not only by oppressive states but also where the state apparatus has broken down. Most of those who died by violence in the 20th century were killed by the agents of states. It seems, therefore, reasonable to conclude that the state should be the first priority of anyone who cares about human rights. But, this is a view far removed from the realities of the post-cold war world. The chapter shows that, even with help from the UN and NGOs, that the state which lacks a central

authority can be as great a threat to human rights as oppressive states. For example, in the course of `voluntary' repatriation, Cambodian refugees were forced to leave a camp in Thailand as it was closing down. The UNHCR could not intervene in the involuntary repatriation because the subjects were under the state sovereignty of Thailand. In the situation of limited availability of land constrained by the landmines, the resources were under the state sovereignty of Cambodia. Thus, the UN and NGOs fell between sovereignty on the one hand and international humanitarian aid on the other. This led to the outcome in which no-one assumes responsibility given the fragility of the legally established government, although the UN and NGOs were supposed to play a role of surrogate government to provide `good governance' to citizens. This is the result of lack of central authority in a situation where many participants are involved. In such circumstances, the UN and NGOs seem to lose sight of the people they are supposed to serve in the first place. If the UN and NGOs, with purposes embedded in humanitarian ideals, lose sight of the people they are supposed to serve, a question arises as to where our confidence must be placed. This is discussed in the next chapter of Conclusion.

Chapter 10 summarises the central theme of the thesis. It begins by stating that the understanding of the complex problems of refugees and internally displaced persons in the contemporary international arena rests essentially on exploring the tension between human right norms and the claims of state sovereignty. The thesis reveals that human rights and state sovereignty still exist in a state of tension. This tension should not prevent human rights mechanisms from continuing to try to meet the difficult situations posed by the issue of refugees and internally displaced persons. But, there is a trend that human rights are now considered international and global issues as a result of efforts by NGOs since 1945.

In developing further this trend, the rise of NGOs in the 1990s is significant and crucial. The study of Cambodia has shown, however, that NGOs often lose sight of the people whom they were supposed to serve in the first place. Nevertheless, what is clear is that a world in which states count for less is a world in which the individual person will count for more. This is a contested statement. Many argue that a world in which states count

for less is a world in which powerful business corporations, national and international and military elite count for more.

However, a fundamental principle of a world in which states dominate and that of a world in which business corporations and military elite dominate are identical. A world centred on states is a world centred on power. In other words, we live in a society based on the `law of jungle' which makes it seem inevitable and natural that the strong dominate the weak. Thus, there is a common thread running through between a world of states and a world of business corporations and military elite that is `worshipping power'. If so, a question may be asked, `how do human rights relate to a power-centred society ?'

Henry Shue states that basic human rights specify the line beneath which no one is to be allowed to sink. They are a restraint upon economic and political forces that would otherwise be too strong to be resisted.[55] Shue rightly omits military force. Both the UN Covenant on Civil and Political Rights, and the European and American Conventions on Human Rights, contain a derogation clause that allows governments to derogate from many human rights during a state of emergency, when in fact the need for protecting an individual is at its greatest. Human rights, therefore, lie on the foundation of peace, although human rights are essential if peace is to endure. Without peace, any other rights can not be enjoyed. That is the reason why the thesis argues that the right to life in the name of the right to peace is the most basic right.

A society in which human rights are respected stands at the opposite end of a society in which power is respected. Because if basic rights are a restraint upon economic, political and military forces that would otherwise be too strong to be resisted by the weak and the powerless, then a society which respects human rights is surely not based on the `law of jungle'. A society which focuses on the weak and the powerless is a society in which ordinary people are respected.

The development of international human rights law and the increasing importance of the role played by NGOs have indeed contributed to the creation of influence, no matter how small it may be, upon states to extend political governance beyond their borders. Although the chapter acknowledges their significant contributions, what is clear is that human rights law and NGOs themselves are not sufficient to create a civil society nationally and internationally in which human rights are respected as the two studies of Rwanda and Cambodia have revealed.

What is needed is to create a culture of human rights among ordinary citizens. This is the key element not only for the creation of a society in which human rights are respected but also for a possible solution of exogenous governance which entails fragmented responsibility and accountability. In the process of promoting a value such as human rights among ordinary citizens the question, however, arises as to how to establish the ethics it proposes in the midst of complex realities and complex human consciousness. Francis Fukuyama suggests that the key lies in trust.[56] Fukuyama believes that what seems at first glance to be an down-to-earth and even primitive quality, is the key for opening up the postmodern age.[57] However, if trust is rooted in traditional culture and custom, it is only practical among those who share certain traditions. What is needed is how to open up such societies. In order to open up such societies, the world in which governance can be conducted must be underpinned by certain common values.

Tsunesaburo Makiguchi, a Japanese educator, wrote a book called **The Geography of Human Life** in 1903. At that time, the Great Powers were all pursing policies of expanding industrial and military might in a worldwide competition for hegemony: the impact of imperialism and colonialism was widespread throughout the world. Against this background, he classified the struggles for survival among nations into four types of competition- military, political, economic and humanitarian. The argument of Makiguchi is that the world could no longer afford military, political or economic rivalries but should shift its energies to competing on a humanitarian plane. Makiguchi's view is significant in that he does more than predict a shift in the modes of competition.

He expresses his view that the very nature of competition must be transformed, from confrontation to cooperation. It is the transformation of the free will of indifference to the free will of involvement in collective life that is important. Makiguchi suggests that humanitarian competition will influence other forms of competition, which will in turn bring about a shift in people's consciousness from competition to coexistence and cooperation.

Each person develops his/her own value system. Any value can be replaced by something else which is its equivalent. While recognising the merit of diversified values, we need to find a value itself that can serve as a common foundation embracing many kinds of values. Without such a common foundation, human mutual trust, coexistence and cooperation cannot be realised. The chapter states that the right to life in the name of right to live in peace, which all members of the world have, is the basic human right. This basic human right is founded on the dignity of life. The dignity of life must be the shared value, because it has no equivalent. It exists above all values. Nothing can be substituted for it. Thus, it meets such requirements for this common foundation. And this right can be only realised by taking Makiguchi's stance: by benefiting others, we benefit ourselves. Likewise, the value of dignity of life, inherent to the lives of all people, exists only in the action of `benefiting others, we benefit ourselves'. That is to say, if you value the dignity of life in the truest sense, you inevitably act based on the principle of `benefiting others, we benefit ourselves'. The chapter ends by saying, although difficult, this seems the only possible way to transform the world of war to the world without war. It is only the first step to create the world of peace.

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CHAPTER 2

REFUGEES: THE TERM AND ITS MEANING

INTRODUCTION: THE HISTORY OF THE DEFINITION

The definition of the term `refugee' is controversial. It is complex because `the problem of definition is not a mere academic exercise but has a bearing on matters of life and death'.[1] We need to know about the definition of the term `refugee' because trying to deal with the problem of people migrating across state boundaries, particularly in times of war, forced expulsion and other stressful situations, has been affected by how these people are defined and treated. And the way in which people are defined and treated is a matter of national and international law, so again the definition of refugees is the important issue within the law. This chapter, therefore, seeks to examine the definition of the term `refugee' from the two perspectives. First, it looks at the political circumstances in which the present definition came into existence and the legal issues surrounding them. Second, in order to analyse the global implications of the 1951 Convention, it examines the regional legal instruments in Africa and Central America. One of important findings is that on the regional level, there is a trend to adopt a broader approach to the definition and treatment of refugees. This may reflect, however, the unwillingness on the part of wealthy states to accept refugees in their own countries. Moreover, even if the universally accepted definition of refugee is expanded, the definition is interpreted through the domestic law of each state. It concludes that states interpret and apply the definition in order to suit their national interests.

THE LIMITATIONS OF THE 1951 CONVENTION

The present universally accepted definition of the term refugee was laid down in the post-Second World War period by two main international legal instruments. These were the 1951 Convention relating to the Status of Refugees (1951 Convention), and its Protocol of

1967 which came into being in order to amend the 1951 Convention. The next section will discuss the 1951 Convention followed by the Protocol of 1967.

The definition of the term refugee in the 1951 Convention was initially limited to those people who acquired such status as a result of events occurring before 1 January, 1951. This time limitation was stated in its Article 1. A. It reads:

> The term refugee shall apply to any person who; (2) As a result of events occurring before 1 January 1951 and owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it. [2]

Besides this time limitation, the 1951 Convention also specified a geographical limitation in Article 1. B. (1) which reads:

> For the purpose of this Convention, the words `events occurring before 1 January 1951' in article 1, section A, shall be understood to mean either (a) `events occurring in Europe before 1 January 1951'; or (b) `events occurring in Europe or elsewhere before 1 January 1951'; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention. [3]

To understand why these two limitations - the geographical (Europe) and the temporal (1 January, 1951) - were included, it is necessary to examine the political circumstances at the time.

A number of writers have analysed the 1951 Convention from political and legal perspectives. For example, Ivor Jackson (1991) and Atle Grahl-Madsen (1966) state that the dateline and the geographical limitations were included in the definition because `certain governments did not want to sign a blank cheque and to undertake obligations towards future refugees, of which the origin and number would be unknown'.[4] That is, while the immediate upheavals of the post-war period after 1945 had led to humanitarian

aid and international action, by 1951 - and after the beginning of the Cold War - countries were much more unwilling to make open-ended commitments. Who were the unwilling countries? Alex Cunliffe states that it was the United States who perceived the United Nations High Commissioner's (UNHCR) primary responsibility as resettling the refugees who were a legacy from the war in Europe.[5]

For Americans, this was a European problem, which required a European solution; in part of course this reflected American fears of the influx of immigration to its own shores. By contrast, some European governments, particularly the United Kingdom and Belgium favoured the development of an international refugee agency, which could address unforeseen future crises. They felt, understandably, that they were in the front line of the problem, since potential refugees from Eastern Europe had now joined the displacements of 1939-1945. Cunliffe continues, however, that in the end, against the belief of the United Kingdom and Belgium that the 1951 Convention should share the universal and eternal element to address refugee problems they were facing, the pressure from Washington championed and restricted the mandate of UNHCR because it was the United States that was a dominant military and financial power in the post-war period.[6]

John Humphrey, the former director of the Division of Human Rights in UN, recalls the time when the ad hoc committee prepared the definition of `refugee' in the draft convention in the summer of 1950. He says:

> The prepared definition was based on categories and it was still controversial. A few delegations, including Canada and the United Kingdom, felt that the protection of the convention should extend to all refugees, but the majority, including France and the United States, wanted the narrower definition which, they said, would be more generally acceptable to governments and easier to implement; the wider the definition, the narrower the protection that governments would be willing to give.[7]

There are few studies, which analyse the political circumstances in depth to explain why and how the definition of the 1951 Convention came to be in the form that it is. Even the writers cited above, Jackson, Grahl-Madsen, Cunliffe, Humphrey, Zolberg and Guy S. Goodwin-Gill [8] only touch on this subject briefly. Therefore, for the purpose of this thesis,

it has been necessary to examine the original UN document in order clearly to understand why and how these two limitations were included in the definition.

POLITICAL CIRCUMSTANCES OF THE INCEPTION OF THE 1951 CONVENTION

The substantive part of the debate began in the UN in the summer of 1950. The discussions at the 158th-161st and 165th-166th meetings of the Social Committee of the UN held on 31 July- 3 August, and 5-10 August respectively, indicate the political circumstances at that time which surrounded the attempt to reach the agreement on the definition of refugee. [9]

In their discussions the representatives of Australia, Brazil, China, France and the United States supported the principle that the definition should be based on precisely defined categories. They maintained that any international instruments that involved definite legal obligations should have basic, and precisely defined, categories. Such a limited definition would also have the advantage that it would be more generally acceptable and more easily implemented than a global definition.[10]

Furthermore, the United States' representative expressed what might have been the UN's own fear, that under a too broad definition the UN High Commissioner, when implementing the 1951 Convention, would be overwhelmed with applications from people who did not require international protection. It was essential, therefore, that both individual states and the UN High Commissioner should know exactly to whom the 1951 Convention applied. Despite the strong support for a limited definition, there were others who supported a more general definition. Among these were the representatives of Belgium, Canada, Pakistan and the United Kingdom. They believed that `the definition should concern itself with all refugees and not merely with certain prescribed and limited categories of refugees'. [11] The reason for this was that `the Convention should not be an instrument of restricted applications' and `a limited classification would not be useful or adequate for a lasting international convention on refugees'. [12] From this perspective, the representatives of Belgium and the United Kingdom had submitted texts for Article 1 to

give a broad definition to the term `refugee' in opposition to a limited one.[13]

At the 159th meeting of the Social Committee on 1 August 1950, however, it was decided by 8 votes to 2, with 4 abstentions, to proceed with a definition of `refugee' based on limited categories, which specified the temporal and geographical restrictions.[14] Thereafter, the Belgian and the United Kingdom amendments were withdrawn. The difficulties over the definition and the differing outlooks of members of the Committee could not, however, be easily resolved.

The discussions over the definition of the term `refugee' continued during late 1950 at the 324th-332nd, 334th and 335th meetings of the Third Committee held on 22-30 November; on 1, 4 and 5 December; 1950 and also at the General Assembly's 325th plenary meeting of 14 December. During the course of these discussions, the two opposing views - the global and more limited definitions - again dominated. For this reason, at the 329th meeting of the Committee on 29 November, 1950, an informal working group was formed, consisting of the representatives of Belgium, Canada, France, Israel, Turkey, the United Kingdom, the United States and Venezuela with the task of taking into consideration the amendments and resolutions in order to reach an agreement on the definition. [15]

At the 332nd meeting on 1 December, 1950, the Informal Working Group presented revised joint compromise amendments to change `as a result of circumstances directly resulting from events in Europe before 1 January 1951' to `as a result of circumstances directly resulting from events before 1 January, 1951' by deleting the reference to `Europe'. Despite this compromise, it was still not possible to reconcile opposing views in the UN General Assembly of 14 December, 1950.[16]

The same arguments were repeated. The representatives of the United Kingdom, the Netherlands, Belgium, Canada and Turkey favoured a broader definition. They believed that the only criteria for eligibility as a refugee should be the individual's need for international protection. The representatives of the United States, France, Venezuela, the Union of South Africa and Israel, on the other hand, stressed the importance of a precise

definition so that those to be afforded protection could be clearly identified. They also stated that too broad a definition might deter states from signing the convention. They argued that the question was less to do with the broad vs. the narrow definition and more to do with a question of whether the convention would enter into force at all. Thus, disagreements persisted.[17]

The UN General Assembly decided, therefore, as a matter of urgency, to convene a plenipotentiary conference to consider a detailed definition of the term `refugee'. Nevertheless, on 14 December 1950, the UN General Assembly adopted the resolution 428(V) by 36 votes to 5, with 11 abstentions, for the establishment of UNHCR without reaching agreement on a definition. On the same date, the UN General Assembly elected, by secret ballot, Mr. G. J. van Heuven Goedhart of Netherlands as High Commissioner for the office. [18]

Seven months later, with the participation of the High Commissioner, Mr. Goedhart, the Conference of Plenipotentiaries met in Geneva from 2-25 July 1951[19] to consider the definition again. This conference reopened the controversial questions: whether the protection provided by the 1951 Convention should be limited to persons who had become refugees by reason of events occurring only in Europe and before 1 January, 1951.[20]

In the Conference, the delegates of France, the United States, Sweden and Italy supported the restrictive definition while the United Kingdom, Egypt, Iraq and Yugoslavia opposed it as they believed that it should be an universal legal instrument for future refugee problems. In the end, the delegate of the Vatican proposed what seemed to be a definition of last resort. This compromise was that each state could declare whether the definition would include only persons who had become refugees `by reason of events occurring in Europe before 1 January, 1951' or `in Europe and other countries before 1 January, 1951' depending on a statement to be made by each contracting party at the time of signature and accession. Conference unanimously adopted this compromise proposal.. The final text of the 1951 Convention (A/CONF.2/108) was adopted by 24 votes to none with no abstentions.[21] It went into force on 22 April, 1954.[22] Because of these limitations in the

definition, it was recognised that the 1951 Convention would not cover every refugee. For this reason, it was recommended in the Recommendation the Final Act of the 1951 Convention that states should apply the Convention beyond its strictly contractual scope, to other refugees within their territory. Recommendation E in its Final Act reads:

> [The Conference] expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides. [23]

Many states had come to rely on this recommendation in the case of refugee crises precipitated by events after 1 January 1951, for example, the cases of Chinese refugees (1953) and Hungarian refugees(1956), until the 1967 Protocol removed that limitation. These cases which relied on the recommendation E in the 1951 Convention will be examined later in the section on the 1967 Protocol. Before moving on to the discussion of the 1967 Protocol, however, one more significant element still needs to be highlighted regarding the 1951 Convention. That is that the 1951 Convention was drafted in the midst of the political division between West and East - a major factor in its form and timing.

The co-operation of the allies at the end of the Second World War did not last long. 1948 saw the beginning of Cold War tensions. As the Communists took over Czechoslovakia together with the separation of Germany into the Federal Republic and the Democratic Republic, the refugee population grew. Cunliffe states that because `the majority of refugees moved from East to West, this was viewed by the West as a welcome evidence of the failure of communist systems'.[24] In fact, the United States' National Security Council Memorandum of 26 March 1953 states that encouraging defection of all USSR nationals and key personnel from the satellite countries could inflict an psychological blow on Communism.[25] But at the same time it posed a real and immediate problem for those countries who would be receiving refugees. Therefore, the setting-up of UNHCR itself was a function of the ideological division between West and East despite the non-political claims of its Statute, and also reflected the need to address the pragmatic issues.

These tensions were already evident during the 324th to the 328th meeting of the third Committee on 22 to 27 November, 1950. The representatives of the Byelorussian SSR, Czechoslovakia, Poland, the Ukrainian SSR, and the USSR claimed that the UN did not solve the refugee problem, as there were many people who, six years after the war, were still in camps. The refugees were being used for cheap and slave labour, for spying and subversive activities, and that the establishment of UNHCR would merely be another centre for the exchange of slave labour serving no worthwhile purpose.[26] Their accounts showed that the refugees remained in the camps doing some labour work without a hope of resettling and starting new lives in other countries.

Furthermore, the representatives of Poland and Czechoslovakia stated that the proposed definition was designed to enable certain countries (i.e. the West) to continue to use refugees as agents to provoke political disorder in their countries of origin and to protect persons co-operating with the intelligence services of those western countries who opposed the governments of the `peoples' democracies. It could be argued, of course, that they were merely trying to defend their own harsh behaviour towards their own nationals. [27] The fact that the Eastern states were strongly opposed to the 1951 Convention, seeing such a legal instrument as a sign of defiance against their communist systems, made Western states agree on a compromise definition of the term `refugee'.

This chapter has, so far, examined the political circumstances at the inception of the 1951 Convention. To reach an agreement on a definition internationally was a very difficult task because of the differing outlooks of the Western nations which were directly involved in resettling European refugees. In the end, however, the opinion that resettling refugees was a European problem which required a European solution won over the opposing view which maintained that the refugee problem was global in nature. As a result, the 1951 Convention became Euro-centric and it will become evident in the following section that this legal instrument was unsatisfactory as the nature of the refugee problem was changing. In the next section, the 1967 Protocol which deleted the time and geographical limitations in the definition of `refugee' of the 1951 Convention will be examined.

THE 1967 PROTOCOL

As this chapter has explained earlier, the 1951 Convention was limited in two regards. First, it was related only to those who fled the countries of origin `as a result of events occurring before 1 January 1951'. [28] Second, it contained a discrepancy with regard to its geographical restriction by which the contracting states had the option of applying it both to persons who had become refugees as a result of events occurring `in Europe' or as a result of events occurring `in Europe or elsewhere'.[29]

These two limitations of time and place had remained until the 1951 Convention was amended by the protocol of 1967. The nature of the refugee problem was changing. For this reason, the UN General Assembly passed special resolutions providing protection to groups of displaced persons who could not be legally classified as refugees. The first major occasion where UNHCR was authorised to respond to a large scale movement of people who did not fall under the limited guidelines of the 1951 Convention occurred when 200,000 Hungarians sought shelter in Austria and Yugoslavia in 1956. This Hungarian case served as a test case for the interpretation of the time limitation in the refugee definition.[30]

On 23 October 1956, violence erupted in Hungary when students, workers and soldiers demonstrated against the much-feared Russian-backed Hungarian Security Police. In the following four days, the fighting had spread throughout the country and the Russians intervened in Budapest with tanks. By 4 November 1956, the Russian army was attacking all the major cities, and any other places where they met resistance. On 4 November 1956, the United States was able to get a resolution (A/3286) adopted by the UN General Assembly with votes of 50 to 8 with 15 abstentions, calling on the Soviet Union to stop attacking the Hungarian people and to withdraw its armed forces from the country.[31]

The resolution also asked the UN Secretary-General to appoint his representatives to investigate the situation in Hungary with an intention of making recommendations to the UN General Assembly concerning the proper methods of eliminating foreign intervention, and to permit UN observers to enter and travel freely in Hungary to make

their own assessment of the situation in order to report to the UN Secretary-General. In the meantime, however, the new pro-Soviet government was installed in Hungary, therefore no co-operation was obtained from the newly installed government of Hungary.[32]

In this West vs. East political climate, the West welcomed the displaced persons from Hungary as a sign of failure of the communist regime. The High Commissioner for Refugees raised funds and co-ordinated assistance to the displaced Hungarians. To overcome the time limit set out in the 1951 Convention, it was decided that the crisis in Hungary was an `after-effect' of `events' which had taken place before 1 January, 1951. The event, in this case, was the arrival of Russian soldiers in Hungary in December 1944 and in January 1945 that led to the gradual and steady establishment of Communist rule in the country after 1946.[33]

In practice, many Western governments regarded the Hungarian crisis as the `after-effect of events' occurring before 1 January 1951 and therefore coming within the scope of the 1951 Convention. Thus there were no particular difficulties in granting legal protection to refugees.[34] Although politically motivated in that the Western states saw the crisis in Hungary as a welcome evidence of failure of the communist system, the UNHCR's intervention was nevertheless perceived as a successful humanitarian response. The Hungarian uprising marked a new stage in the evolution of the definition of refugee. It provided the basis for a series of supportive UN General Assembly resolutions to protect a large group of displaced persons who were either clearly not within the 1951 Convention or else had not been specifically determined to be within the 1951 Convention definition.[35] These include the Mainland Chinese in Hong Kong, Algerians in Tunisia and Morocco and Angolans in Congo (now Zaire). [36]

The case of Hungarian refugees shows that the UN member states were willing to stretch the meaning of the definition in the face of unforeseen events. In 1957, following the 1956 Hungarian crisis, the UN General Assembly authorised the UN High Commissioner to assist displaced persons who did not come within the statutory

definition. In this case, they were the people fleeing from Mainland China to Hong Kong whose status as `refugees' was complicated by the existence of two Chinas, the People's Republic of China (China) and the Republic of China (Taiwan). [37]

THE IMPACT OF THE POST-1949 CHINESE REVOLUTION

Due to the expansion of communist power and after the proclamation of the People's Republic of China in 1949, the Nationalist Chinese fled to Taiwan. In addition, there were also a large number of people fleeing from China to Hong Kong. These included both Chinese and European nationals.[38] In 1953, the first special attention was given to finding asylum for some 800 sick and elderly persons among 15,000 displaced persons of European origin. By the end of 1953, homes and sanatorium in Hong Kong had been found for more than 300 of these elderly persons, and furthermore the first group of 51 persons had been moved from Shanghai to Hong Kong to await transport to Sweden, Denmark and Belgium. In 1954, many who fled from China were destitute, and the UNHCR spent approximately US$34,000 monthly from the Fund on material aid for them, including maintenance while in transit in Hong Kong en route for overseas destinations.[39]

In the same year, a special seven-man mission led by Dr. Edvard Hambro, former Registrar of the International Court of Justice, made a survey of the situation of Chinese displaced persons in Hong Kong. Dr. Hambro's survey, carried out with funds provided by the Ford Foundation, was presented to the Advisory Committee's fifth session in Geneva from 6 to 10 December, 1954. Dr. Hambro estimated that there were some 385,000 political refugees (including dependants, 670,000) in Hong Kong. He recommended a three-fold solution consisting of voluntary repatriation, either to China or to Taiwan; emigration; and economic integration into Hong Kong. On 26 November 1957, a resolution was approved by 50 votes to 9 with 11 abstentions, by the UN General Assembly, appealing to the UN member states, the UN special agencies and non-governmental organisations to give all possible assistance to alleviating the distress of the Chinese displaced in Hong Kong. It authorised the UN High Commissioner for Refugees to use his good offices to encourage arrangements for the contributions. [40]

This was the first resolution that the UN General Assembly had authorised to protect displaced persons who did not come in the domain of the pre-1951 Europe statutory definition.[41] The resolution reads:

> authorise[d] the High Commissioner, in respect of refugees who do not come within the competence of the United Nations, to use his good offices in the transmission of contributions designed to provide assistance to these refugees.[42]

It is, however, difficult to say whether the first resolution authorised to assist displaced persons who did not fall under the scope of 1951 Convention was either the case of Chinese or that of Hungarians. Johan Cels states:

> in Europe, the interpretation of the refugee definition caused little political controversy until the late 1960s and early 1970s since the large majority of refugees were Eastern European and therefore granted Convention status, even quite dubious grounds.[43]

While Hungarians were given refugee status immediately and a resettlement programme was rapidly implemented in Europe, the situation of Chinese displaced persons in Hong Kong was different. According to Gervase Coles:

> Because of the particular political and security factors involved and the lack of resettlement opportunity for Chinese refugees outside the territory of Hong Kong, the United Kingdom government decided that these refugees did not come within the 1951 Convention although it asked UNHCR certain assistance to the Chinese refugees. [44]

That is to say that as soon as a situation which did not correspond to the interests of other countries arose, especially the Western governments, the application of the 1951 Convention was withheld. Instead of granting refugee status, the good offices of UNHCR were used to provide displaced persons with temporary material assistance. Shelly Pitterman states that the `good offices' procedure is based on the concept of collective prima facie eligibility in order to broaden the mandate. In other words, it is a useful, backdoor procedure for UNHCR to provide material assistance to displaced persons who do not fully come under the mandate without making any change in the

definition of refugees in the 1951 Convention.[45] The procedure has often been manipulated for political motives. Good offices were often used when a host country or a potential receiving country did not want to accept fleeing people as of refugee status, yet it had to recognise the need to provide material assistance to keep them alive.

In this regard, Gil Loescher states that governments respond to refugee movements according to the relations between sending and receiving countries. If there are political and economic tensions between them, the way in which refugees are treated can be directly influenced. Moreover, politically or militarily active refugees can cause strategic and political difficulties for the government of the country of origin, and therefore complicate relations between sending and receiving countries. A positive response tends to be shown towards refugees in the regions where the West believes that it has vital interests. On the other hand, in some areas where interests have not been involved, the West's `generosity has been less forthcoming'.[46] So, in the case of the displaced persons from Hungary and China, it was not coincidental that the West showed more willingness to grant the refugee status to the people from Hungary than to those from China.

So far, the study has shown that UNHCR had been increasingly involved in situations where the large-scale refugees and displaced persons called for a new approach. This new approach arose not just from European Cold War situations or the Communist accession to power in China. The newly independent states in Africa also began to play a significant role in demanding changes in the UNHCR's approach.

THE AFRICAN SITUATION

The African refugee situations were complex. They arose in the course of situations made more complicated by ethnic, linguistic and regional divisions and exacerbated by civil wars and as a legacy of the colonial period. In economic terms, colonialism emphasised the production of what was most immediately profitable, replacing food crops with cash crops for export. As a result, the African countries became reliant on monocrop production, and in continuing these policies after Independence, they became dangerously subject to fluctuations in world market prices. Moreover, colonial rule

created new political units that cut across ethnic boundaries, that frequently led to civil wars.

In the north of the continent, the situation was somewhat different. The Chinese precedent was followed by the case of refugees from the Algerian insurrection in 1954. The Algerian War, fought from 1 November, 1954 until 1 July 1962, was a rebellion by Muslim Algerians against French rule. Algeria was the last of the French holdings in North Africa to become independent in 1962 after Tunisia and Morocco had achieved that status in 1956.[47]

In Algeria, since the establishment of French rule in 1830, more than a million European settlers - the majority of French origin - had owned the principal industrial, commercial and agricultural enterprises. On the other hand, 8.5 million Algerian Muslims either pursued primitive economic activities or performed menial tasks. They had equality before the law but little power to make or administer it. Thus, Algerian Nationalist aspirations emerged from Muslim discontent. [48] A National Liberation Front (FLN from its French name) was formed on 1 November 1954, and small FLN bands began to raid French army installations. The French army responded with military force. [49] In this war which lasted until 1962, many Algerians fled to the neighbouring countries of Tunisia and Morocco.

In this crisis, France opposed the application of the 1951 Convention to Algerian displaced persons and stressed that the eventual solution could only be the return to Algeria of the persons concerned.[50] However, France was persuaded to accept a compromise that was at least to enable UNHCR to provide assistance to those displaced in Tunisia and Morocco. [51] On 18 March 1962 when the Evian agreement was signed between France and the authorities representing Algeria, it was agreed that UNHCR would try to help the voluntary repatriation of the Algerians displaced in Tunisia and Morocco, before the referendum by which Algerians were to decide on their future status. This referendum marked the independence of Algeria on 1 July, 1962. [52]

The repatriation began in Morocco on 10 May 1962 and in Tunisia on 30 May 1962 and ended at the end of July 1962 with the return of over 180,000 Algerians. In June 1962, UNHCR and the League of Red Cross Societies launched simultaneous appeals in order to obtain more financial means to carry out the repatriation. As a result, a total of $7.5 million was contributed to UNHCR for the relief and repatriation operation up to July 1962. [53]

Around the time of the Algerian crisis, new waves of displaced persons were seen in the other regions of Africa. For example, in 1961, violence caused by political conflicts in the emerging state of Congo forced people to leave for Burundi, the Central Africa Republic, Uganda and the United Republic of Tanzania. By 1966 the number of Congolese displaced persons amounted to 75,000. In the same year, the number of displaced persons in other African states rose dramatically. Sudanese displaced persons in the Central African Republic, the Democratic Republic of the Congo and Uganda, reached 106,000. People from Portuguese Guinea in Senegal rose from 51,000 to 61,000. Rwandan displaced persons in Burundi, the Democratic Republic of the Congo, Uganda and the United Republic of Tanzania remained in the vicinity of 160,000. [54] The sheer scale of the displaced persons in African states thus put more pressure on UNHCR to make changes in the 1951 Convention.

Another point must be raised as to the displaced persons in Africa during this period. Goodwin-Gill states that conditions made individual assessments of refugee status impractical. Many felt that people should benefit from refugee status when there was no doubt that political conditions had compelled the flight of the groups although it might not be possible to establish a `well-founded fear of persecution' for each individual case. A precedent for such a situation had been established for Hungarian refugees in 1956. But the approach towards Africa was different partly because the West did not wish to anger newly independent states by granting refugee status to displaced people, which might imply that a well-founded fear of persecution existed.[55] Moreover, it appeared that the problem was spreading to other parts of the world. It was not only in Africa but also in Asia where a large number of people were fleeing to neighbouring countries. In 1966, Chinese displaced persons in Macao numbered nearly 75,000; they received housing and

employment assistance provided by the UNHCR. 7,000 Tibetans fleeing from the Chinese occupation were living in Nepal and 50,000 more remained in India, Sikkim and Bhutan. There was an urgent and world-wide need to extend the scope of the 1951 Convention.

In response to this need, in 1966 a draft protocol resolution, extending the scope of the 1951 Convention, was submitted by the following 15 UN member states, some of which were not signatories to the 1951 Convention: Algeria, Burundi, the Congo, France, Guinea, Libya, Mali, Mauritania, Morocco, Pakistan, Sudan, Tunisia, the United Republic of Tanzania, Yugoslavia and Zambia. It is notable that only two of these countries, France and Yugoslavia, were European. The Third (Social, Humanitarian and Cultural) Committee of the UN General Assembly considered the draft Protocol at its 21st session, on 7 December 1966. On 16 December, following the report of the Third Committee, the UN General Assembly adopted the resolution 2198 (XXI) by 91 votes to none with 15 abstentions.

By this resolution, the UN General Assembly made the following points. First, Article 1 A (2) of the 1951 Convention was extended by Article I 2 of the Protocol by omitting the dateline. As a result, equal refugee status should now be enjoyed by all refugees covered by the 1951 Convention's definition irrespective of this dateline. Second, the optional restriction (Article 1 B (1)(a) of the 1951 Convention) to Europe was removed by Article I 3 of the Protocol. The signature by the President of the UN General Assembly and the UN Secretary-General took place on 31 January 1967. After the initial ratification by the six states of the Holy See, Central African Republic, Cameroon, Gambia, Senegal and Sweden, the 1967 Protocol came into force on 4 October, 1967. Three other states also ratified in 1967; they were Algeria, Argentina, and Norway. It is notable that seven out of nine countries which ratified in 1967 were non-European, which indicates a geographical shift of refugee problems from Europe to non-European countries. Thus, the 1967 Protocol enlarged the scope of refugee definition in order to meet the demands created by new waves of displaced persons in the world.[56]

It also needs to be stressed that, compared with the 1951 Convention, the 1967 Protocol came into force surprisingly quickly, taking less than a year. By comparison, the 1951 Convention adopted on 2-25 July 1951, took nearly three years to come into force (22 April, 1954), following the initial ratification of Denmark, Norway, Belgium, Luxembourg, Federal Republic of Germany and Australia, all of which were European countries. [57]

From 1951 to 1967, what had changed was both the scale of the number of displaced persons, and their location in the upheaval of post-Independence third world countries. As a result there were increased demands and also greater awareness regarding the problems of displaced persons from developing countries. This change in nature of displaced persons has provoked a question if the refugee definition set out in the 1951 Convention is after all appropriate. In other words, is the mere deletion of time and geographical limits sufficient, or does the 1951 Convention require more fundamental reappraisal?

THE GLOBAL IMPLICATIONS OF THE 1951 CONVENTION

The `globalisation' of refugee problems in the 1960s called into question the appropriateness of the 1951 Convention's definition and applicability. The 1951 Convention's definition of `refugee' has four basic characteristics: (1) Such persons are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion. [58]

There are two main opposing arguments involved in this definition of the refugee. One is that the 1951 Convention is the essential part of our humanitarian heritage which defines basic rights and minimum standards of treatment necessary to refugees. It has provided a solid legal basis as well as a flexibility for various situations, therefore it should be preserved as such. The other argument is that the 1951 Convention was

written primarily by Europeans for the solution of refugee problems in Europe after the Second World War. It is, therefore, too Euro-centric and requires changes in order to accord with the present refugee situations around the globe. [59]

It is argued by many writers that the 1951 Convention, which requires that the individual be in danger of persecution in his or her native land, should be broadened to include victims of economic and political instability or natural disasters. [60]

Most refugees today are from third world countries. It is, therefore, argued that in addition to political persecution, modern refugees flee a whole range of problems including civil strife, political instability and harsh economic conditions and natural calamities.[61] For example, Jacques Vernant notes:

> A man's economic situation is no longer looked on as a `natural' phenomenon, but as a responsibility of the state. The view is steadily gaining ground that the modern state is responsible for the living conditions of its nationals.[62]

In order to understand such divided arguments on the definition, the following section will examine the regional legal instruments based on and developed from the 1951 Convention, yet they have applied the broader definition of refugee and recognised the diversity of the conditions that can produce refugees.

The Organisation of African Unity and Refugees

In February 1964, three years before the 1967 Protocol, the Council of Ministers of the Organisation of African Unity (OAU) met in Lagos, Nigeria and expressed their concern over the problem of displaced persons in Africa with particular reference to those from Rwanda. They noted that the displaced persons from Rwanda were a very heavy burden on adjacent countries, all of which were suffering from their own economic problems. The OAU established an ad hoc commission to study the problem.[63]

The ad hoc commission consisted of the representatives of Rwanda, Burundi, Congo-Leopoldville, Uganda, Tanganyika (soon afterwards to become the United Republic of Tanganyika and Zanzibar), Sudan, Senegal, Nigeria, Ghana, and Cameroon.[64] These

1964 deliberations formed the basis of what was subsequently to become the 1969 OAU Convention of Refugees which included four major points. The first one was to promote the voluntary return of refugees to their countries of origin. The second was to urge the settlement of refugees away from the frontiers of those countries. Related to this was a stress on devising means of preventing refugees from engaging in subversive activities. The third was that the granting of asylum should not be regarded as an unfriendly act by the country of asylum against the country of origin. The fourth was to encourage bilateral negotiations between the countries of origin and asylum, in order to solve refugee problems by peaceful means.[65]

The principles developed by the 1964 commission were further refined by the first major International Conference on the Legal, Social and Economic Aspects of the African Refugee Problem, held in Addis Ababa in 1967 under the joint sponsorship of the OAU, the UNHCR, the UN Economic Commission for Africa and the Dag Hammarskjold Foundation.[66]

With regard to the definition of refugee, the extension of 1951 Convention was considered. Although it was universalised both in time and space by the 1967 Protocol, it was still too limited for the refugee problems facing the OAU. The reference to `well-founded fear of persecution' implied a situation in which an individual refugee's eligibility could be carefully assessed, but by the early 1960s, it was already clear that refugees in Africa were more likely to be the product of mass movements.[67] Moreover, people fled their counties of origin not only because of their fear of persecution but also for more diversified reasons. Thus, the 1969 OAU `Convention Governing the Specific Aspects of Refugee Problems in Africa' adopted the 1951 Convention, but it also extended it. It reads that the term refugee shall also apply to:

> every persons who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to take refuge in another place outside his country of origin or nationality.[68]

The OAU Convention, thus, contains two definitions of refugee. The first is the traditional treaty definition, the UN persecution-based definition. The second expands the first and clearly covers situations where heavy fighting occurs. It also applies where there has been a widespread disease and famine, or where there has been a breakdown in public order which forces people to flee. [69] It also includes the victims of foreign intervention, arguing that victims of such processes are similar to those of persecution and they are equally worthy of special consideration. It can also be seen as a collective claim by African states on the international community.[70] Some argue that the broadened definition set out in the OAU Convention may be perceived as self-serving because it enables African states to acknowledge people fleeing their home countries as refugees without necessarily implying `persecution' existed in their home countries. Thus, the broadened definition may be able to make the responsibility of the OAU's members ambiguous.[71]

The OAU and the UN definitions reflect different historical contexts. The latter was a response to the European totalitarian experience when, indeed, refugees were primarily the persecuted victims of highly organised predatory states. Shacknove states that similar states still exist, and the UN definition covers such victims. But the OAU definition has recognised, as the UN definition has not, that the normal bond between the citizen and the state can be severed in diverse ways, persecution being but one.[72]

On 10 September, 1969, the thirty-seven member states signed the OAU Convention. Subsequently, it came into force on 20 June 1974 after having been ratified by fifteen countries, one-third of the member states of the OAU.[73] Going beyond an exclusive emphasis on `a well founded fear of persecution' of the 1951 Convention, the OAU Convention has expanded its scope. The next section will examine another regional legal instrument which emerged in Central America and which took the definition of refugee into a new stage.

The Cartagena Declaration on Refugees

Displaced persons in Central America during the 1980s led in due course to one of the most encompassing approaches to the problem. Nora Hamilton and Manuel Pastor state

that when the Reagan Administration came into office in 1981, revolutionary movements appeared to be ascendant in Central America. The Nicaraguan government was attempting to reorder its society according to what it termed the needs of the majority. In El Salvador, guerrilla movements had united to form the FMLN (Farabundo Marti Front for National Liberation), and in both El Salvador and Guatemala revolutionary forces were threatening the status quo. As a result, these activities posed a sharp challenge to the ruling elite of Central America and to the regional influence traditionally exercised by the United States.[74]

The Reagan administration attributed the unfolding events in Central America to interference by foreign powers, specifically the Soviet Union and Cuba, and viewed them as a threat to the U.S. security. For this reason, it increased military aid to the Salvadoran government and began a process of organising, training, and financing a counterrevolutionary force against the Sandinistas in Nicaragua. [75] This growing war in Central America forced one to two million Salvadorans, Guatemalans and Nicaraguans to flee from their homes in the 1980s.[76] Against the background of this crisis, a group of experts and representatives from governments in Central America had met together in a colloquium in Colombia from 19-22 November, 1984, from which the Cartagena Declaration emerged. [77]

The Republic of Colombia sponsored, in co-operation with the University of Cartagena de Indias, the Regional Centre for Third World Studies, and the UNHCR, a colloquium on the international protection of refugees in Central America, Mexico, and Panama. As part of the colloquium's conclusions and recommendations, also known as the Cartagena Declaration on Refugees, it was recommended that the traditional definition of refugee should be expanded along the lines of the OAU Convention. In addition to the 1951 Convention and the 1967 Protocol definition, the Cartagena Declaration on refugees to includes `persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order'.[78] It broadens the definition of `refugee' similar to that of the OAU. But the uniqueness of the Cartagena Declaration lies in an explicit link between the violations of

human rights and refugees, a point that would be widely recognised a decade later. This is not a binding treaty, but it represents an endorsement by the states concerned as to the standards of protection and assistance for the refugees.[79]

Particular regions, such as Africa or Central America, often share histories, traditions, and cultures that facilitate co-ordination and co-operation. For this reason, regions can serve as laboratories for new approaches, and models for other regions. In this way, regions could exert bottom-up pressure on the universal international norms. Regional approaches, however, do carry a risk. This arises where the wealthy states may use the existence of `regional solutions' as an excuse for reducing support for refugees, and for denying their own responsibilities. The difficulty is, therefore, as Aleinikoff observes, how to create a `ratchet' effect by which protection may be extended, but not reduced.[80]

Similarly, as Miranda observes, while immigration policy in wealthy states has become more restrictive, the number of displaced persons in poor states has increased. At the same time, states in Africa and Central America have created their own regional agreements that provide protection beyond the universally accepted definition. If the regional agreements were created as a result of the increasing unwillingness of the wealthy states to accept refugees, then how can one expect that the regional legal instruments can be seen as a development of international customary norms which reflect state practice?[81] We will discuss this matter in the following section.

INTERPRETATION OF THE DEFINITION OF REFUGEE BY STATES

Immigration policy is decided and implemented by individual states. The interpretation of the definition of refugee is, therefore, largely influenced and dominated by national interests. As the number of refugees increase, the wealthy states which have traditionally accepted refugees now interpret the 1951 Convention and 1967 Protocol more restrictively. For example, immigration policies in wealthy states like Australia, Canada, the United States and other Western European countries have become more restrictive.[82] Even if the definition of refugee is expanded, what matters in the end is how each state

interprets the definition. One of many such examples comes from the situation in El Salvador in 1981.

The UNHCR declared that all Salvadorans who had left their country since the beginning of 1980 should be considered as refugees, on the grounds that the Salvadorans had fled from the consequences of political events in which they did not necessarily play an active role, and that they and their families were likely to suffer if returned to El Salvador. But the US, which signed the 1967 Protocol on 1 November, 1968[83], stated in its 1983 Country Reports on the World Refugee Situation that the majority of Salvadorans in the United States were economic migrants, therefore they were not eligible for asylum.[84] One of the more recent cases was Germany. Germany, which ratified the 1951 Convention on 19 November, 1951 and signed the 1967 Protocol on 5 November, 1969 [85], had the most liberal asylum law in West Europe until 1994. Germany had been a preferred destination of refugees from all over the world until then. Under the provisions of Article 16 of the German Basic Law, anyone who set foot in the country and claimed asylum was guaranteed provisional admittance. After the end of Cold War in 1989, the number of refugees into Germany rose enormously, from 121,000 in 1989 to 438,000 in 1992. As a result, court procedures to determine if asylum-seekers were allowed to stay became increasingly delayed. On 1 July 1994 a new law on the right of asylum came into effect, stating that foreigners are no longer admitted to asylum proceedings when they arrive in Germany via `a safe third country'. That means that they can be immediately deported via `a safe third country'. `A safe third country' is one in which political refugees find protection and suffer no form of persecution. These include all members of EU, Finland, Norway, Sweden, Poland, the Czech Republic, Austria and Switzerland. Furthermore, it states that refugees arriving from a `safe country of origin' will now be assumed under law as not being politically persecuted. The safe countries of origin include Poland, the Czech Republic, Slovakia Republics, Rumania, Bulgaria, Gambia, Ghana and Senegal. [86]

The wealthy states deny their responsibilities to accept refugees in their own countries as the numbers of refugees increase. Granting refugee status is, more than ever before, a delicate domestic and international political matter. National interests continue to

dominate the interpretation and application, as the examples given in this chapter have shown. Even if the definition is expanded, domestic implementation always allows states to manipulate the definition to suit their own interests.

CONCLUSION

First, this chapter examined the political circumstances from which the present definition has evolved in the post-II World War period, and the continuing debate over whether it requires changes in order to accord with changing circumstances. In the first part, the historical development of the 1951 Convention and the 1967 Protocol showed how the UN member states came to a consensus on the definition of the term `refugee', based on their political interests. Their main argument was that although some thought that a narrow definition would exclude countless people under dire circumstances, others claimed that an overly inclusive definition would financially exhaust the relief programmes and the willingness and support of the host and donor governments. Another argument was based on the ideological division between West and East. In the end, the restrictive definition was accepted. This was followed by the amendment of the 1967 Protocol which deleted the time and geographical limits from the 1951 Convention. This happened because growing numbers of refugees came from non-European countries, partly, but not solely, because of decolonization in Africa and elsewhere. In order to meet the needs of the different refugee situations, a broader legal instrument was necessary.

In the latter part, the global implications of the 1951 Convention was examined, by considering the Organisation of African Unity Convention in Africa and the Cartagena Declaration in Central America. The analysis revealed that these two regional legal instruments included and expanded the universally accepted definition to make it suitable to the situations in their regions. This suggests that it is more appropriate to expand the definition set out in the 1951 Convention in order to accord with the present situation of refugees. But, in practice, the 1951 Convention and 1967 Protocol are implemented through the domestic law of the states who are signatories to those instruments. Although the 1951 Convention and 1967 Protocol are used by states as the

basis for granting asylum, national interests continue to dominate the interpretation and application. So, even if the definition is expanded, domestic implementation always allows states to manipulate the definition to suit their own interests.

ENDNOTES

1. Aristide R. Zolberg, Escape From Violence, (Oxford: Oxford University Press, 1989), p.3.

2. Convention relating to the Status of Refugees. General Assembly Resolution 429 (V), 14 December, 1950. Adopted on 28 July, 1951. Entry into force 22 April, 1954. [189 UNTS 137].

3. Ibid,

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Monaco, the Netherlands, Norway, Sweden, Switzerland, Turkey, the United Kingdom, the United States, Venezuela, and Yugoslavia. Cuban and Iran were represented as observers. UN Bulletin., 1 August, 1951, p.161.

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CHAPTER 3

THE RELATIONS BETWEEN REFUGEES AND HUMAN RIGHTS

INTRODUCTION

The previous chapter examined the definition of refugee in order to show the political circumstances from which the present universally accepted definition has developed and changed. It indicated that national interests always dominate in defining and treating refugees. This chapter considers state formation, law of nationality and the legal relations between refugees and human rights. In the course of examination, together with refugees, the two groups of minorities and stateless are also discussed. Although they differ from refugees in legal status and protection guaranteed by the international regime, there is a common element shared by all groups. That is, they suffer from the loss of the right to government protection. The situations of the minorities and stateless highlight a close link between human rights and states. The examination reveals that in the political and legal perspectives, there is a trend to perceive the cause of refugees as the violations of human rights on the part of states of origin. It concludes by asserting that the refugee and human rights issues are closely related.

STATE FORMATION

Andrew Shacknove believes that, following Hannah Arendt and Aristide R. Zolberg, the main responsibility for forced migration arises from the formation of new states, often through civil wars or foreign aggression.[1] Similarly, the sociologist Jeremy Hein sees refugee migrations as being caused by changes in states, as does the demographer Charles P. Keely.[2] This is so, Keely believes because `the ideal type of a nation-state is a homogeneous, self-reproducing people, with a common history, culture, language and usually religion, a shared sense of fate and relation to and claim on a territory rooted in long-standing settlement'.[3] Even in many multination countries, the presumption remains that a country should have a united people. As a result of `a people's (a nation's)

drive for autonomy', a dominant group sometimes tries to suppress or expel minorities or to impose a new national identity or an ideology to unite diverse peoples.[4]

Aristide R. Zolberg, Astri Suhrke and Sergio Aguayo put forward the view in 1986 that the conflicts arising from the formation of new political communities are the source of refugee flows. They argue that this phenomenon was evident above all in Asia and Africa when European colonial empires were dismantled. The successor states adopted the nation as their model of political organisation, but it was extremely difficult to unite their multi-ethnic and multi-cultural peoples, in situations which differed from the countries of Western Europe. This is partly a consequence of historical processes resulting in a complex ethnic society, but it is also partly attributable to imperial policies that had intensified differences among ethnic and racial groups by endowing them with a dimension of social and economic inequality. [5]

For example, at independence, social conflict between socio-economic classes tended to manifest itself as a confrontation between ethnic groups. The degree of violence is likely to be high, especially where ethnic differences coincide with class lines. This is so because independence provides an opportunity for drastic action against privileged minorities.[6] These processes have not been confined to post-colonial situations after 1945. The dismantlement of the Austro-Hungarian and Ottoman Empires after World War I created enormous tensions, producing large migrations of displaced persons. The successors to these empires, in becoming states, persecuted minorities on the ground that they were obstacles to the achievement of national unity. This persecution became a key mechanism in the formation of successor states. As a result, a large flow of displaced persons resulted.[7]

Hannah Arendt also stresses that the liquidation of Europe's multinational empires, Russia and Austria-Hungary, created two victim groups, the minorities and stateless. The Peace Treaties of 1919 and 1920, `lumped together many peoples in single states, called some of them "state People" and entrusted them with the government, silently assumed that others (such as the Slovaks in Czechoslovakia, or the Croats and Slovenes in Yugoslavia) were equal partners in the government, which of course they were not'.[8]

This arbitrariness created minorities and the stateless who had no governments to represent and protect them, and were forced to live under the law of exception of the Minority Treaties.[9]

The minorities were persons insisting on a nationality different from that of the state in which they lived. The stateless were misfits in an even more extreme sense, in that no matter how national boundaries might be reorganised, they would always remain residual groups who did not belong to any established states or recognised national minority. That is minorities were only `half stateless' because in law they belonged to some political body even though they needed additional protection in the form of special treaties and guarantees. But the problems of stateless people were more intractable. In some cases their real origin could not be determined, in other cases their origin changed hands many times due to post-war disputes.[10]

After World War I, some people had taken refuge in statelessness in order to remain where they were, and avoid being deported to a `homeland' where they were strangers, as was in the case of many Polish and Rumanian Jews in France and Germany. Others had been forced out of their countries by revolutions, and as a result they were denationalised by the victorious governments. Included in this group were millions of Russians, and large numbers of Armenians, Hungarians, Germans and Spaniards.[11] Newly emerged states would rather lose their citizens than keep people with different views.[12]

The real significance of the Minority Treaties lay not in their practical application but in the fact that the minorities and stateless were guaranteed by an international body, the League of Nations. This implied the recognition that millions of people needed an additional guarantee of their elementary rights from an outside body. That is, in the words of Arendt `only people of the same national origin could enjoy the full protection of legal institutions, that persons of different nationality needed some law of exception until or unless they were completely assimilated and divorced from their origin'.[13] Denationalisation became a powerful weapon of totalitarian politics. [14] Such that `one is almost tempted to measure the degree of totalitarian infection by the extent to which the

concerned governments use their sovereign right of denationalisation'. [15] Thus, until the end of Word War I, the inherent dangers of linking rights with nationality remained hidden from view. The contents of the Minority Treaties will be discussed in details in Chapter 7.

Based on Arendt's work above, Zolberg states his view in 1985, 1989 and 1996 [16] that massive refugee flows occurred in Europe in the period following World War I as well as in the 16th and 17th centuries when there was a transformation from a world of empires and small self-sufficient communities or tribes into a world of states. This process normally begins very abruptly as a result of a change of internal or external circumstances. The initial stage is one of a generalised political crisis, in the course of which victim groups are likely to emerge. Such transformations are rarely limited to one country, but more commonly cover a wider region. The resulting tensions cross country boundaries and these in turn reinforce refugee-producing conditions across the states of a region.[17]

Zolberg continues that in such circumstances the notion of persecution in the definition of refugee status is important. It indicates that victims are those `who are singled out as targets for the wilful exercise of extraordinary malevolence on the part of some agent'.[18] Zolberg highlights the fact that the legal language of the UN does not identify who that agent might be. [19] It is normally assumed, however, that the persecutor is in effect the state of origin. The home state may act directly or indirectly, for example when it tolerates the actions of unofficial persecutors and fails to protect their targets, even though citizens and legally established foreign residents are normally entitled to such protection. Zolberg's `formation of states' argument closely linked with persecution by states. And he concludes that refugees are persons whose presence abroad is attributable to a well-founded fear of violence - physical and circumstantial, that have life-threatening effects. In his definition, it is evident Zolberg believes that human rights abuses by some internal agent such as the government are the root cause of forced migration. [20]

The claim that the modern emergence of states create the conditions of forced displacements in which certain groups are persecuted and outstripped of their rights by the new governments raise a question of `what kind of rights were lost?' The answer is to be seen in the work of Arendt.

First, it is the loss of people's rights: the loss of their homes, `the loss of the entire social texture into which they were born and in which they established for themselves a distinct place in the world'.[21] And those displaced suffered from the impossibility of finding new homes, because states began to exert increasingly harsh restrictions: `Suddenly, there was no place on earth where migrants could go without the severest restrictions, no country where they would be assimilated, no territory where they could find a new community of their own'.[22] The second loss was the loss of government protection. This meant not only the loss of legal status in their own country, but in all countries although some states had traditionally offered the right of asylum to those who, for political reasons, had been persecuted by their own governments. But as the twentieth century progressed, when new categories of persecuted people emerged, the majority of persecuted people did not qualify for the right of asylum, which was based on assumptions about political or religious convictions. The new refugees were persecuted not because of their convictions or actions, but because of characteristics they could not alter - their race or class.[23]

The above analysis reveals Arendt's crucial point: `The Rights of Man, after all, had been defined as "inalienable" because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them'.[24] In the period after 1918, minorities themselves found it difficult to recognise a non-national guarantee. They wanted a guarantee of their `national' rights as citizens, as opposed to their linguistic, religious, and ethnic rights. In the case of the stateless, they saw themselves in the same position as minority groups. Like minorities, they saw their loss of national rights as identical to the loss of human rights, given that the former inevitably entailed the latter.[25] As a result, such displaced populations were convinced (given that, as

Arendt argues, true freedom, true emancipation, and true popular sovereignty could be attained only with full national emancipation) that people without their own national government were deprived of human rights.[26]

It is clear that the formation of states is a crucial element in a process of forced migration. But it is not the case that the state formation itself is the cause of forced migration. This position is, rather, that the loss of human rights is identical with the loss of national rights which occurs under the formation of states.[27] That is to say, the root cause of refugees is absence of human rights within the states of origin.

To stress the argument so far, the cause of forced migration is a human rights issue. In order to understand the fundamental problem at work here, the next section will look at the legal aspect of change of sovereignty which often occurs in the process of the formation of states. That is, as states are formed, broken up, or parts of them seceded, major questions of the status of their inhabitants arise. As the international lawyer Vaclav Mikulka states, the change of sovereignty has a profound effect on the nationality of the inhabitants of a territory. This then becomes one of the most difficult problems in the law of state secessions.[28] They have become major issues in the twentieth century, with wars and decolonization affecting very large numbers of people.

STATE SECESSION AND THE LAW OF NATIONALITY

Mikulka outlines a number of theories on the manner in which a change of nationality of inhabitants may be brought about. For example, while one theory asserts that nationality is automatically changed at the moment of state secession, other theories contend that inhabitants acquire the nationality of the successor state only by an express or a tacit submission to the new sovereign.[29] A third theory regards nationality primarily as a matter of domestic jurisdiction, that is, the successor state has the right to determine those it claims as its nationals, and to indicate the methods through which its nationality can be acquired.[30] In support of this position, the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Article 1, provided that:

> It is for each State to determine under its own laws who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.[31]

Mikulka states that no serious attempt to set up a universal instrument to provide a solution for the problem of nationality in state secession has resulted from this view that the question is only a matter of internal law. This also explains why the International Law Commission is not anxious to deal with the problem of nationality in the context of state secession, even though it has discussed the issue for nearly 20 years. This does not, however, mean that international law does not have any relevance for nationality in the context of state secession. On the contrary, the successor state must exercise its legislative competence within the limitations imposed by general international law as well as within international treaties,[32] particularly in the area of protection of human rights.

Mikulka argues that the obligation of states to protect human rights makes questionable any state action that leads to statelessness or to the exercise of any kind of discrimination. As Article 15 of the Universal Declaration of Human Rights provides:
1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

In the light of this, states cannot refuse to exercise their responsibilities to protect human rights in the context of state secession.[33] It follows that the nationality laws of successor states must be exercised in accordance with the protection of human rights. Mikulka points out, `Article 9 of the UN Convention on Reduction of Statelessness (1960) prohibits the deprivation of nationality on racial, ethnic, religious, or political grounds'. In spite of the 1960 Convention, deprivation of nationality does occur, as the example of Estonia shows. The Estonian Citizenship Law of 1938, restored in January 1992, holds that only citizens of 1940 Estonia and their direct descendants can automatically become Estonian citizens. All other residents must go through the process of naturalisation, no matter how long they have lived in the country or were born there.[34] It is argued that the

reasons for such provisions are not based on grounds of legal consistency but on issues of ethnicity. This approach of `ethnic purity' deprived almost forty percent of the Estonian population of their political rights, many of whom were born in Estonia or had lived there for decades. Such a division of the permanent residents of Estonia, therefore, constitutes discrimination.[35] Mikulka, thus, concludes that the protection of human rights is a key criteria in determining nationality in the context of law of state secessions. This protection of human rights is also a key criteria in refugee law.

THE LEGAL RELATIONS BETWEEN REFUGEES AND HUMAN RIGHTS

The international human rights lawyer, Chaloka Beyani states that human rights law is closely related to refugee law based on the concept of persecution. He continues:

> The 1951 Convention is the establishment of a system of international protection to persons who are in need of it. From the perspective of international law, the Convention accords the status of a refugee to a person who has lost the protection of their state of origin or nationality. It is essentially the loss, or failure, of state protection which makes international protection necessary of refugees.[36]

Article 1 (2) of the 1951 Convention states:

> ....owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...[37]

A well founded fear of persecution based on reasons specified such as being outside the country of origin, nationality, or habitual residence evidenced by unwillingness to return to such a country are all important elements in the definition of a refugee. Beyani states that `a well-founded fear of persecution' is the most important factor as to the determination of refugee status. This is so, because the other elements, such as being outside the country of origin, nationality, or habitual residence, unwillingness to return, are all essentially questions of fact. But as facts, they are also evidence of the claimants' fear of persecution in their county of origin, nationality, or habitual residence, and indicate that they have lost the protection of the home country. They are the objective facts due to `a well-founded fear of persecution'. Persecution, however, is not defined in

the 1951 Convention. The judicial view is that persecution connotes oppressive action. The problem with such a narrow and literal approach is that it threatens the humanitarian spirit of the 1951 Convention. Beyani argues that the concept of persecution should be broadened in order to provide protection to refugees, and link human rights to the refugee regime.

Beyani points out that the 1951 Convention is based on humanitarian ideals found in the concept of human rights. For example, its preamble affirms the principle enunciated in the Charter of UN that human beings shall enjoy fundamental rights and freedoms without discrimination. The grounds on which persecution is recognised in the 1951 Convention, of race, religion, nationality, political opinion or membership of a particular social group are also identical to those on which discrimination under human rights standards is prohibited in general international law. Thus, there is a connection between persecution and a failure on the part of states to protect certain human rights. Beyani argues that unjustified discrimination on grounds of race, religion, nationality, political opinion, or membership of a particular social group, may constitute persecution in international law.[38] This suggests that refugees may be produced because of a failure on the part of states to fulfil their responsibility.

Refugee Law and State Responsibility

Article 23 of the 1993 Vienna Declaration (part I) refers to refugees. It says, 'The World Conference on Human Rights underlines the responsibility of States, particularly as they relate to the countries of origin'. [39] Refugee law is now directed not only at receiving states as to admissions and treatments after the entry of refugees, but also at states of origin whose actions or omissions cause forced displacements of their own nationals.[40] Until now, the burden of caring for millions of refugees has been assumed by the countries of asylum, of resettlement and donors. This overlooks the responsibilities of the countries of origin.[41] There is thus a growing view on the subject of state responsibility and forced population displacement. Beyani points out that the force lying behind the notion of state responsibility is to tell the state in question that such unacceptable conduct towards their own nationals will meet legal consequences.[42]

The law of state responsibility has not yet been fully developed.[43] It has been evolving, however, since the late 1940s. The first move came with the International Law Commission (ICL), a body of experts established by the UN General Assembly on 21 November 1947 resolution 174(II). On 3 November 1948, the first elections of members took place, and on 12 April 1949, the ICL opened its first annual session.[44] ILC has a three-part plan of state responsibility. Part 1 is concerned with the question of on what grounds and under what circumstances a state may be held to have committed an internationally wrongful act. Part 2 deals with the consequences for a state of such an act. Part 3 concerns implementation.[45] But it has taken a long time for these objectives to be incorporated in international law. The draft articles of Part I were adopted without a vote by the UN General Assembly on 15 December 1980. [46] Article 1 (part I) defines:

Every International wrongful act of a State entails the international responsibility of that State.[47] Article 3 says:

> There is an internationally wrongful act of a state when
> (a) conduct consisting of an action or omission is attributable to the State under international law; and
> (b) that conduct constitutes a breach of an international obligation of the State.[48]

The issues of displaced persons in fact go back much earlier than this. The principle of state responsibility was applied to the problem of displacement by Judge R. Yewdall Jennings in 1939. Jennings referred to an even earlier document, the letter written by Mr. James G. McDonald on 27 December 1935, in which McDonald said to the Secretary-General of the League of Nations, in resigning from the office of High Commissioner for Refugees coming from Germany, that `it will not be enough to continue the activities on behalf of those who flee from the Reich. Efforts must be made to remove or mitigate the causes which create German refugees'. [49] Jennings stressed that causing the flows of refugees to other states was a matter of international concern. It was an illegal act as the state of origin abused its rights to flood other states with destitute refugees. If the conduct of the state of origin is illegal, it follows that it is under the obligation to make good the wrong done. [50]

Jennings' thesis was that if a state's treatment of its own nationals went against those principles of justice and humanity recognised by civilised states, then that came within

the ambit of international law. Beyani points out that Jennings' pioneering position of 1939 was not followed up, but it has recently re-emerged in the field of international human rights law. Beyani does not give an account of the reason for this re-emerged position but the assumption is that the major factor was the end of Cold War in the late 1980s. Mikhail S Gorbachev reoriented international discourse. He shifted the emphasis from the interests of limited national and political groups to those of all humanity as he realised that no work in the name of the class struggle and the international communist movement can protect humanity from nuclear destruction. Consequently, Gorbachev's diplomacy led to the sudden collapse of the Berlin Wall, `the domino-like downfall of East European communist regimes and the end of the Cold War'.[51]

Before these developments, the UN had been little more than a sparring ground for the Soviet and American blocs. Today, the role of the UN has a greater significance.[52] International law is more willing to require states to fulfil their responsibility, particularly towards their own nationals. Beyani asserts that legal developments in human rights leave no doubt that the conduct of a state with regard to the treatment of its own population is a matter of international law rather than an exclusively domestic one..[53] These legal developments in human rights will be discussed later in Chapter 7. In any event, this assumption that the treatment of its own population is a matter of international law, raises a further question. If international obligations exist to grant entry to refugees based on the principle of burden-sharing, it may mitigate the liability of the state of origin.. But this argument ignores the fact that the obligation to provide sanctuary to refugees does not rectify the wrong arising from breach of the legal duties of the state of origin. In this regard, Goodwin-Gill states:

> A priori, individuals and groups ought to be free to enjoy human rights in the territory with which they are connected by the internationally relevant social fact of attachment. The right to seek asylum and the benefits due to refugees, including non-refoulement and a certain standard of treatment, may therefore be seen as consequence of the breakdown of the norm.[54]

As to the state responsibility, the 1992 Cairo Declaration of Principles of International Law on Compensation to Refugees, Principle 1 says that the responsibility for caring for refugees rests ultimately on the countries that directly or indirectly force their own

citizens to flee. Principle 2 claims that refugees are deprived of the full enjoyment of all articles in the Universal Declaration of Human Rights which presupposes a person's ability to live in the place chosen as home. Thus the state that turns a person into a refugee commits an internationally wrongful act, which creates the obligation to make good the wrong done. Principle 5 says that a state that has committed an internationally wrongful act by generating refugees shall be required (1) to discontinue the act, (2) to apply remedies provided under the municipal law, (3) to restore the situation to that existed prior to the act, (4) to pay compensation if it is impossible to restore the pre-existing situation, and (5) to provide guarantees against the repetition of the act. The Cairo Declaration prepared by the International Committee on the legal status of refugees, was approved by the International Law Association at its sixty-fifth Conference in Cairo held during 20-26 April 1992. [55] The Cairo Declaration lacks binding legal force, but it is so persuasive that it may have an indirect legal effect on the application of state responsibility.[56]

CONCLUSION

This chapter considered the state formation, law of nationality and the relations between refugees and human rights. It revealed that under the formation of states, the unwanted citizens are persecuted by newly emerged states in the form of loss of nationality. That is the loss of the right to government protection. From a legal point of state secession, some argue that the matter of nationality is within the context of internal law, therefore it should be left to each government to decide. Others such as Mikulka hold the view that international law has significant relevance for nationality in the context of state secession. The successor state must exercise its legislative competence within general international law as well as within international treaties in the area of protection of human rights. This protection of human rights is also a significant criteria in refugee law. A failure on the part of states of origin to fulfil their responsibility to protect human rights amount to state persecution set out in the 1951 Convention. Thus, the refugee and human rights issues are closely linked.

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CHAPTER 4

THE INTERNALLY DISPLACED PERSONS

INTRODUCTION

The previous chapter showed that the problem of refugees is increasingly perceived as a human rights issue by addressing the responsibility of states of origin. This chapter considers the issue of internally displaced persons because the way in which they are defined and treated by the international community, has an important effect on refugees. The chapter begins by looking at how the UN has, in practice, dealt with internally displaced persons. It also examines the problem of defining internally displaced persons and the debate over whether there should be any legal protection. One of the important findings is that the growing numbers of internally displaced persons have played a major role in positioning human rights at the heart of the issue of refugees and internally displaced persons. It concludes by asserting that the essential question to be addressed is the human rights issue.

This reflects the current UN policy which stresses the human rights basis to humanitarian assistance.[1] The widespread armed conflicts of an ethnic or similar nature has given rise to the need to assist civilian victims caught in war. The UN, as a part of its peace-keeping mandate, has in a number of recent cases, sent troops under its command to ensure the provision of humanitarian aid. This practice has reaffirmed the concept of 'the right to humanitarian assistance'. The above consideration, however, highlighted the point that international law has not addressed or formulated legal concepts to meet these new contingencies. As a result, in April, 1993, the Council of the International Institute of Humanitarian Law adopted a document entitled 'Guiding Principles and the Right to Humanitarian Assistance'[2] in order to fill the gaps of the existing mandates of the various agencies in determining humanitarian approaches to internally displaced persons. With the publication of the Guiding Principles, UN agencies and NGOs have

been challenged to demonstrate the extent to which a rights-based approach to humanitarian assistance is `mainstreamed' within their organisations.[3] Similarly, Mary Anderson argues in her book Do No Harm [4] that aid delivers messages. She states that the context, style and modes of aid communicate values, which can also reinforce, prolong and exacerbate violence, or encourage and support the non-war, rather than the war, actions and attitudes of people. It can create space for people to talk about peace and give a voice to oppose the manipulations of `conflict entrepreneurs', thereby helping to create peace. This chapter concludes by asserting that the essential question to be addressed is the human rights issue.

THE WAY IN WHICH THE UN HAS DEALT WITH INTERNALLY DISPLACED PERSONS

Luke T. Lee states that during the early years of the UN, the term `refugees' included internally displaced persons. For example, the Constitution of the International Refugee Organisation, the first international organisation for refugees created by the UN in 1946 reads:

> the term `refugee' also applies to persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein. (18 UNTS 3, Annes I, Part I, Section A, Para. 3)[5]

Thus, unsettled persons of Jewish origin or foreigners or stateless persons, who had resided in Germany or Austria, were victims of nazi persecution, and were detained in Germany or Austria, were also defined as `refugees' even if they had never left Germany or Austria. Similarly, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) formulates its definition of `Palestine refugees' as:

> persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both their homes and means of livelihood as

> a result of the 1948 conflict, and took refuge in one of the countries or areas where UNRWA provides relief to their descendants. (UNRWA 1992)[6]

According to this definition, Luke states that many Palestine `refugees' were regarded as internally displaced persons. Although the UN did not differentiate between `refugees' and `internally displaced persons' during the Korean War which began in 1950, the number of `refugees' increased to approximately five million during 1951-52, including South Koreans driven from their homes as well as North Koreans who had moved southward seeking refuge within the area of Korea controlled by the UN Command forces. By June 30, 1953, this exodus had almost halved, to 2.9 million, of which approximately 830,000 were North Koreans, with the rest (some 2 Million) being internally displaced persons in South Korea.[7] Lee states that, given the situation in Korea, it was inadequate for the 1951 Convention to emphasise border crossing as a prerequisite of refugee status. However, the 1951 Convention was essentially a European regional instrument until the adoption of the 1967 Protocol. It, therefore, mirrored European political realities where the crossing of the `Iron Curtain' was critically important to determine refugee status. [8]

The non-intervention of one state in another's internal affairs was basic to the problem. Article 2(7) of the Charter of the UN precludes the intervention of the organisation in matters within the domestic jurisdiction of member states. This was foremost in the minds of the draftsmen of the 1951 Convention on the Status of Refugees.[9] As Plender states, `in the immediate aftermath of the Second World War it was scarcely to be contemplated that the principal recipients of fugitives from East Europe would involve themselves in the movement of persons within the territories of the Soviet Union or the states located within its sphere of influence'. [10] As stated in Chapter 2, because of this conflict between East and West Europe, the establishment of the Office of the High Commissioner for Refugees (UNHCR) itself faced East European opposition. Plender states that as a result of their opposition, the definition of the term `refugee' was confined to the cases of external displacement not because of `some inherent rule of law

or logic', but because of the political circumstances prevailing at the time of the creation of the Office of the High Commissioner for Refugees.[11]

Goodwin-Gill states that from an international law perspective, primary responsibility for the protection of and assistance to internally displaced persons rests with the territorial state, in virtue of its sovereignty and the principle of non-intervention. In practice, however, internal displacement often occurs as a result of civil conflicts, in situations where the authority of the central government is itself in dispute, and its capacity or willingness to provide protection and assistance are equally in doubt. For this reason, the UNHCR has included those displaced within the countries of origin in its orbit at least since 1972 when the Economic and Social Council (ECOSOC) and the UN General Assembly endorsed the operations in the Sudan although the UNHCR had been assisting refugees and displaced persons on an unofficial basis since the Algerian War of Independence (1954 to 1962). [12]

In the Sudan, in 1972, the size of the exodus into neighbouring Uganda, Zaire, and the Central African Republic had reached 160,000-180,000 as a result of the conflict between the Sudanese Government and the Southern groups struggling for self-rule. The solution came with the signature of the Addis Ababa Agreement in 1972. This was followed by the large-scale repatriation not only for those beyond the frontiers of Sudan, but also for those 500,000 who were internally displaced within the country. It should be noted that this operation was the first occasion on which the UNHCR was requested to assist internally displaced persons within their own country by the government, in this case the Sudanese government.[13]

The ECOSOC resolution 1705(LIII), 27 July, 1972, referring to Sudan reads, `the assistance required for voluntary repatriation, rehabilitation and resettlement of the refugees returning from abroad, as well as of persons displaced within the country'. Similarly, the UN General Assembly resolution 2958(XXVII), 12 December, 1972 mentions `the relief, rehabilitation and resettlement operations of the refugees and other

displaced persons'. These resolutions set precedents for those internally displaced persons who are called `displaced persons' without specification as to internal or external. Despite this lack of specification as internal or external, Goodwin-Gill states that since assistance activities are referred to `refugees', `returnees' and `displaced persons', it is reasonable to infer an expectation that such programmes might usefully benefit internally displaced persons.[14]

The preamble of the UN resolution 3454(XXX) of 9 December, 1975 specifically reaffirms the position that: `the eminently humanitarian character of the activities of the High Commissioner for the benefit of refugees and displaced persons'. Sadruddin Aga Khan states this resolution was intended to re-establish the comprehensive character of the UN's competence. That is the High Commissioner's Office can take action on behalf of large groups of people who may not fall within the scope of the 1951 Convention definition but are in a situation analogous to that of refugees.[15] Similarly, the UN General Assembly resolution A/32/352 8 December, 1977 includes a reference that `providing international protection and material assistance to refugees and displaced persons as well as in promoting permanent solutions to their problems'.[16]

The idea that refugees need not be defined as necessarily outside their own countries has also been developed by the domestic courts. For example, the US recognises that refugees need not be defined as necessarily outside their own countries in the Refugee Act of 1980. It defines `refugees' to mean, inter alia:

> in such special circumstances as the President after appropriate consultation...may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[17]

This provision has provided the basis for the Orderly Departure Programme (ODP) administered by the UNHCR in relation to Vietnam. The Orderly Departure system was

a way of bringing the exodus into more manageable proportions and as a means to facilitate family reunion and safe exodus from Vietnam in 1979. While the war lasted in North and South Vietnam, many became internally displaced. Each side secured zones to absorb these people who did not go across international boundaries. It was only when the war ended in April 1975 that operations to evacuate them started. In 1975, about 125,000 Vietnamese were evacuated. They were associated with the South Vietnamese government and the US role in the war.[18] It was followed by a smaller outflow of 21,100 between 1976-1977. By mid-1978, there was a second flow which consisted of the ethnic Chinese. The Chinese in Vietnam were placed in a disadvantageous position due to the growing hostility between the Socialist Republic of Vietnam and China. For example, in the past, most ethnic Chinese in South Vietnam were able to retain their Chinese citizenship which exempted them from military service. But the Socialist Republic of Vietnam claimed that there were no rights without Vietnamese citizenship. If one maintained a Chinese citizenship, he/she was not allowed to have any rights including the right to a ration card which was very important for survival after the collapse of the America wartime economy in Saigon.[19] As a result, they were forced to obtain Vietnamese citizenship which entailed the obligation of military service. Moreover, many of the urban Chinese were forced to relocate to the inhospitable New Economic Zones which were created by the Vietnamese government to deal with the problem of urban overpopulation and shortages of agricultural production.[20]

Under this hostile political climate, many Chinese started fleeing from Vietnam. Between 1978 and 1979, approximately 163,000 people sought asylum in Southeast Asia and Hong Kong. In January 1979, Vietnam announced efforts to curb illegal departures and declared that it would cooperate with the UNHCR in implementing a programme for ODP. In February of the same year, the Association of Southeast Asia Nations (ASEAN) foreign ministers announced the terms for the centres: refugees would be admitted on the basis of firm commitments from third countries that they would be resettled within a reasonable time; the country providing the site would be entitled to limit the numbers of refugees, would retain sovereignty, administrative

control and responsibility for security, and should not bear the cost. The first step was taken by establishing refugee processing centres in Indonesia and the Philippines.[21] Under this programme `refugees' were airlifted from Ho Chi Minh City to Bangkok for onward flights to resettlement countries. As the UNHCR was involved in the ODP, it is reasonable to assume, as Luke suggests, that all of the UN member states have accepted that refugees need not by definition be physically outside their countries of origin.[22]

Other UN developments in the past decade have affected internally displaced persons. During the period 1988-1991, the UN General Assembly began to emphasise the need for better co-ordination of relief programmes for the internally displaced person; a task initially entrusted to the UN Development Programme (UNDP).[23] The UN General Assembly recognised that UNHCR activities under its original mandate could be extended to internally displaced persons, given that refugees and internally displaced persons were so intertwined. It would be practically impossible to assist one group and not the other. This is the case when refugees are repatriated to the same area to which internally displaced persons are returning. A similar situation arises where both external and internal displacement arise from a single cause. Here, there is an obvious advantage in having one operation to deal with both groups although they are on different sides of the border, or where a refugee flow could be prevented by protecting internally displaced persons to remain in safety in their own country.[24]

GROWING UN CONCERN WITH INTERNAL DISPLACEMENT

The UN first raised the question of the institutional protection of internally displaced persons at the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa held in Oslo in 1988. In the following year the International Conference on Central American Refugees addressed itself to the subject. On 27 July 1990 the UN Economic and Social Council requested the UN Secretary-General:

> to initiate a system-wide review to assess the experience and capacity of various organisations, in the co-ordination of assistance to all refugees, displaced persons and returnees, and the full spectrum of their needs.[25]

Then, on 5 March 1991, the Commission on Human Rights requested the Secretary General to compile an analytical report on internally displaced persons. [26]

The concern for internally displaced persons continued to grow during the Gulf War. The impracticality of using boundaries to distinguish refugees from internally displaced persons in such an ethnic conflict/civil strife situation was highlighted by John Bolton, the former US Assistant Secretary of State who accompanied James Baker, the former US Secretary of State, to the Iraqi-Turkish border near Tchivergia in April 1991. He described how he saw the dramatic evidence of the plight of the refugees and internally displaced persons. On the border, Baker saw an almost indescribable scene of many thousands of people just sitting on the hill sides and in the valley with no shelter, no sanitation, no food distribution or any protection. This dramatic sight had a profound effect on Baker which, in Bolton's view, led directly to America's decision to launch 'Operation Provide Comfort'. But the reality was that the border was unmarked and ambiguous- as the Defence Attache from Ankara pointed out: 'I do not know how quite to say this, but we - and the Secretary - are about ten yards inside Iraq'. The lesson to be drawn was that the people on one side of the line were in exactly the same conditions as the people on the other side of the line. They both needed protection and they both needed assistance.[27]

A month later, on 5 April 1991, the French representative at the Security Council proposed Security Council Resolution 688 which reads:

> condemn the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security in the region and insist that Iraq allow immediate access by international humanitarian organisations.[28]

The resolution was adopted by 10 votes to 3 with 7 abstentions. By linking the problem of internally displaced persons to the threat of international peace and security, the Security Council authorised the establishment of safe havens in the northern part of Iraq and the provision of protection and assistance to anyone displaced irrespective of whether of not he or she had crossed an international border. Iraq initially objected to the Security Council action as a violation of its territorial sovereignty,[29] but subsequently agreed on a Memorandum of Understanding authorising humanitarian assistance by UN personnel within Iraq.[30] Plender states that 'as a matter of law and as a matter of practice, the consent of the host state is normally required to provide humanitarian assistance to displaced persons'.[31] However, he points out that recent international practice does not support the proposition that humanitarian assistance can never be supplied without the consent from the host state. As in the case of the provision of aid in Iraq, it was on the basis of a Memorandum of Understanding with the government of Iraq, dated 18 April 1991, that humanitarian operations were undertaken in the north of Iraq. That Memorandum was renewed on 22 October 1992 but there was an interval between the expiry of the first Memorandum and the establishment of the second. Even so, humanitarian assistance continued to be provided without any formal consent on the Iraqi side.[32]

Although the Iraqi case clearly demonstrated that the UN recognised the need to extend its protection and assistance to internally displaced persons, it was in fact the situation in the former Yugoslavia that really caused the UN to examine and seek to define the functions in relation to internally displaced persons. In the summer of 1991, armed conflict erupted between Serbia and the newly declared Republic of Slovenia that quickly engulfed other Balkan republics.[33] The UNHCR provided material assistance to refugees and, at the request of UN Secretary-General Perez de Cuellar, to internally displaced persons in the former Yugoslavia from November 1991 onwards.[34] On 5 March 1992, the UN Secretary-General, at the request of the Commission on Human Rights, appointed Dr. Francis Deng to serve as his Representative on Internally Displaced Persons. On the same day, the UN General Assembly requested Deng to study

the position of internally displaced persons.[35] Dr. Deng had served as the Sudan's Minister of State of Foreign Affairs, as its ambassador to Canada, the United States, and Scandinavia, and as a Human Rights Officer in the United Nations Secretariat.[36] Three months later, on 3 July 1992, the High Commissioner for Refugees requested UN member states to extend `temporary protection' to those in need of it as a result of the conflict in former Yugoslavia.[37]

By the summer of 1992, humanitarian airlifts by the UN were carrying a daily average of 200 metric tons of food and medical supplies to Sarajevo. In parallel to these actions, UNHCR, on 29 July 1992 convened a high-level international meeting in Geneva to consider protecting and assisting the victims of the war. This meeting was entitled the International Meeting on Humanitarian Aid for Victims of the Conflict in Former Yugoslavia. It endorsed a Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia which included respect for human rights, humanitarian law, humanitarian access, preventive and temporary protection to cover material assistance, special needs, and return and rehabilitation.[38]

On 16 December 1992, `the first explicit reference' to internally displaced persons, appeared in the resolution adopted by the UN General Assembly without a vote. This resolution commends:

> efforts by the High Commissioner, on the basis of specific request from the Secretary General or the competent principal organs of the United Nations and with the consent of the concerned State, to undertake activities in favour of internally displaced persons, taking into account the complementarities of the mandates and expertise of other relevant organisations. [39]

Given its growing involvement with internally displaced persons, the UNHCR published internal guidelines in April 1993 setting out a number of legal considerations and criteria. While emphasising that the UNHCR `does not have a general competence' for internally displaced persons, the guidelines identify the criteria for engaging in helping them as a specific request from the UN Secretary-General or other competent

authority, and the consent of the state concerned.[40] A subsequent resolution of the UN General Assembly adopted on 20 December 1993 welcomed the extension of UNHCR protection and assistance to internally displaced persons. This was to be done on a case-by-case basis, and through dialogue with individual governments.[41] Moreover, in 1993, the Commission of Human rights extended Dr. Deng's mandate for a two year period and subsequently in 1995 for another three years.[42]

DEFINING `INTERNAL DISPLACEMENT'

The UN's growing concern, from 1985 onwards, with the practical problems of people at risk within their own countries, led to the search for a more formal definition. On 2 February 1995, Francis Deng submitted a report on Internally Displaced Persons, under the provisions of the Commission on Human Rights resolutions 1993/95 and 1994/68. The report notes that in 1992, when the UN Economic and Social Council considered for the first time the issue of internally displaced persons, it relied upon the definition contained in the 1992 analytical report of the Secretary-General.[43] The 1992 report has defined internally displaced persons as `persons who have been forced to flee their homes suddenly, or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who are within the territory of their own country'. Moreover, the Executive Committee of Internally Displaced Persons (No. 75 (XLV)-1994) recognised that:

> (g) in many instances, the internally displaced are present alongside refugees, returnees, or a vulnerable local population in situations where it is neither reasonable nor feasible to treat the categories differently in responding to their needs for assistance and protection.[44]

But the Deng 1995 report noted that there was no firm agreement on what should be included in the definition. As it observed, some countries would have preferred to see internally displaced persons defined as persons in a refugee-like situation, but who had not crossed the borders of their country. Others opposed the definition's inclusion of natural disasters on the ground that persons displaced as a result of such phenomena

would not qualify for refugee status. In contrast, some observers would like to see the definition broadened to include development projects that cause relocation within a country, while others favoured extending the definition to those who return to their homes' areas from abroad but have lost their land, home or means of production. At the extreme were those who questioned whether there should be a definition at all, or who warned against a definition that would leave out people who would not meet the `formal' criteria. [45]

The prime difficulty in developing the definition of internally displaced persons comes from the following reasons. First, although internally displaced persons are in a refugee-like situation, their position is quite different from that of refugees. Second, internally displaced persons face tremendously diverse situations that vary widely from country to country. Thirdly, there is an argument why should there be a definition of internally displaced persons at all? The next section will examine the above points.

A Refugee-like situation?

Shacknove and Khan state that the use of border-crossing as the criterion for distinguishing between two groups is not appropriate. Shacknove states that under normal conditions, state protection is given to the citizen, following him/her into foreign jurisdictions. For the refugees, however, state protection is absent, even at home. It is this absence of state protection which constitutes the basis of refugeehood: the refugee does not necessarily need to cross an international frontier.[46]

Similarly, Sadruddin Aga Khan states that the situation of displaced persons is in many respects analogous to that of refugees, uprooted from their homes by similar events. Displaced persons experience the same hardships and sufferings: but they retain in principle their national status and do not present any special legal problems. However, due to their particular circumstances, including their isolation and the confusion prevailing in the country, these persons find themselves facing the same uncertainties as refugees because of the lack of state protection of their basic needs. Khan states that it is

not surprising that internally displaced persons have tended to be identified with refugees, and that they have received international assistance.[47] Bennett also states that:

> the concept of internally displaced persons is an artificial construct. It is forced migration, which should be addressed, whether it be refugees, development displacement or internal displacement. The root causes are the same: a violation of the basic right to reside peacefully in one's own home.[48]

Having said that internally displaced persons live under similar circumstances to those of refugees, some important differences must be noted. For example, internally displaced persons are often caught up in the middle of armed conflict and may be more vulnerable to violence than refugees. Frequently they need to be defended from armed attack or evacuated from conflict areas or protected from forcible relocation or expulsion. It may be more difficult to gain access to internally displaced persons, and this may require the backup of military forces. Women and children may need greater protection against sexual assault and forced conscription.[49]

There is another difference between refugees and internally displaced persons. Refugees have legal rights to asylum and non-refoulement. They can seek to reside on the territory of a foreign state lawfully and obtain a status as close to that of its nationals as possible. This international protection arises because governments accede to and observe the terms of international treaties on refugees. By contrast, internally displaced persons do not have binding legal instruments like the 1951 Convention and 1967 Protocol. There is a further difference between the internally displaced and refugees over return or voluntary repatriation. The UNHCR has a statutory responsibility in the case of refugees to promote their voluntary return which could involve monitoring and returning people to their final destinations. However, it has no statutory responsibility in the case of internally displaced persons for safe return or resettlement within their home countries.[50]

Diversity of Internal Displacement

The variation between countries means that, as Cohen and Cuenod explain, in some countries, internally displaced persons can be in camps and in need of assistance and

protection. In other countries, they remain in their home communities but are constrained by lack of land, services and security. They are also likely to be scattered among different areas of their countries, making it difficult to identify and to reach them.[51]

Deng illustrates these problems in his 1995 report. For example, in Somalia, Sudan, Sri Lanka, the former Yugoslavia and Rwanda, internally displaced persons were identifiable as large clusters of people in camps. They were entirely dependent on humanitarian assistance and precarious protection from the controlling authorities. On the other hand, in El Salvador, internally displaced persons were largely villagers integrated into rural areas but still constrained by lack of land and vital services and under precarious security conditions. In Colombia, internally displaced persons, who consisted of 1 to 3 per cent of the population, secured their safety by merging into the community to avoid being clearly identified, but the communities into which they merged were equally poor and inadequately protected. In Burundi, internally displaced persons, who consisted of up to 10 per cent of the population, were in a wide variety of situations. They were dispersed either in army-protected camps or rural areas to avoid the arm forces, in a manner compatible to displaced persons in El Salvador and Colombia: but unlike the latter, they did not disappear into rural communities, but dispersed into the hills, the marshes or the valleys away from the roads. Different forms of internal displacement, therefore, require different approaches to the problem. When internally displaced persons are in camps, assistance and protection can be provided to them easily. When they are integrated into communities, however, assistance and protection may be better organised on a dispersed, community basis. When internally displaced persons are dispersed and in hiding, the provision of assistance and protection may be very difficult.[52]

In the end, in his report of 6 March 1995, Deng states that the draft statement on the principles of internally displaced persons would be prepared to give further consideration to the working definition in order to finalise it. He also expresses the view

that the adaptation of a definition would facilitate the collection of statistical and other data on internally displaced persons and prove useful to operational agencies in the field.[53]

Why Should There be Legal Protection?

It has been revealed so far that there is a clear recognition that internally displaced persons need a legal instrument which defines their entitlements for protection. There are, however, some who question why it is necessary to create a new legal instrument, on the grounds that everyone, including internally displaced persons, benefit from international humanitarian and human rights law. These laws covers all the legal protection needs of internally displaced persons. It is, therefore, difficult to see what additional guarantees can be added that do not already exist.[54] In response to this argument, Sadako Ogata states that there are of course provisions to protect internally displaced persons in humanitarian law, in particular the Additional Protocol II to the Geneva Conventions for the protection of civilians in internal armed conflicts and the mandate of the International Committee of the Red Cross (ICRC). They, however, have their limitations. Ogata continues that for example the Additional Protocol II comes fully into operation only when the party opposing the government consists of an organised armed force, uses armed action and controls a significant part of the territory. It does not apply to situations of internal disturbances and tensions which do not meet these conditions even though violence may be used by either or both parties. Many internally displaced persons suffer from such a situation. In situations of internal disturbances and tensions, where gross human rights violations occur but which do not amount to armed conflict, then the application of humanitarian law is precluded. The law of human rights is applicable in situations of internal disturbances and tensions, but it is considerably weakened by the fact that governments are allowed to derogate from many human rights during a state of emergency, at time when the need for protection of the individual is at its greatest. The UN Covenant on Civil and Political Rights contains a derogation clause as do the European and American Conventions on Human Rights. [55]

Deng and Cohen also state in their book Masses in Flight that situations where legal protection is totally absent are few, but there are several categories of insufficient protection for internally displaced persons. They list four categories: normative gaps; applicability gaps; consensus gaps; and ratification gaps. A example from the first category, normative gaps, is the absence of a right to restitution of property lost as a consequence of displacement during internal or international armed conflict, or to compensation for its loss. Secondly, applicability gaps include a situation where there are no clear safeguards against arbitrary detention in situations of non-international armed conflict, because there are no such guarantees in humanitarian law, and human rights law might be derogable that is, set aside owing to the seriousness of a civil war. Thirdly, consensus gaps arise from the prohibition of return of people to situations of imminent danger. That is, it has been recognised that it is inhuman to send a person to country in which he or she will face torture, death or other very serious violations of human rights. As all the case law in practice refers to returns across international frontiers, a prohibition of the inhuman return of internally displaced persons to dangerous areas within their own country needs to be articulated. Finally, ratification gaps are still numerous. They result in a vacuum of legal protection for internally displaced persons in states that have not ratified key human rights treaties and/or the Additional Protocols to the Geneva Conventions. Deng and Cohen conclude by stating that, considering the impact of these four categories, there are serious gaps in international law for the protection of internally displaced persons.[56]

It seems that behind the logic of the argument that it is not necessary to have a new legal instrument, is a dilemma that arises between protecting people in their countries of origin and simultaneously defending their right to leave their country and to seek asylum from persecution. As Cohen and Cuenod explain, too a great a focus on in-country protection could detract from efforts to gain asylum for internally displaced persons. The International Committee of the Red Cross (ICRC) has challenged the view that priority should be given to in-country protection to enable people to remain within their countries of origin. The problem is that to make that a prior criterion would inevitably

convey the impression that the interests of third countries [i.e., countries reluctant to receive refugees] were being placed before those of the victims.[57] An example comes from the Kurdish situation. The creation of a safe zone for Kurds in Iraq removed the legal basis for leaving the country in search of asylum when Turkey violated the principle of non-refoulement and decided to close its border to Kurdish refugees.[58] The UNHCR has, therefore, repeatedly pointed out that protection for internally displaced persons cannot be at the expense of the organisation's basic commitment to asylum.[59]

INTERNALLY DISPLACED PERSONS AND HUMAN RIGHTS

It is important to note that refugee law is a type of legal protection that allows a needy foreigner to survive in a host state until a durable solution is found to his/her particular situation. It is not protection from human rights abuses that caused people to flee their own countries in the first place. The position of refugee law is that human rights violations have already occurred and that victims have fled the country of origin. Refugee law can be seen as a last resort to respect minimal standards for certain foreigners who do not benefit from other national protection. That is to say that refugee law is a last resort if people cannot be sure that their human rights will be respected in their own country.[60] Internally displaced persons, however, remain within their home countries where human rights violations occur. This situation, therefore, raises a question of human rights because the very existence of internally displaced persons implies that states fail to protect their citizens.

Chapter 3 has revealed that the problem of refugees is essentially a human rights issue. The growing numbers of internally displaced persons also highlights the issue of human rights. The very existence of internally displaced persons arises because states deny their responsibility to protect the human rights of their citizens. For example, as stated on in Chapter 2, the 1984 Cartagena Declaration took the definition of refugee into a new stage by making a link between violations of human rights and refugees. It is interesting to note that in 1983, the U.S. Department of State estimated that there were 439,000

Salvadorans and 300,000 Guatemalans who were internally displaced within their countries of origin.[61] This situation of growing numbers of internally displaced persons in Central America caused concerns and prompted the Cartagena Declaration to include the following paragraph:

> To express its concern at the situation of displaced persons within their own countries. In this connection, the Colloquium calls on national authorities and the competent international organisations to offer protection and assistance to those persons and to help relieve the hardship which many of them face.[62]

Against the background of growing concerns for internally displaced persons, the Cartagena Declaration made a explicit link between the violations of human rights and refugees.

In 1998, the Guiding Principles on Internal Displacement were finally presented to the UN Commission on Human Rights in the Deng report. It sets out the rights of internally displaced persons and the obligations of governments. These include protection before internal displacement occurs, that is, protection against arbitrary displacement, during situations of displacement, and in return and reintegration. The report affirms the right of internally displaced persons to request international humanitarian assistance, the right of international actors to offer such assistance, and the duty of states to accept such offers. Although it is not a binding instrument, the Guiding Principles has a practical value to provide a yardstick in monitoring the treatment of internally displaced persons. It also lays down the guarantees against the forced return of internally displaced persons to places of danger and the compensation for property lost during displacement.[63]

A definition of internally displaced persons reads:

> People or groups of people who have been forced or obliged to flee or to leave their homes or places of habitual residence in particular as a result of, or in order to avoid the effects of, armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border.[64]

The term `in particular' in the definition, implies that internal displacement is not limited to the causes alone set out in the definition. At the same time, the definition does not encompass those who migrate because of economic causes. But if people are forced to leave their homes because of economic injustice due to the systematic violation of their economic rights, they come under the definition. But the element of coercion in most cases of economic migration is not clear. The argument for including natural disasters is based on cases where governments respond to disasters by discriminating against certain groups on political and ethnic grounds. For example, when famine hit Ethiopia in the mid-1980s, the government relocated hundreds of thousands of Tigrayans who were regarded as political opponents, under the pretext of responding to a natural disaster. The same reasoning applies to the inclusion of human-made disasters, such as nuclear or chemical accidents. Although people displaced by such disasters receive assistance from their governments and international community, there may be situations in which systematic violations of human rights occur. The same is true for development projects that cause displacement.[65]

The definition of internally displaced persons contains the two important elements: involuntary movement and remaining within one's national borders. The former is contested by Jon Bennett. Bennett argues that we take for granted the concept of `forced migration', the involuntary movement of (usually) a large group of people due to external pressure. However, even in situations of extreme violence some people remain within their local community or at least within the immediate surroundings. The decision to stay might be a question of resources, or an active resistance against migratory pressure. Alternatively, temporary displacement might be considered a practical solution to violence, especially in the early stages of violence. Thus, in Uganda, people who feared attack leave their homes during the night and return homes during the day to farm the land. It is said that in the town of Gulu, Uganda, as many as 15,000 people were reported in 1996 to be sheltering in the town's public buildings fearing the atrocities of the Lord's Resistance Army. In societies where political conformity is

particularly acute, the concept of `voluntary' displacement is also problematic. For example, in Myanmar (Burma), tens of thousands of people have been told to move to the outskirts of the capital, Yangon, to make way for new construction projects. In the absence of any effective judicial process, military threat is the ultimate sanction for those who refuse to move. Given the oppressive nature of the current Myanmar regime, it is understandable that resistance is minimal and that the letter of request issued to these town dwellers is `voluntarily' adhered to. Thus, Bennett asserts that we should get beyond widespread conditions such a `forced displacement' to the particular vulnerabilities that people face. [66]

Bennett's argument is controversial. The question may be posed as to whether it would not be preferable to use one definition for all those displaced. In other words, would it not be better to expand the term `internally displaced persons' to the fullest extent possible? After all, this would conform with the popular concept - violation of human rights - behind the usage of the terms. But that is not practical nor possible because of the diverse situations people face and the international community is not prepared to take such a radical step.[67] Furthermore, protecting and assisting people in their own countries in the midst of violence and insecurity raise many thorny problems. A major constraint in developing effective protection mechanisms is the sensitivity of the issue of sovereignty of states.[68]

Bennett does not claim, however, whether the definition should be expanded or not. His position is rather that our perceptions of displacements should get beyond the definition such as `forced displacement'. It is a desire to place human rights at the heart of the issue of refugees and internally displaced persons in order to examine the problem in perspective.

CONCLUSION

The present situation of internally displaced persons in 1990s clearly demonstrates that the attention to the legal definition alone contributes little to the solutions.[69] The chapter showed that although the 1951 Convention and the 1967 Protocol do not include them, the UNHCR has been implicitly including those displaced within their own countries in UN relief programmes. This reflects a broader and more inclusive approach within the UNHCR to respond to the continually changing circumstances of displaced persons in the world.

Today, there are an estimated 20-22 million internally displaced people.[70] Deng states:

> It has been by now clearly established that refugees under the 1951 Geneva Convention on the Status of Refugees are essentially persons whose human rights are no longer being protected by the State of nationality. They have indeed been violated or are threatened by the State or other entity on the five grounds of race, nationality, religion, political opinion, or membership in a particular social group. Many believe that the term `refugee' especially as defined in the 1951 Convention is unduly and unrealistically restrictive.[71]

In order to clarify a human experience of flight from one's home, alternative terminology such as `displaced persons,' `victims of state violence' and people of `forced migration' are also considered. But they lack a precision which may lead to both further exclusion and confusion. Nevertheless, through the use of the concept of human rights, the terms `refugees' and `displaced persons' have come to be used, sometimes synonymously.[72] As the late Sir Humphrey Waldock, former President of the International Court of Justice, defined human rights as `rights which attach to all human beings equally, whatever their nationality'- and thus wherever they are.[73]

Responsibility for protecting and assisting internally displaced persons lies in the first instance with the home country, but if it is unable or unwilling to meet the minimum standards required by humanitarian or human rights law, then protection becomes a matter

for international concern. Protecting internally displaced persons, however, raises the sensitive issue of state sovereignty. As a result, the resistance of governments continues to be a serious obstacle to international involvement with internally displaced persons.

In future, the restrictive immigration policies of wealthy states may escalate even more if internally displaced persons are granted protection under international law. This is so because there would then be no reason to allow those displaced within the country of origin to become cross-border refugees that could also reinforce no-entry policies by states and justify containment strategies.[74] In any event, this chapter concludes by asserting that the growing numbers of internally displaced persons have set forward the issue of human rights, and that the essential question to be addressed for internally displaced persons as well as refugees is that of human rights.

So far, this thesis has been concerned with the theoretical definitions, and historical evolution, of refugees and internally displaced persons. It has noted how these definitions and experiences have changed in the Twentieth century, particularly since 1945. These changes have taken place within two kinds of context: the period of the Cold War (and its aftermath) and the ending of colonialism. The growing concern with the problems of refugees and internally displaced persons has given rise to an expanding international and regional regime - of law, convention and practice? The conclusion has been that, at the heart of the issue, lie two related and fundamental concepts: of human rights and of state sovereignty. Refugees and displaced persons, it is argued, are essentially a matter of human rights, and these in turn are moulded, and frequently constrained, by notions of state sovereignty.

But what are these human rights and state sovereignty that, this thesis argues, form the essential basis for an understanding of how refugees' and displaced persons' issues should be addressed? To answer these questions the following three chapters explore in turn the fundamental parameters: human rights, state sovereignty and the evolution of human rights within state sovereignty. We begin, in Chapter 5, with human rights.

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CHAPTER 5

BASIC HUMAN RIGHTS

INTRODUCTION

As the previous chapter concluded, an analysis of the problems of refugees and internally displaced persons would be set in the context of human rights and state sovereignty. As the issue of human rights plays a major role in international and national law, tension between human rights and state sovereignty increases. Human rights are, however, still open to interpretation. In order to understand fully the context within which the issue of human rights and state sovereignty is being analysed, the following two chapters examine the characteristics and development of both concepts. This chapter concentrates on human rights. It begins by looking at the categorisations of human rights followed by the debate over 'basic rights'. One of important findings is that human rights are established on the foundation of peace. It concludes, therefore, by asserting that the right to life in the name of right to peace is the most basic right.

THE CATEGORIES OF HUMAN RIGHTS

Karel Vasak, the French jurist, categorises rights into those: first-generation of civil and political rights, second-generation of economic and social rights, and the third-generation of solidarity rights.[1] 'Both the first and second generation rights are, in essence, possessed by individuals. The third generation rights build on the collective dimension and concern the rights of peoples. The first generation of civil and political rights include the rights to life, liberty, security of the person, privacy and property, the right to a fair trial, freedom from slavery, torture and arbitrary arrest, freedom of movement and to seek asylum, the rights to a nationality, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of assembly and association and the right to free elections, universal suffrage and participation in public affairs.

First-generation rights, therefore, protect citizens from coercion or oppression on the part of states. Second-generation economic and social rights include the right to work and for a just reward, the right to form and join trade unions, the right to rest and leisure and to periodic holidays with pay, the right to a standard of living adequate to health and well-being, the right to social security, the right to education, and the right to participation in the cultural life of a community. The second-generation rights relate to fundamental aspects of existence and make demands on states. The third-generation of collective human rights include those of nations to self-determination, of races to freedom from discrimination, of classes to freedom from neo-colonialism, the right to development, the right to a wholesome environment and the right to peace and to common ownership of the human heritage.[2] The third-generation rights are unique in that they extend beyond the framework of states. While recognising that these definitions are disputed - among lawyers, academics, states and international bodies - as to which categories can be accepted as 'rights', the purpose of this section is to provide the framework of analysis within which discussion of the issues of refugees and internally displaced persons can take place.

Elements of these rights appear in the international Conventions. For example, in the Universal Declaration of Human Rights, the rights defined in Article 3 through Article 21 belong to the first generation. Article 22 through Article 27 are categorised as the second generation. The last three, Article 28, 29 and 30 appeal for the establishment of an international order in which the rights and freedoms set out in the Declaration can be fully realised and to strengthen individual awareness of these rights and freedoms. One may say, therefore, that the last three Articles were anticipating the rights of 'the third generation'.[3]

The idea of third generation rights was in part born of the gap between the economically developed and developing countries. People in developing countries suffer from poverty to a far greater degree than those in the developed world. This poverty creates unstable social conditions in which human rights are often violated. It was, therefore, clearly

understood that the development and prosperity of countries are essential factors for the realisation of human rights. This recognition, a correlation between the enjoyment of human rights and economic and social development, was stated in the Proclamation of Teheran of 13 May 1968. Article 12 says the widening gap between the economically developed and developing countries deters the realisation of human rights in the international community.[4] This awareness grew more strongly during the early 1970s when many people witnessed that human rights were, more often than not, violated in the economically developing countries. This right to development which requires international cooperation on the global plane has expanded to the right to peace, to a wholesome environment, and to the common ownership of the human heritage.

There are many other categorisations. For example, there is the distinction between negative rights that require only forbearance on the part of others, and positive rights that require others to provide goods or services if they are to be implemented. Henry Shue, however, states that this distinction fails to correspond to the distinction between civil and political and economic and social rights and has no moral significance. The right to protection against torture is considered as a negative right. It requires nothing more than that the state should refrain from incursions on personal liberty and bodily integrity. But in order to assure that such incursions do not occur, it requires major positive programmes such as the training, supervision and control of the police and security forces. In some countries, this would be expensive and politically impossible without changing the regime. Protecting people against torture, therefore, requires positive endeavours by the state. On the other hand, the positive right to food can be realised simply by government restraint. Shue uses the example of government development programmes that have encouraged the production of cash crops for export rather than traditional food crops for local consumption. In this case, the right to food would have been better realised if the government had done nothing more than refrain from interfering with agricultural incentives. [5]

All human rights require both positive action and restraint on the part of the state. Moreover, whether a right is relatively positive or negative depends on circumstances.

Jack Donnelly states that the right to food is a fairly negative right in the wheatfields of Kansas but rather positive in East Los Angeles. The right to protection against torture is largely negative in Stockholm but more positive in Argentina in the late 1970s, but today it is much close to a negative right.[6]

Donnelly continues that there are other categorisations and suggests four main groups: personal rights, legal rights, civil rights and political rights. Personal rights provide minimal guarantees of individual bodily and moral integrity. The right to life, protection against discrimination, prohibition of slavery, recognition before the law, protection against torture, and nationality (the Universal Declaration of Human Rights, Articles 1,2,4,5,6,15) fall into this category. Legal rights give procedural projections for individuals in dealing with the legal and political system, especially the criminal law. (the Universal Declaration of Human Rights, Articles 9-11) belong to this category. Civil rights define a private sphere of conscience and belief and a public sphere in which private belief, as well as public concern, can be freely explored. They include freedom of thought, conscience, speech, press, association and assembly (the Universal Declaration of Human Rights, Articles 18-20) and are considered as civil rights. Political rights empower citizens to participate in and ultimately control the state. The right to popular participation in government Article 21 falls into this category along with many public aspects of civil liberties including the freedoms of speech, press, and assembly. Difficulties arise with any form of categorisation. For example, protection against torture classed as a personal right, can also be a legal right. The dual nature that exist between many civil and political rights is also observed. But in spite of these problems, categorisation helps to make clear the diversity of human rights that are normally grouped together.[7] The point here is not to rest on any particular categorisation, but to have a clearer picture of the nature of human rights and to see their interrelationships.

BASIC RIGHTS

As was noted above, what counts as `rights' is contested. The different perspectives have been explored by Vincent. One perceptive is the conservative position which recognises

only civil and political rights as human rights. These are regarded as being able to claim the status of `human rights' because the right to life is fundamental while the right to holidays with pay is not. Important rights are those which must be recognised and honoured now, not policies that might be nice to have some day. Vincent states that there is a weak and a strong response to the conservative position. First, the weak response is that economic and social rights are different from civil and political rights, but this does not mean that economic and social rights are less important. The rights to subsistence, to social security, to education and to employment are not insignificant matters. The difficulty of providing these rights should not be used to dismiss them as rights. Second, the strong response to the conservative position is that there is no difference between civil and political rights and economic and social rights in terms of their claims on state action. The right to subsistence (an economic and social right) is as important as the right to security (a civil and political right). For example, starvation is as much a threat as violence.

In short, Vincent argues that the right to life is basic if there are such things as basic rights. And sense cannot be made of a right to life unless it is a right to subsistence as well as to security. At this basic level, the first-generation civil and political rights (the right to security) and the second-generation economic and social rights (the right to subsistence) are interdependent if a minimally satisfactory human life is to be lived.[8]

Henry Shue, for his part, recognises three basic rights: to security, subsistence and liberty. Shue considers them as basic, because they are essential to the enjoyment of all other rights. [9] Shue states that basic human rights specify the line beneath which no one is to be allowed to sink. They are a restraint upon economic and political forces that would otherwise be too strong to be resisted by the weak.[10] Similarly, Oliver Ramsbotham and Tom Woodhouse view the rights to security and to subsistence as essential because above all, the right to life is the basic human right. [11] The appeal is to what is essential or basic for a proper human life. It is in this context that human rights are sometimes called inalienable. It is not that they cannot be alienated, but that if they are, the life left is not fully human life.[12]

Donnelly argues, however, that we need to redefine `basic rights'. By distinguishing a core group of `basic rights', the difficulty is that we cannot avoid devaluing the remaining human rights. We make implicit or even explicit arguments that basic rights are more important than other rights. Donnelly takes the view that such an approach carries a danger. Even if `basic rights' are enjoyed, people still could be left living degraded lives, unable to speak their minds, to choose their religion, to become involved in politics and to get an education and so on. Implementing `basic rights' will not assure, therefore, that life is anything more than `brutish'. Thus, without other human rights, `basic rights' are inadequate to protect human dignity. Donnelly asserts that human dignity, the realisation of which is the aim of human rights, cannot be reduced to a short or narrow list of `basic rights'. All human rights are `basic rights' in the fundamental sense that systematic violations of any human rights prevents realising a life of full human dignity and enjoying the minimum conditions necessary for a life worthy of a human being.[13]

THE RIGHT TO LIFE AND THE RIGHT TO PEACE

Article 3 of the Universal Declaration on Human Rights (UDHR) reads, `Everyone has the right to life, liberty and security of the person'. Lars Adam Rehof says that this right to life, in particular, means protection and preservation of human life and the degree of state responsibility for safeguarding it. In drafting Article 3 of the UDHR between the beginning of 1947 and the summer of 1948, the delegates of the UN Human Rights Commission and the UN General Assembly's Third Committee discussed a number of important issues. These were the protection of unborn life, abortion, people suffering from incurable diseases, psychiatric patients, foreigners, subsistence for those who could not support themselves, death penalty and the use of force as part of police enforcement. It is striking how up-to-date many of the topics still seem to be. They were eternal questions. Question of life and death were not - are still not - met by easy answers.[14] In my view, what is most interesting in the discussions of the right to life of Article 3 was that the delegates did not touch on the issue of war. It is evident that they all assumed peace as the pre-condition on which the right to life is established.

The right to life to which Vincent, Shue, Ramsbotham and Woodhouse refer is somewhat different from the right to life of Article 3 of the UDHR, but they are all, in essence, similar. First, they are different in the sense that Article 3 is categorised as first-generation while the above writers perceive the right to life in both the first-generation of civil and political rights (the right to security) and the second-generation of economic and social rights (the right to subsistence). Second, they are similar in the sense that both are perceived within the frame-work of states. I believe that the right to life as the basic human right, however, also belongs to the third-generation category. It is the right to life which all citizens of the world possess. It is not just the question of the first and second-generation categories. It also includes the third-generation in the name of right to peace.

The preamble to the Universal Declaration of Human Rights says: `recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.[15] That is to say, the realisation of human rights is the necessary foundation for peace. But, at the same time, all the rights in the Universal Declaration are established on the foundation of peace. Without peace, human rights cannot be protected. In wartime, people engage in destructive acts which are totally contrary to Article 1, `All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards on another in a spirit of brotherhood'. This is the precise reason why the UN Charter took its purpose to be the maintenance of peace and security.

The preamble to the Declaration of the Right of Peoples to Peace adopted by the General Assembly on 12 November 1984 clearly expresses the will to eradicate war and, above all, to avert a world-wide nuclear catastrophe. In the nuclear age, the establishment of a lasting peace means to preserve human civilisation and to make the survival of mankind possible. [16] The existence of nuclear weapons has made the traditional preoccupation with peace and security among states change its nature into peace and security for the survival of the human race. It is this right to peace which this thesis proposes as the strong

- indeed the only - way forward in protecting and ensuring in international practice the rights of refugees and internally displaced persons.

But Donnelly, who states that all human rights are basic rights that are necessary for a life worthy of a human being, ignores the fact that all such rights are established on the foundation of peace. Donnelly, like other writers, assumes rather than makes explicit that peace is the precondition on which human rights are established.

This right to peace is, however, a contested topic. Stephen Marks argues that the right to peace is not difficult to deduce from the U. N. Charter and many other basic documents. It is the right of every individual to contribute to efforts for peace including refusal to participate in military effort, and the collective right of every state to benefit from the full respect by other states of the principle of non-use of force, of non aggression, of peaceful settlement of disputes as laid down in the Geneva Conventions and Additional Protocols as well as from the implementation of policies aimed at general and complete disarmament under effective international control. Marks asserts, while no authorised formulation exists, this right to peace will be increasingly refined in the coming years. Ian Brownlie is, by contrast, sceptical of this type of a new generation of human rights. Brownlie states that they would be only acceptable as standards of morality rather than `rights', and one could sit round a table with non-lawyers and agree on practical programmes for attaining these good ends. Brownlie continues that what concerns him as a lawyer, however, is that the attempt to give the new rights an actual legal standing is completely outside the main stream of diplomacy and international law.[17] The question is, is it completely outside the main stream of diplomacy and international law as Brownlie claims?

One way of answering this question is to consider the analysis put forward by John Humphrey. He examines the relationship between respect for human rights and peace. He does not suggest that all social unrest is caused by violations of human rights or that such violations are the cause of all wars, but says, `the relationship does exist and it is a very close one'.[18] For example, the United Nations Covenant on Civil and Political Rights

recognises in its Article 4 that ratifying states may, in time of emergency that threatens the life of the state, derogate from some of the obligations under the instrument as do the European and Inter-American regional conventions on human rights.[19] Humphrey states that it is a proof that there is a relationship between peace -in this case domestic peace - and human rights. The state of emergency could of course be war when the most basic rights may disappear even in democratic countries as a war usually becomes the occasion of the denial of human rights in both camps.

In the words of Lord Wright, the Chairman of the United Nations War Crimes Commission, in 1948 `war is in itself a wicked and vicious thing; it necessarily involves a systematic infringement of the ordinary human rights of individual men and women over the whole vast theatre in which it operates'.[20] This is suffering brought about not only by acts of war by the enemies of the state of which an individual is a citizen, but also, as the reference above to emergency shows, by the states of which individuals are citizens.

Humphrey also points out that President Franklin D. Roosevelt and Winston Churchill understood that there was a close relationship between the peace they wanted to secure and the promotion of respect for human rights. That is why Roosevelt had said in his Four Freedoms Address, before the United States entered the war, that human rights are the `necessary conditions of peace and no distant millennium'.[21] And Churchill described the war as a struggle `to establish on impregnable rocks the rights of the individual'.[22] Furthermore, the preamble of the UN Charter (as do the preambles to the Universal Declaration and the two UN Covenants on Human Rights) stresses the relationship between respect for human rights and peace. It reads, `We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights'.[23] Moreover, two of the purposes of the United Nations stated in Article 1 of the UN Charter read, `respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion', and `to maintain international peace and security'.[24] The instrument puts exactly the same level of importance on the both purposes.

Humphrey does not identify explicitly the link between peace and respect for human rights. But he states that the fast-developing world of human rights is helping to change the very character and structure of a traditional international legal order that is becoming obsolete in a world threatened by nuclear destruction. Humphrey continues that world law is now no longer simply an international order as the fast developing world law of human rights recognises the legal personality of individual men and women. And there is a close relationship between human rights and a world legal order, one of the purposes of which is to preserve peace at all levels, national and international. This statement parallels with Lauterpacht's statement considered below in Chapter 7 that the direct subjection of the individual to international law was essential in order to strengthen the ethical basis of international law and of its effectiveness at the time when the power of the machinery of the state threatened the very existence of mankind.[25] Humphrey ends by saying, `Could it be that this radical change in the very nature and structure of international law will be the elan vital that will help bring peace to a troubled planet?' [26] In short, Humphrey presents his view that a world legal order reaching individuals and extending beyond the states framework may help establish respect for human rights and peace, particularly in the age of nuclear weapons. But what is the clear link between human rights and peace as he claims exists?

It can be inferred from his statements above that the link may be `the right to life'. But this right to life that Humphrey might imply, I think, is not the same one to which Vincent, Shue, Ramsbotham, Woodhouse and Article 3 of the Universal Declaration and Donnelly refer. It is the right to life in a more fundamental sense.

On 8 September 1957, a Japanese Buddhist philosopher, Josei Toda made his landmark declaration denouncing nuclear weapons in Yokohama, Japan. In his declaration, Toda pronounced nuclear weapons as an absolute evil and a crime against humanity. He states, `we, the citizens of the world, have an inviolable right to life'. The declaration is imbued with his ardent wish to establish the right to live in peace as a fundamental right for every human being. The right to life which Toda declared and Humphrey might imply

significantly differ from the right to life stated by other writers in that the former overcomes the barriers of state sovereignty. It is the right to life that all members of the human family possess. It is, therefore, the right to live in peace, free from fear of nuclear destruction and wars.[27] What Toda tried to achieve, by going beyond the states' framework, was to place `the right to life' and `the right to live in peace' above the interests of states which justify violence, wars and the possession, development and use of nuclear weapons.

To recognise the right to life of all members of the human family is, in essence, linked to the right to peace. The right to peace is indivisible from the right to life. I believe that the right to peace is the most fundamental and basic human right. As Galtung states, peace is a primary requirement for the human condition itself.[28] It is so because, without the right to peace, not only do all human rights lose the foundation on which they are grounded, but also people cannot be fully human as the tragic situation in Rwanda will demonstrate in Chapter 8.

CONCLUSION

This chapter began by looking at the categorisation of human rights. This enabled us to have a clearer view of their interrelationships that would help us understand further the relation between human rights and state sovereignty. It revealed that there are different ways to categorise human rights. The issue of basic rights was also examined in order to extract a short core of `basic rights' from the long list of human rights. There were different accounts of `basic rights'. Some even pose a question of if there are any basic rights. All human rights are, however, grounded on the foundation of peace. I argue that the right to life must be seen not within the framework of states but beyond the barriers of states is the most basic human rights in the age of nuclear weapons.

ENDNOTES

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CHAPTER 6

THE LEGAL SOVEREIGNTY OF STATES

Words always involve illusion. Realities fixed in verbal terms contain no certainties. Daisaku Ikeda [1]

INTRODUCTION

As was set out at the conclusion of Chapter 4, the three subsequent chapters deal with human rights, legal sovereignty of states, and the development of human rights within the state sovereignty context. This sequence of analysis is necessary to support the central theme of the thesis that the understanding of the complex problems of refugees and internally displaced persons in the contemporary international arena rests essentially on exploring the tension between human rights norms and the claims of state sovereignty. It is with the claims of state sovereignty that this chapter is concerned.

The previous chapter has examined the characteristics and nature of human rights. This thesis argues that the essential linkage between refugees and internally displaced persons is grounded in human rights. Human rights, for their part, are claims against states, arguably, against international society as a whole. As the previous chapter has made it clear, however, international efforts to protect human rights are often countered by the claim of states to sovereignty. This can have adverse effects on rights-claimants, especially for internally displaced persons as they remain within the borders of their own countries. In order to understand more fully the context within which the issue of human rights and state sovereignty is being analysed, it is necessary to look at the concept of sovereignty. The chapter includes the definition of sovereignty in national and international law, individual versus states, primacy of national law, primacy of international law, and negative and relative legal sovereignty. One of important findings

is that, as sovereignty is a human construction, it has a variety of interpretations depending on ethical or political preferences. In the context of this thesis' concern with displaced persons and human rights, the chapter finds the arguments of Kelsen more persuasive. His claims are that the expression of `a state is sovereign' is irrelevant. It must be replaced by the term `the primacy of national law'. This position allows a degree of interaction between the state-centred and international law perspectives. This in turn allows the problems of how displaced persons and their rights may be protected to be considered without being blocked completely by the claim of states for absolute autonomy on the grounds of state sovereignty. Moreover, `state sovereignty' assumes an existence of central authority in a state. But what should be the ground rules to deal with a situation where the state apparatus has broken down in the case of parts in Africa? In this case, it can be argued that primacy of international law prevails.

The concept of sovereignty is complex and has given rise to widespread debate. The standard works on sovereignty include F. H. Hinsley, Ernest Gellner, Hedley Bull, Robert Cox, David Held, A.D. Smith, Adda B. Bozeman and others. In considering refugees and internally displaced persons, we are particularly concerned with a part of the debate that relates to international law and international relations. For this purpose, this chapter concentrates on Hans Kelsen, K. W. B. Middleton, and George Schwarzenberger because they highlight the complexity of sovereignty in national and international law which in turn affects how countries deal with their refugees and internally displaced persons.

It needs to be emphasised that I do not wish to display state sovereignty in a wholly negative light. It is, of course, more complex. Human rights and humanitarian action can be a cover for imperialism and the imposition of the will of the powerful on the weak, just as much as sovereignty. The reason for the examination of sovereignty does not stem from the question of whether it should or has been constrained in favour of human rights, but rather from the very question of what sovereignty is or means. The chapter will end by arguing that, although defining sovereignty is a difficult and complex task, the key point is to understand that `state sovereignty' cannot be used to prevent

international concern and intervention in refugee and internally displaced persons situations.

THE DEFINITION OF SOVEREIGNTY IN NATIONAL AND INTERNATIONAL LAW

Thomas G. Weiss and Jarta Chopra state that like private ownership, sovereignty implies absolute rights to territory and the exclusion of trespass by others. The enclosure of territory by sovereign boundaries separates internal from external space. Internal space, in this case, means that within a territory there is the unity of control or some final point of authority whose influence extends from the centre to the border. [2] Sovereignty and the framework of ideas which surround it are long standing and dominant features of political analysis and policy. We describe and think about the world in which states are the principal actors, the principal centres of power, and the principal objects of interest. In spite of developments in international analysis, sovereign states are not being superseded as the principal actors in world politics. This is so even though we recognise that the times are global. The world is undergoing a process of economic, technological, political, ecological, cultural, and educational integration. The number and power of new international organisations are on the rise. Communication systems bring virtually every point of the earth's surface into close, almost instant, contact. But what is remarkable is that while all these factors are widely acknowledged, the global system which underlies much of the political commentary and analysis remains a world of sovereign states.[3] The proposition that sovereignty is an absolute concept without external restraints does not hold true, but it is true that the concept of sovereignty is an absolutely necessary characteristic of the states which constitute the international system and the international legal order.[4]

The birth of sovereignty in states dates from the end of the Thirty Years War in 1648. Following three decades of war between Catholics and Protestants, the Peace of Westphalia separated the powers of church and state. By doing so, states gradually gained the special god-like features of church authority. States have inherited the

pedigree of sovereignty, the central element of international relations.[5] F. H. Hinsley states that sovereignty is not a fact, but is a concept. The concept is closely linked with the emergence of states which command or rule the community. A state is the instrument of political power, with sovereignty a quality of this instrument.[6]

W. J. Stankiewicz states that the modern concept of sovereignty has emerged as many 'types' of sovereignty: political, legal, internal, external, popular, coercive, influential, positive, negative, absolute, and relative. Such complexity is understandable. Any concept that is assumed to make a fundamental statement about the nature of society will be adapted by different interest groups to serve their purposes.[7] Thus, the term 'sovereignty', one of the most important concepts of the theory of national and international law, has a variety of meanings, a fact that Hans Kelsen believes, causes theoretical confusions.[8] Before we move on to Kelsen, it is useful to look at some examples in relation to state sovereignty.

IS THE CONCEPT OF SOVEREIGNTY CHANGING?

On 5 April 1991, the UN Security Council created a precedent by adopting resolution 688, linking human rights violations to threats to international peace and security. This resolution was followed by the intervention of the coalition forces to create a safety zone in northern Iraq. The Security Council's action could be seen in two ways. First, it was to advocate humanitarian intervention. Second, it was to show governments the rising international interest in, and collective responsibility for human rights and humanitarian assistance. Either approach raises the question of the limits of sovereignty of states.

Sadako Ogata, the UN High Commissioner for Refugees, takes the latter approach and states that the international community has been ambiguous on this point. The UN Charter upholds sovereignty by forbidding intervention in matters 'essentially within the domestic jurisdiction' of states. The Gulf War was fought to preserve state sovereignty and territorial integrity of Kuwait. Yet it was the same Allied forces who then breached the principle by forcibly creating a 'security zone' in northern Iraq.[9] Ogata states that the

current position of the international community is embodied in the UN General Assembly resolution (A/Res/46-182) of 17 December 1991 which tries to find a balance between sovereign rights and individual rights. According to this resolution, 'humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country'. It allows humanitarian assistance to be provided with the consent of the affected country rather than its request which was previously required in providing assistance. These developments indicate an evolution in the concept of sovereignty of states,[10] that is not so much to advocate humanitarian intervention as to alert governments to increasing international interests and collective responsibility on human rights issues.[11]

As to the evolution in the concept of sovereignty of states, Zolberg states that industrial democracies, the ex-Communist countries, and the developing world are alike in a sense that the monopolistic claims of the sovereign states over their subjects/citizens are increasingly questioned. One example is the direct challenges from the Catalans in Spain, the Flemish in Belgium or the Ukrainians in the former Soviet Union. All these groups claim an alternative national identity.[12]

This upsurgence of nationality is reflected in the fact that more new states have been admitted to the UN General Assembly between 1991 and 1996 than at any time since the great wave of African decolonization in the early 1960s. But, by contrast, globalizing forces are, it is argued, are becoming more important. As Zolberg states, liberal norms and humanitarian views are becoming increasingly globalized: the state as a form of national organisation will become increasingly relative. It will share normative and institutional space with other groupings. This is a contested position, given the continued place of states in theories of the international system. In addition, it must be recognised that the traditional state system leaves us with a legacy of entities that are sovereign states in name, but which lack the capacity to provide their citizens with protection - the basic legitimisation of what it means to be sovereign.[13] If the concept of sovereignty is changing, as Ogata and Zolberg state, then we must first understand what

sovereignty itself means. This will then enable an analysis of the changes in 'sovereignty' in the context of human rights to be made in the next chapter.

INDIVIDUALS VERSUS STATES

According to the international lawyer Paul Sieghart, the traditional position, largely unchallenged, was that the doctrine of sovereignty prevented international law from recognising any rights vested in any individual against his/her own sovereign state. As Sieghart stresses, one of the fundamental principles of international law since its inception has been that of state sovereignty. This doctrine reserves to each state the exclusive right to take any action it thinks fit, as long as the action does not interfere with the rights of other states, and is not prohibited by international law on that or any other ground. In addition this principle gives a state complete freedom of action, in international law, to deal with its own nationals ('personal sovereignty') and with its own territory ('territorial sovereignty'). It follows from this principle that 'what a government did to its own citizens was its own affair and beyond the reach of international law or legal intervention by other states'.[14]

But the case of aliens was different. As a part of state sovereignty, a state was able to demand respect for its own nationals abroad, against any treatment that would violate the 'personal sovereignty' of the state to which they belonged. This led to the development of an international minimum standard for the safety of aliens which required the protection of their lives, liberty and property in the domestic law of all states. International law continues to impose an obligation on states to make their territories safe for the nationals of other states, even though there is no such obligation in return for their own nationals.[15] It should be noted that Sieghart makes an important comment here that 'even that demand for the aliens flowed only from the doctrine of state sovereignty itself'. This means that if a state failed to protect another state's nationals, for example by taking away their property, compensation was due to the other state whose 'personal sovereignty' had been violated, not to the individual whose property had been seized. Whether the state chooses to pass the compensation on to the

injured individuals was, in international law, entirely its own affair.[16] This is the traditional practice of international law in relation to the concept of state sovereignty and individuals.

Philip Allott argues that although people now believe that such a traditional practice of state control over its nationals, is natural and inevitable, this has not always been the case. In the sixteenth century, theologians and philosophers explored whether there could be a universal legal system that could govern the whole of humanity regardless of state boundaries. Francisco de Vitoria (1492-1546) took the view that the basis of a universal law for all human beings is found in natural reason, the rational character of human nature. The rules of the law of nations, that is, 'international law' ought to be derived from natural law and from a consensus of the whole world on behalf of the common good of all.[17] Similarly, another Spanish theologian and philosopher, Francisco Suarez (1548-1617) argued that the rational basis of the law of nations is a moral and political unity through mutual love and mercy for all, even to strangers of every nation. It is the case, therefore, that although a sovereign nation, state or kingdom may constitute a perfect community in itself, each one of them is also viewed in relation to the human race, a member of universal society. [18] Vitoria and Suarez, that is, took a view that they lived in the society of the human race rather than that of nations.

In the seventeenth century, a Dutch law scholar, Hugo Grotius (1583-1645) distinguished between the law of nations and the law of nature for the purpose of making clear to the new sovereigns that their will is not the only test of what is right. Grotius explained that nations are sovereign and independent of each other, but they are all equally governed by the law of nations acting for the common interest of all. They are also governed by natural law, which is the product of human nature and thus indirectly is the work of God who made human nature as it is - the human nature of sociability and rationality. Furthermore, nations are governed by a moral order which comes directly from God.[19] Although Grotius made a clear distinction between the law of nations and the law of nature, his view was compatible to that of Vitoria and Suarez. Grotius's intention was to claim the universal common interest of all people.

Similarly, in the eighteenth century, the German philosopher Christian von Wolff (1679-1754) championed universality. For Wolff, the society of the whole human race continues to exist even after the creation of states. Individual men do not cease to be members of this universal society just because several have formed together a certain particular society. Wolff wrote his book **The Law of Nations treated according to a Scientific Method** (1749)[20] in Latin. Therefore, only the learned were able to read it, among whom was Emmerich de Vattel (1714-67). It was Vattel's version which became widely influential. Vattel's book, **The Law of Nations or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and Sovereigns** (1758), was based on Wolff's ideas. But, according to Allott, it differed from Wolff on the essential theoretical point. While Vattel agreed that there is a universal human society governed by the law of nature, he emphasised that the formation of states makes a significant difference to this universal society.

Vattel's argument is as follows. The society established among men is that they should assist one another to advance their own perfection. And states are also bound mutually to advance this human society since they (the states) may be regarded as many persons living together. The aim of this greater society of states is likewise that of mutual assistance in order to perfect themselves. That is, the society of states should contribute as far as it can to the happiness and advancement of other states. But this co-exists with a state's duty to itself. Vattel argues that the state's duties toward itself prevail over its duties toward others. This is the key point and marks the difference between Wolff's original work and Vattel's interpretation. For Vattel, a state owes to itself to consider what it can do for its own happiness and advancement. Since states are free and independent of one another, as men are, then each state should be left to decide what its conscience demands of it, what it can or cannot do. It is, therefore, for each state to determine what duties it can fulfil towards others without failing in its duty towards itself. From this perspective, Vattel argued that it is essential to every civil society that each member should yield certain of his/her rights to the national body and that there should be some authority capable of giving commands prescribing laws and compelling

those who refuse to obey.[21] Allott argues that Vattel's book was the work which formed the minds of those who shaped the emerging international arena. In the following nineteenth century when the law of nations came to be known as international law, natural law ceased to be a major influence on most philosophers, let alone diplomats and politicians. Allott states that if Christian von Wolff had written his book in simple lucid French like Vattel, the history of the world might have been different, and a more universalistic view of individual rights might have prevailed.

Allott emphasises that those developments in international law are not simply a story of historical events, but rather reveal how the present world structure came to seem to be natural and inevitable. It is questionable that the world we live in today might have been different if Wolff's book had been read more widely and Vattel's less. The result of the debate from Vattel onwards, however, is that we have a world in which there is one set of moral judgements, social aspirations and legal expectations, within our own state and another set of moral judgements, social aspirations and legal expectations for everything that happens beyond the frontiers of our national society.[22] In other words, the contemporary world society is that of a collection of states rather than the universalism of the whole human race. The next section will discuss this present world structure of national and international law which has come to seem so natural and inevitable.

LEGAL SOVEREIGNTY

Today's world appears firmly based on a concept of state sovereignty. For Kelsen, sovereignty is a special quality of states. It is the quality of being a supreme power or supreme order of human behaviour. However, in spite of the assertion that sovereignty is an essential quality of states, even the `sovereign' states, it is argued, are bound by a wider normative order derived largely from the Western, Judaeo-Christian tradition. In order to maintain the idea of the state as a supreme authority in strictly legal terms, however, sovereignty ought to mean that the state is seen as the supreme legal authority, and `sovereignty' means only that the state is not subject to a legal order superior to its.[23]

It is argued, however, that this concept of the state as a supreme legal authority is incompatible with international law. Sovereignty implies that the state is a self-sufficient legal order and this must mean that a judge operating that order needs to look no further than to its own supreme norm for guidance. The traditional problem that then arises is put by Kelsen in the following terms:[24]

> the state is sovereign means that the national legal order is an order above which there is no higher order. The only order that could be assumed to be superior to that of the national legal order is the international legal order. The question whether the state is sovereign or not thus coincides with the question whether or not international law is an order superior to national law.[25]

The problem of state sovereignty is a problem of the supremacy of the national legal order in its relation to the international order. In this relationship two theories exist, one dualistic and the other monistic. Dualistic theory holds that international law and national law are different systems of norms independent of each other. This dualistic position, Kelsen argues, is inadmissible. It is not possible to assume the simultaneous validity of two systems of norms regulating human behaviour, if these systems conflict with each other, in situations where, for example, one side says that a certain action ought to be performed and the other proscribes it. Two norms, one of which prescribes that A ought to be, and the other that A ought not to be, cannot be assumed as simultaneously valid, just as two judgements, the one of which asserts that A is, whereas the other declares that A is not, cannot be true together.[26]

Kelsen rejects the dualistic position in favour of a monistic approach. He argues that the problem of sovereignty can only be solved on the basis of the monistic construction of the relations between international law and national law. Monistic theory holds that international law and national law in fact form a unity. This unity is achieved in two ways either by the primacy of international law or by the primacy of national law. From a strictly legal viewpoint, Kelsen believes that both constructions are equally possible. And their difference is the difference between two systems of reference.[27]

Before we analyse monistic theory further, it should be noted that other writers do not share Kelsen's view that the dualistic construction is inadmissible. In their opinion, international law and national law are two separate, mutually independent legal orders that regulate different matters and have different sources. For instance, Stanley I. Benn states, `Kelsen's argument that two norms contradict and logically exclude one another, cannot be simultaneously valid, misses the point'. He argues that many such systems can logically exist, side by side, and none can claim greater legal validity than another.[28]

The dualistic position is supported by the argument that the two legal systems address different subject matters. National law regulates the behaviour of individuals while international law the behaviour of states. Similarly, while national law is concerned with the domestic affairs of the state, international law is concerned with foreign affairs. Kelsen, however, argues that it is impossible to distinguish so-called `domestic affairs' from `foreign affairs' as two different subject matters of legal regulation. His logic is that so-called domestic affairs can be made the subject matter of an international agreement and so be transformed into foreign affairs. He uses as an example of the relation between employers and employees. This is clearly an internal relationship within the state, and its legal regulation a typical `domestic affair'. But, as Kelsen observes, as soon as a state concludes a treaty with other states concerning the regulation of this relationship, it becomes a foreign affairs matter. The result is that `Every matter that is or can be, regulated by national law is open to regulation by international law as well. It is therefore impossible to substantiate the pluralistic view by a difference in subject matter between international and national law'.[29]

THE PRIMACY OF NATIONAL LAW

Kelsen goes on to argue, however, that the primacy of national law is established when international law becomes part of the national legal order. This is possible where a state recognises international law as valid, and incorporates international conventions into domestic law. That is to say that international law is regarded as valid for the state only if the state recognises it as such.[30]

If the recognising state makes international law a part of its own law and thus restricts its own sovereignty, then the sovereignty of that state is not in conflict with international law. That is to say if it restricts its own freedom of action or competence by accepting the obligations established by general international law, the state is still regarded as a supreme legal authority.[31]

Even where international law is conceived of as part of domestic law, however, Kelsen states that it is still necessary to distinguish between national law in its narrower and wider senses. National law in the narrower sense is that internal legal order comprised of constitutional norms and those norms created by custom, and legislative, judicial and administrative acts. National law in the wider sense is, by contrast, the national legal order made up of these norms plus those incorporated from international law. From Kelsen's perspective, national law in the narrower sense cannot be seen as truly sovereign, because it is subordinated to that wider definition of national law which recognises it as national law.[32]

It follows that only the national legal order in the wider sense, comprising international law as a part of it, can be presupposed as sovereign in the proper sense of this term. For this reason, Kelsen recommends that we should speak of the `primacy of national law' instead of `state sovereignty' when this construction of the relationship between national and international law is chosen.[33]

THE PRIMACY OF INTERNATIONAL LAW

Kelsen goes on to observe that if an international legal norm authorises a state or a group of states to apply a coercive order, and it legitimates this coercive order as legally valid within the international community, then international law must be regarded as a universal legal order, superior to that of the state. This international law, then, can be seen as a universal legal order superior to national law. This is the meaning of the primacy of international law.[34]

If this construction of the relation between international and national law is accepted, Kelsen states that one cannot speak of the sovereignty of the state in the original sense. The term `sovereign state' means, rather, that the state is legally independent of other states or that the national legal order is subject only to the international and to no other national legal order. As a result, the original meaning of sovereignty that the state is not subject to a legal order superior to its own, is lost. Kelsen recommends, therefore, that the misleading term `sovereignty' should not be used when one assumes the primacy of international law. He also states, `in this case it is not permissible to speak of a "relative" sovereignty of the states as some writers do, because this formula implies a contradiction in the original meaning of the term "sovereignty of the state"'.[35]

As stated above, the term `sovereignty of the state' in the original sense of the term is properly used only if the primacy of national law is assumed. Yet Kelsen states that it is questionable whether the writers who prefer the primacy of national law would be willing to accept its consequences.[36] States, in fact, presuppose the principle of sovereign equality of all members of the international community, a position which Kelsen rejects.[37]

What is derived from Kelsen's overall argument is that the term `sovereignty' means only that the state is a supreme legal authority, not subject to a legal order superior to its own. If we argue for the primacy of national law, the state becomes sovereign because the validity of international law is placed within this national legal order. But, there is a contradiction in this approach. This sovereign state excludes the sovereignty of any other state because other states must be regarded as subordinated to this national legal order of the initial state. Thus, the expression that `the state is sovereign' is inappropriate. Kelsen recommends that we should speak of `the primacy of national law' instead of `sovereignty of the state' in the case where national law is paramount.[38]
If we argue for the primacy of international law, individual state sovereignty cannot exist since international law can be regarded as a universal legal order superior to all others.

Therefore, he again recommends the misleading term `sovereignty of the state' should not be used when the primacy of international law is assumed.

Kelsen's work has been controversial, appearing as it does to challenge the international state-centred system as we know it. A compromise position is put forward by K. W. E. Middleton. Unlike Kelsen, Middleton tries to reconcile the sovereignty of states with international law through the concept of relative sovereignty as opposed to absolute sovereignty. He says that if national sovereignty means that states are invested with an absolute and unlimited authority, then there is no possibility of reconciling the sovereignty of states with international law. However, international law cannot ignore the concept of sovereignty while the states remain in practice and in law independent of one another. If sovereignty means absolute authority, that a state which enters into a treaty with another state could never claim that the terms of the treaty are binding on the other state without denying the sovereignty of the latter, which is clearly contrary to the practice of states in the world. [39]

In fact, the very existence of international law presupposes the concept of sovereignty of states. The Charter of the UN is explicitly based on the principle of the sovereignty of the member states. Article 2 (1) reads that `The Organisation is based on the principle of the sovereign equality of all its Members'. Middleton adds that since the UN Charter contains an important exception to the general rule in the power given to the Security Council in order to make decisions binding on all members for the limited purpose of maintaining or restoring peace (Article 25 and 39), the five permanent members of the Security Council are alone, by reason of their veto, sovereign in the fullest sense.[40]

The right of entering into international agreements is an attribute of state sovereignty. Thus, if a state undertakes to refrain from performing a particular act or from placing a restriction upon the exercise of the sovereign rights of the state by entering into international engagements, then that in itself is an attribute of state sovereignty.[41] This statement sounds similar to Kelsen's primacy of national law in that the will of the state to enter into international treaties and to limit the exercise of sovereignty is recognised

as the primacy of national law over international law. The state, therefore, is not subordinated to international law.

Middleton's interpretation is, however, different from that of Kelsen. Middleton sees the will of the state to limit the exercise of its own sovereignty in international law as validating international law found in the notion of `international law'. In other words, to limit its own sovereignty in international law shows the independent will of the state within international law. This will of liberty and independence means that a state is sovereign in the sense it is subordinated `only' to international law. [42] According to Middleton, however, there is a fundamental distinction between a limitation on the exercise of sovereignty and a surrender of sovereignty. This fundamental distinction centres on `control'. When a state is subject to another state we mean that the latter is entitled to control the actions of the former. When a state is subject to a general rule of law or a particular treaty obligation, we mean only that it is bound to conduct itself in accordance with that law or obligation. Thus, no question of control by any external authority is involved.[43]

The willingness of a state to limit the exercise of its own sovereignty is a voluntary act, while the surrender of its sovereignty is a forced one. In limiting the exercise of sovereignty in entering international treaties, no external control exists. On the other hand, in surrendering sovereignty against its will, an eternal control exists. Thus, if a state is subject to international law due to its own will and the state is independent in law, it is regarded as fully sovereign. If a state is partly controlled externally against its will and the state is partly deprived of its legal independence, then it is regarded as partly sovereign. If a state is wholly deprived of its legal dependence, the state suffers from a total loss of sovereignty.[44]

What Middleton is seeking to establish here is that if sovereignty means an absolute authority above all rules of law - that is Kelsen's position - there is no possibility of reconciling the sovereignty of states with the obligatory nature of international law - then an approach of relative sovereignty is applied depending on the degrees of the

external control which are in operation. However, the degree of this external control differs according to the treaties entered into by the state concerned. The question then arises of how far such external power may go without reducing the quality of the sovereign state. Middleton states that `as long as the state possesses some degree of independence in law and paramount authority somewhere, the state must have a share of sovereignty', and `if another state acquires a right to veto any measure passed by its legislature, then the state suffers from a loss of a total sovereignty'. He does not give particular examples of either hypotheses. It seems that expressions such as `some degree of independence', `paramount authority somewhere', `a share of sovereignty' are too ambiguous as criteria with which to make judgements.[45]`

For his part, Kelsen sees the operation of treaties rather differently. He states that the only reliable criterion is that the state is not subjected to the national law of another state. If a state by a treaty entered into with another state submits in any respect to the national law of the other state, it ceases to be a sovereign state. The typical case which he describes is that several states establish a federal state of which they become so-called component states. Since the treaty contains the federal constitution that the contracting states submit to, they lose their quality as sovereign states. [46]

Middleton rejects this, arguing that in a federal union, which consists of a large political community embracing a number of smaller communities, both the larger unit and the smaller units possess sovereign rights and the individual citizens of the union owe obedience simultaneously to the federal and to the regional governments. Thus, Kelsen differs from Middleton both over the issue of the position of treaties, and over the distribution of sovereignty in a federal system. Kelsen argues that in this case it is not sovereignty which is divided since it is a quality that is not divisible. It is the state power or the competence of the state in the federal state that is divided between a central organ and several local organs. But it must be noted here that Middleton clearly states that sovereignty is a matter of political authority and not of political power.

These differing views between Middleton and Kelsen are based on the different approaches of relative and absolute sovereignty. In order to examine the complexities of this debate in the context of the present thesis, it is necessary to take the analysis further. The next section will examine the analysis of relative sovereignty by Schwarzenberger which was applied, though not fully explained, by Middleton.[47]

NEGATIVE AND RELATIVE LEGAL SOVEREIGNTY

Schwarzenberger states that the term sovereignty signifies one of two things. Supremacy over others (omnipotence) or freedom from control by others (independence). Schwarzenberger sets out six forms of sovereignty, grouped in three pairs: positive and negative sovereignty; political and legal sovereignty; absolute and relative sovereignty.[48]

These six forms of sovereignty are set in a table as follows.

Criteria	Forms of sovereignty	
Contents of Sovereignty:	Positive	Negative
Field of Manifestation of Sovereignty:	Political	Legal
Scope for Manifestation of Sovereignty:	Absolute	Relative

This analysis enables us to look at legal sovereignty. Schwarzenberger, arguing from the theological tradition of sovereignty as omnipotence, emphasises the `positive' aspect of the phenomenon, that is to say, the complete subjection of humankind to God. Simultaneously, the `negative' aspect is implied in this formulation, if God is supreme, He Himself cannot be subject to any other being, that is to say He is free of control by others(independence).[49]

This theological concept of sovereignty has been secularised to describe the position of princes who, in relation to their own subjects, are supreme. In this way, the bearers of

positive sovereignty have changed from God to princes.[50] Schwarzenberger moves on from the theological premise to explain absolute and relative sovereignty applied to our present situations.

If sovereignty is to be absolute, this rules out the co-existence of entities which do not accept any one as superior. Then, either one of these entities must succeed in attaining supremacy over the rest or must agree to pool their sovereign rights and create a new bearer of positive sovereignty. The other alternative is for the entities to resign themselves to the necessity of co-existence. In the latter case, the content of sovereignty is transformed from positive sovereignty (omnipotence) into negative sovereignty (independence) while the scope of sovereignty shifts from absolute into relative sovereignty.[51]

In relations among states, positive sovereignty is regarded as absolute dominance while negative sovereignty is regarded as non-recognition of any superior authority. On the level of legal relations, Schwarzenberger states that negative sovereignty may be expressed in terms of a right or freedom not to have to recognise any superior. In the case of the co-existence of sovereign states in international law, they recognise one another as bearers of negative and relative sovereignty. Therefore, positive and absolute sovereignty must be carved out from international law. On this point, Schwarzenberger and Middleton differ from Kelsen as they both use an approach of negative and relative sovereignty while Kelsen uses that of positive and absolute sovereignty.[52]

As a result, Schwarzenberger and Middleton find a way to reconcile sovereignty with international law while Kelsen does not. Schwarzenberger states that negative and relative sovereignty make it possible to find a place for interdependence that is mutual and a reciprocity of dependence between states.[53] By contrast, Kelsen holds that the term 'state' means a social order, especially a national legal order. This national legal order is the supreme legal authority and may be expressed in the statement 'the state is sovereign'. This is the usual way to speak of sovereignty. But if the state is a subject of national or international obligations, responsibilities and rights, then the state cannot be

considered as sovereign in the sense of supreme authority. The usual argument that the state can always change its own law and hence it stands above its law is, according to Kelsen, utterly wrong.[54] This is the subject of intensive disputes in international law.

Kelsen argues that the statement that the state can change its law means only that certain individuals, as determined by the law, can make such changes in a procedure likewise determined by the law. These individuals in changing the law are completely subjected to the law and stand in no way above it. As the subject of the law, the state cannot be a supreme authority because it is subordinated to the law.[55] Therefore, according to his logic, the expression of `a state is sovereign' is irrelevant. It must be replaced, as was noted above, by the term `the primacy of national law'.

I find the arguments of Kelsen more persuasive in the context of this thesis' concern with displaced persons and human rights. This definition of sovereignty allows a degree of interaction between the state-centred and international law perspectives. This in turn allows the problems of how displaced persons and their rights may be protected to be considered without being blocked completely by the claim of states for absolute autonomy on the grounds of state sovereignty. It must be noted, however, that sovereignty assumes the existence of central authority within a state. What should be the ground rules for international action when the state apparatus has disintegrated? In this situation, it can be argued that the primacy of international law prevails.

CONCLUSION

The concern of this chapter has been to examine the concept of sovereignty in order to set the framework within which the relations of individuals and groups to their states can be analysed. As stated in the beginning of this chapter, the issue of refugees and internally displaced persons hinges on how their human rights may be violated in the state and inter-state context. The international protection of human rights, especially those of internally displaced persons, poses the crucial question of how such an international protective regime can be compatible with the traditional doctrine of state

sovereignty. The problem is that internally displaced persons, by definition, remain within the borders of their own countries. Therefore, the states in which displaced persons remain have often claimed their `sovereignty' over them and have blocked international protection for them. This is due to the proposition that remained for many centuries without challenge: state sovereignty prevented international law from recognising any rights vested in any individual against any sovereign state of his/her own. This chapter has shown that it is essential to re-examine the present interpretation of the relation between national and intentional law. It has become clearer in the process of examination that the question of whether a state is sovereign or not is the question as to whether or not international law is supposed to be an order superior to national law. As the examination has shown, different answers or interpretations exist.

As Kelsen points out, a person whose political attitude is that of nationalism and imperialism may be inclined to accept as a hypothesis the basic norm of his own national legal order. A person whose sympathy is for internationalism and pacifism may be inclined to accept as a hypothesis the basic norm of international law.[56] Middleton and Schwarzenberger lean towards internationalism, and the approach of negative and relative sovereignty is applied to explain the interdependence of `sovereign states'. On the other hand, Kelsen does not lean towards either side but refutes the concept of state sovereignty in both nationalism and internationalism by saying that the term `sovereignty' should not be used at all in relation to the state because the term is too ambiguous.[57]

Some may argue that the question is not what pure legal sovereignty means, but rather that the question should be to what extent state sovereignty is in fact limited, what are the reasons, what are the trends, and what is desirable against the background of human rights. The answer for the above question is as follows. The perspective taken in this chapter is to start from the relation of the state to its individual citizens. Following Johan Galtung, the point is: `Those who engage in major collective state violence, or the minor violence of terrorism on behalf of the state or the nation, are playing by social rules and get away with impunity, but those who engage in individual violence, or collective

violence on behalf of other groups than the state and nation - gender, generation, race, class - cannot hide behind such rules'. [58] If so, the meaning of the legal sovereignty of states must be clarified not to point out injustice but to sincerely question what state sovereignty means.

The position held in this thesis is that state sovereignty means the primacy of national law in the case where national law is paramount. This enables us to look at the changing pattern of human rights in the `state sovereignty' framework. As stated at the beginning of this chapter, UN now provides humanitarian assistance with the consent of the affected country rather than its request which was previously required. This development indicates that the claim of states to sovereignty cannot be used to prevent international concern and intervention in refugee and internally displaced persons situations.

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CHAPTER 7

THE EVOLUTION OF HUMAN RIGHTS IN THE CONTEXT OF STATE SOVEREIGNTY

'Like many other things devised by man, laws are subject to a process of development - continuous and evolutionary....' Paul Sieghart[1]

INTRODUCTION

The purpose of this thesis is to examine the situation of refugees and internally displaced persons in the context of international human right. As the previous two chapters have shown, to do this requires both a definition of basic human rights and a realisation that the concept of state sovereignty can place limits on the ability of international regime to tackle these issues. But the concepts themselves are not unchanging. In particular, attempts to define universal human rights have been evolving since the early years of the twentieth century. It is this evolution with which the present chapter is concerned.

The thesis has shown that the essential problem to be addressed in the situations of refugees and internally displaced persons is human rights, both its definition and its application. The present chapter examines how the nature of human rights has been developed and changed in relation to state sovereignty. That is to say, to what extent the demand for, and exercise of, human rights in fact limits sovereignty.

The present chapter explores the developments of human rights in the twentieth century: before 1920; in the aftermath of World War I and after 1945; the Universal Declaration of Human Rights in 1948; the rise of NGOs and the civil society in the 1990s; human rights and state sovereignty in the 1990s; tribunals and the establishment of the international criminal court of justice in 1998; good governance with regards to

international efforts for creating the society founded on human rights within a state. One of major findings is that due to the `revolutionary' developments of human rights after 1945, international law now considers not only states but also individuals as the subjects of international law. It concludes by stating that human rights and state sovereignty still exist in a state of tension, but that this tension must not prevent human rights mechanisms from trying to meet the difficult situations posed by forced migration.

It is important to recognise at the start that states protect as well as violate human rights. This thesis is concerned, however, with forced migration. As the previous chapters have revealed, refugees and internally displaced persons emerge because they are unable to obtain protection of their human rights from their own states.

As A.H. Robertson says, international action to protect human rights is `revolutionary', given that traditional international law had no place for such action.[2] John Humphrey explains that within international law, there has never been a more revolutionary development than the recognition that human rights are matters of international concern.[3] Similarly, A.J. Harris says, the evolution of the international law of human rights has been one of the most remarkable features in development of international law since 1945.[4] Why do the above writers call the development of human rights in international law `revolutionary' or `remarkable'?

Lassa Oppenheim (1858-1919), a leading United Kingdom authority on international law, wrote that the so-called rights of man not only do not but cannot enjoy any protection under international law, because international law is concerned solely with the relations between states. International law cannot confer rights on individuals; thus relations between individuals and states remain exclusively within their domestic jurisdiction.[5] This approach, which views states as the only subjects of international law, is identified with the assertion of state sovereignty. It is, therefore relatively easy to disprove the notion that an individual is placed `in the same elevated category as sovereign states'.[6] Humphrey takes the same position, that human rights are largely a matter of internal relations between states and individuals.[7] People were seen as

categories rather than individuals: as aliens or nationals, not as individuals. While this view provided protection to aliens, the treatment of nationals was regarded as being within the domestic jurisdiction of sovereign states.[8]

The above statements explain why it was `revolutionary' that international law is now concerned with individuals. It is a major step to move from the orthodox to the new approach that the fundamental rights of an individual are a matter of international law. What, then, was a cause of this change ?

THE DEVELOPMENT OF HUMAN RIGHTS BEFORE 1920

Robertson points out that legal rules are a reflection of social standards at a particular time. The current emphasis on the international protection of human rights shows a profound change in individual and governmental attitudes which took place as a result of the Second World War.[9]

The roots of these changes, however, go back into the conflicts of the 19th century. And, for this first half of the twentieth century, there was little concern in the international community for human rights. Sovereign states were broadly free to treat their nationals and residents as they liked, with one possible exception. This exception was humanitarian intervention, a movement that goes back to the 19th century. While humanitarian intervention is not a subject of this thesis, the course of development of human rights has to take account of it.

Humanitarian Intervention

Humanitarian intervention arises in the context where, if a government commits atrocities against its own people that shocks the conscience of humankind, then other countries have a right to intervene, if necessary, by force.[10] Sieghart explains that this humanitarian intervention provides a limited exception to the doctrine of state sovereignty. [11] Such action was fairly common in the nineteenth century, usually for the protection of religious minorities, and usually, if not always, political. There was,

therefore, an argument as to whether the right of individuals really existed. One thing is certain: while states might chase to act, they were under no obligation to protect persecuted people in other countries.[12] For example, in the nineteenth century, Britain helped the Spanish colonies of Latin America gain their independence for the right of `self-government', the equivalent of `self-determination' today. In this case, Britain wanted to promote its own commercial and political interests in the newly independent regions. Britain also helped to establish independent states from the Ottoman and Austrian empires at the end of the nineteenth century in order to frustrate Russian expansion towards the West.[13] A case, however, existed for humanitarian intervention arising out of genuine concerns for the rights of people. An example is the case of some 12,000 Christians, killed by the Ottoman troops in an area that is today Bulgaria, in 1876. The British Prime Minister, William Gladstone managed to invoke the doctrine of humanitarian intervention, and promoted a foreign policy to support the freedom of persecuted people in Bulgaria.[14] This action led to the Treaty of Berlin of 1878, under which Bulgaria, Montenegro, Serbia, Rumania and Turkey assumed obligations to grant religious freedom to their nationals.[15] This case was not politically motivated. It was due to the indignation over the Turkish atrocities in Bulgaria and an expression of a deep, moral feeling. [16] No national interests were involved, since most people in Britain still regarded Turkey as their ally.[17] This event was, therefore, important since international concerns over human rights had arisen, for the first time, to bring about a change in the policy of another state.[18]

Slaves

There were also developments in the anti-slavery movement, a genuinely international movement for human rights, motivated by a sincere concern for the rights of individuals.[19] The Quakers in both Britain and the US had been opposed to the slave trade since before the end of the seventeenth century, but it was not until 1807 that, in Britain a bill to abolish slavery finally passed both Houses of Parliament. The trade was abolished in Denmark in 1802 and in France by Napoleon in 1814. These movements against the slave trade promoted a movement against slavery itself. [20]

In 1833, the bill for abolishing slavery in all British territories was passed and this was followed over the next forty years in most other European states.[21] The Conference of Berlin on Central Africa of 1885 was able to state in its General act that `trading in slaves is forbidden in conformity with the principles of international law as recognised by the signatory powers'. This was taken a step further at the Brussels conference in 1890, and an anti-slavery Act (called the General Act of the Brussels Conference) was signed, and later ratified by eighteen states. The 1890 Act listed the details of agreed measures in Africa and on the seas, to visit, search, confiscate ships trading slaves and to punish their masters and crews. Moreover, the Act established the special office in cooperation with the Belgian Foreign Ministry and International Maritime Office in Zanzibar (Tanzania) to implement the above provisions.[22] Together with the Convention of St Germain-en-Laye of 1919, the International Convention on the Abolition of Slavery and the Slave Trade was signed under the auspices of the League of Nations at Geneva on 25 September 1926 which entered into force on 9 March, 1927. It proclaimed `(a) To prevent and suppress the slave trade; (b) To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms'.[23] Thus, the anti-slavery movement advanced humanitarian interest in international law.

Servicemen and Prisoners of War

Another development of significance to international intervention claims concerned the wounded during wars. Henry Dunant, a Swiss national, witnessed the sufferings of the wounded in the battle of Solferino, Italy in 1859. As a result, `he personally helped more than a thousand casualties and called on the local inhabitants to assist him in the work'.[24] This experience led him to found, with the Geneva Lawyer Gustave Moynier and others, the Comite International et Permanent de Secours aux Blesses Militaires. In 1863, the representatives of sixteen states attended a conference and agreed to set up private societies to supplement the work of the national army medical corps in their countries. They chose as their emblem the Swiss flag in reverse, a red cross on a white background.[25] This arrangement was officially recognised by the Geneva Convention in 1864. In it twelve states agreed to respect the immunity of military hospitals and their

staff to care for the sick and wounded whatever their nationality. This Geneva Convention was revised and developed in the light of the experience of the First World War, by the Geneva Convention of 1929. The Red Cross was also concerned with prisoners of war, in a number of ways. First, it identified their whereabouts and physical condition, and made this information available to their home countries. Second, it arranged correspondence with their families. Thirdly, it visited prisoner of war camps and provided medical supplies. Fourthly, it repatriated the seriously wounded on an exchange basis.[26]

As the humanitarian work of the Red Cross during the First World War was so significant, the Covenant of the League of Nations stated the following in Article 25:

> The Members of the League agree to encourage and promote the establishment and cooperation of duly authorised voluntary national Red Cross organisations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.[27]

The example of the Red Cross shows a growing awareness, among people, of the protection of the weak in the society, which in turn became reflected in international law.

DEVELOPMENTS IN THE AFTERMATH OF WORLD WAR I

Following the First World War, concern for individual rights was extended to groups beyond humanitarian situations.

Labourers

In 1919, the International Labour Organisation(ILO) was established. It promoted a succession of international conventions to protect industrial workers from gross exploitation, and to improve their working conditions. Even before the formal establishment of the ILO, two multilateral labour conventions were concluded in Berne, Switzerland in 1906. One banned night work by women, and the other banned the use of

white phosphorus in manufacturing matches.[28] On 28 June, 1930, the Forced Labour Convention was adopted by the General Conference of the International Labour Organisation. It proclaimed its aim as: `to suppress the use of forced or compulsory labour in all its forms within the shortest possible period', and it entered into force on 1 May, 1932.[29]

The study, so far, has revealed that the condition of individuals had gradually become matters of concern for international law. These legal and social developments to protect an individual promoted the concept of human rights. But the term `human rights' did not appear in the Covenant of the League of Nations. It was not an important subject to be discussed except for one particular type of rights. That was the rights of minorities and stateless persons within a state dominated by another nationality.[30]

Minorities and Stateless People

In 1919 and 1920, problems of protection of minorities and stateless arose as self-determination grew in the aftermath of the First World War. As the multinational empires, non-racial states of the Austro-Hungarian, and Ottoman empires disappeared, almost every European state came to be dominated by a single nationality. The minorities and stateless within these states were exposed to possible abuses without special means to protect them. The Minority Treaties were, therefore, created to safeguard the rights of those under the League of Nations.[31]

President Woodrow Wilson was conscious of their ill-treatment and thus pressed for international protection for them. He drafted the League of Nations Covenant several times, indicating that his position went beyond opposition to discrimination. It was rather a claim to the collective rights of people based on religion, race and nationality. This broad approach, based on human rights per se rather than on the rights of minorities, provoked resistance from states. For example, the Japanese delegate objected to inserting provisions into the Covenant to recognise the equality of states and peoples. In the international arena, the concept of inferior and superior states, peoples and races still prevailed. The British delegate also took the view that this was a territorial, not a

broad human right. He states that the controversial minority section should be dealt with in the territorial treaties to settle post-war boundaries. In addition, Australia and New Zealand feared that the League might challenge their treatment of Aboriginal and Maori populations. In the end, Wilson accepted the deletion of a wider approach of human rights in order to avoid controversy. As a result, the Covenant provisions reflected the concept of inferior and superior peoples, states and races to some extent. Article 22 of the Covenant of the League of Nations reads '...peoples which are not yet able to stand by themselves under the strenuous conditions of the modern world..'. Thus, international law hesitated to enter the age of human rights. Instead, it entered the age of minority rights.[32]

The states which accepted the principles of the minority treaties formed a belt from the Finnish gulf in the north to the Persian gulf in the south.[33] The treaties were in three groups. The first were minorities treaties between the principal Allied and associated powers on the one hand, and Poland (Versailles, 28 June ,1919), Czechoslovakia (St Germain-en-Laye, 10 September, 1919), Yugoslavia (St Germain-en-Laye, 10 September, 1919), Rumania (Paris, 9 December, 1920) and Greece (Sevres, 10 August, 1920), on the other hand. The second group took the form of special chapters in the peace treaties with Bulgaria (Neuilly-sur-Seine, 27 November, 1919), Austria (St Germain-en-Laye, 10 September, 1919), Hungary (Trianon, 4 June, 1920) and Turkey (Lausanne, 1923). The third group were certain states which made declarations regarding minorities before the Council of League of Nations as a condition of their admission to the League: Finland (27 June, 1921), Albanian (2 October, 1921), Lithuanian (12 May, 1922), Latvia (7 July, 1923), Estonia (17 September, 1923) and Iraq (13 July, 1932). In addition to these treaties and declarations, minority problems were dealt with in a number of bilateral international agreements. The most important among these were the German-Polish Convention (Geneva, 15 May, 1922) regarding the protection of minorities in Upper Silesia, and the Greco-Turkish agreement on minority populations (Lausanne, 30 January, 1923). The convention regarding the Memel territory of Lithuania (Paris, 8 May, 1934) also dealt with minority problems. [34]

All of these international agreements guaranteed equality with regard to civil and political rights, freedom of religion, the right of minorities to use their own language and the right to maintain their own religious and educational establishments. Moreover, when the rights were violated by states, minority groups could bring their complaints before the League of Nations. The procedure was that if the Secretary-General considered the case admissible, the Council of the League would appoint an ad hoc Minorities Committee to investigate and try to reach a friendly settlement. If this failed, the complaint was referred to the Council again. The Council in turn could refer the matter to the Permanent Court of International Justice.[35]

One of the Minority Treaties, the 1922 German-Polish Convention on Upper Silesia has a particular importance in the development of these international agreements. The region was divided into two parts between Germany and Poland. The 1922 Convention guaranteed not only the protection of minorities on both sides of the frontier, but also set up a system to implement it. For example, the following new bodies were established: a Minorities Office in each part of Upper Silesia, a Mixed Commission, and an Arbitral Tribunal. The Commission and the Tribunal each had an independent president appointed by the League of Nations Council. The Mixed Commission dealt with more than 2,000 cases during the fifteen years of its existence (1922-37), and mainly worked on the basis of conciliation. The Arbitral Tribunal, on the other hand, was a judicial body to hear claims by individuals. It gave judgements which were binding in the two countries. Either government could take a case to the Permanent Court of International Justice if they differed over the questions of law. [36]

The Minority Treaties were, thus, one of the first attempts to create explicit and institutionalised international restraints on the rights of sovereign states over their own subjects. The newly created or enlarged states were promised equal status in state sovereignty with Western states, but they were bound to the regulations on how to treat minorities in their own states. As a result, some states such as Latvia, Rumania and Poland regarded the Minority Treaties as a breach of promise. [37] In fact, the international protection of minorities was not extended to old established states. For

example, the new frontiers granted to Italy by the peace treaty included large minorities, the Germans in South Tirol, and Slovenes and Croats in Trieste. These minorities were not only not protected by any minority treaty, but they were soon subjected to persecution by the fascist regime in Italy. The same is true of Jews in Germany, the Ukrainians, the Caucasians and the Muslims in Central Asia of the Russian empire.[38]

It is said that the failure of the minority system of the League was the result of the general state of international order and relations. And when that order disintegrated the system collapsed with it like one floor of a toppling building. Dictatorships replaced democracies and hate and intolerance flourished, and the minorities and stateless suffered from such a political climate.[39] Nevertheless, minority and stateless rights became of increasing international concern during the early part of the twentieth century. These events took place in parallel with the League's concern with the problem of refugees after the First World War. And, despite the reluctance of government officials to be engaged in it at first, there was one individual committed to rights of people who eventually pressured and persuaded the international community to deal with the refugee situation.

Refugees

Fridjof Nansen (1861-1930), the Norwegian scientist and polar explorer, helped the lives of thousands of refugees during the post-First World War period. In 1903, Nansen was made the first Norwegian Ambassador in London, and during the First World War, he was the president of the Union of Defence in neutral Norway. After the war, Nansen become a devoted supporter of the League of Nations; under his influence, Norway joined the League of Nations in 1920 and Nansen became the first Norwegian representative to the League. In 1921, the League established a refugee organisation and appointed Nansen as the first High Commissioner for Refugees. It must be noted that as early as 1919, Nansen launched his plea for the starving population in Russia. He suggested that he would organise an international non-political Commission to provide Russia with food and medical supplies. But the member-states were reluctant to cooperate with the Bolshevik regime and Nansen's plan was abandoned.

Nansen's first big job at the League was to help prisoners of war return home. The Nansen Relief, an umbrella organisation for the international Red Cross, the YMCA, and government representatives, worked with the League though it was financed by voluntarily contributions. By 1921, no less than 437,000 prisoners of war of some thirty nationalities had been repatriated. Meanwhile, the famine disaster in Russia threatened thousands of lives. In August and November 1992, Nansen visited Russia and upon his return, appealed to the League to provide a large-scale loan to Russia. The League refused, mainly for political reasons, and Nansen was accused of Bolshevik sympathies. He turned for assistance to private people, touring cities in American and Europe and giving talks on what he saw in the famine-stricken regions in Russia. His efforts were successful.

His action must be seen in the context of changing relations between states. After 1918, the question of passports became critical. As a result of the upheavals of war and revolution, 1 to 1.5 million Russian nationals had fled the empire. These people consisted of different ethnic and religious groups - Jews, ethnic Germans and White Russian Orthodox people. They were scattered across Europe and Asia. Some found asylum in north-eastern Europe such as Poland, Czechoslovakia, and Germany, while others sought sanctuary in Asia Minor, particularly in Constantinople. Still others escaped to China, especially to Manchuria and Shanghai. The All-Russian Central Executive Committee revoked Soviet citizenship for those who had resided abroad for more than five years and for those who had left Russia after 7 November, 1917 without the permission of the Soviet government. It was estimated that around 200,000 Russians exiles were unemployed and poverty-stricken because they had no valid passports, and so could not work in the country of first refuge or move to another country in search of better conditions. [40]

It was this situation which Nansen sought to address. As the High Commissioner for Refugees he introduced identity papers for the stateless people, called `Nansen passports'. These documents, though restrictive, allowed thousands of refugees to move

from the refugee camps around Constantinople to other settlements where friends or work awaited them. Nansen also persuaded governments to accept these people and provide them with help. But a Nansen passport did not replace a national passport because it did not give the holder the right to return to issuing state without a special provision to that effect. On 31 May, 1924, the benefits of Nansen passports were extended to another group of refugees - Armenians who survived political and religious persecution in Turkey. In 1915, in an effort to `cleanse' the Ottoman Empire, the Turkish government embarked on a well-planned and systematic programme of mass murder and deportation of the Armenian population, resulting in some 1.5 million Armenians dead between 500,000 to 1,000,000 survivors were left destitute in overcrowded and unsanitary camps across Southern Europe and the Middle East. In May 1924, the League of Nations adopted a resolution[41] to provide Armenians with an emergency certificate similar to the identity document for Russian refugees. Eventually Nansen passports for Russians were recognised by 54 countries, and 30 countries acceded to those for Armenians. Refugee work and the issuing of Nansen passports were transferred to the International Labour Organisation (ILO) in 1925, and came under the jurisdiction of the Refugee Service of the ILO. Five years later, the refugee work was entrusted to the International Refugee Office, which became known as the Nansen International Office for Refugees in commemoration of the High Commissioner who had died earlier the same year on 13 May, 1930.[42] Thus, Nansen laid the foundation for the subsequent development of the international refugee regime.

From the various situations discussed in this chapter, we can see that during the inter-war years many international activities began to protect the rights of individuals. International law came to be concerned with individuals, not only with relations among states. But this social and legal change occurred only in certain circumstances such as humanitarian questions, slavery, workers, the wounded and prisoners of war, minorities, the stateless and refugees. It did not apply to all the basic rights of an individual. Moreover, the question of international measures to enforce them was not considered at all.[43] It was still widely accepted that protection of individual rights was ultimately the responsibility of sovereign states. This idea effectively excluded the possibility of

judging and criticising the treatment of people by their own government. The problem was highlighted by the events evoked by National Socialist Germany in the late 1930s and early 1940s. Sieghart points out that the unprecedented atrocities were carried out lawfully by the regime in power upon millions of its own citizens. The domestic laws that authorised this mass killing in Germany had been enacted by a legislature lawfully established and it was installed under the constitution of a sovereign state. The strict doctrine of state sovereignty that existed at the time made any foreign criticism of those laws ineffective.[44]

Against the violation of human rights by the Axis powers of Rome-Berlin-Tokyo, the Allied Powers perceived the Second World War as the vindication of human rights. This was expressed by President Roosevelt in January 1941 before the United States entered the war. He defined four freedoms: freedom of speech; freedom of worship; freedom from want; freedom from fear `everywhere in the world'.[45] Furthermore, the Declaration of 1 January 1942 was signed by the 26 `United Nations' fighting the Axis powers which said `that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands'. In 1944, the Dumbarton Oaks Proposals claimed the establishment of the UN and one provision about human rights `to promote respect for human rights and fundamental freedoms'. Thus, the traumatic experience of the Second World War set a new stage for further developments of human rights.[46]

DEVELOPMENT OF HUMAN RIGHTS AFTER 1945

As Humphrey says, `references to human rights run through the United Nations Charter like a golden thread'.[47] This was the result of lobbying by NGOs and individuals. The US government invited some forty-two private organisations to the San Francisco Conference in 1945. They represented various aspects of American life such as churches, trade unions, ethnic groups and peace movements, and acted as consultants. They succeeded, with help from the government representatives of smaller countries, in putting forward the human rights provisions of the UN Charter. From this experience

Humphrey draws two lessons. One is that a group of determined individuals can influence even an international conference. The other is that in human rights issues, individuals and governments are on opposite sides of the ring and governments move only when they are forced to do so. [48]

It is interesting to note that although the Allied powers fought the war on the slogan that the realisation of human rights `everywhere in the world' was a prime goal, a great majority of states, including the great powers, were not willing to undertake fully binding commitments to achieve that purpose after the war. At the San Francisco Conference, although the Panamanian delegate proposed that the new Charter should ensure not only `the promotion' but also `the protection' of human rights and fundamental freedoms, this suggestion was rejected on the ground that it might be interpreted such that the UN had the right to impose the observance of human rights and freedoms upon member states.

In regard to this, H. Lauterpacht suggests, if the UN member states had been willing to undertake fully binding commitments to protect human rights and fundamental freedoms, this would have decisively influenced the capacity of the UN to accomplish the purpose proclaimed in its Charter.[49] Their unwillingness to do so consequently led to the situation where, although the Charter mentioned human rights in many places, it did not define or even list what they were. Many observers considered that the human rights provisions in the Charter were too weak. The UN, therefore, agreed to include an additional article by which the Economic and Social Council would set up a Commission to draft a bill of human rights. This understanding was specifically stated in the closing speech of the conference by President Truman, and it was one of the first acts in which the Economic and Social Council engaged. [50]

In any event, the UN Charter was signed in 26 June 1945 and entered into force on 24 October of the same year with 51 original members. The UN Charter starts with the famous phrase `WE THE PEOPLES OF THE UNITED NATIONS DETERMINED...'. And, as described above by Humphrey as `a golden thread', the term `human rights' runs

through it. The preamble proclaims `to reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. Article 1 of Purposes and Principles, paragraph 3 reads `in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion'. Further, Article 13, paragraph 1(b) says, `the General Assembly shall initiate studies and make recommendations for the purpose of assisting in the realisation of human rights and fundamental freedoms for all'. Article 55(c) reads, `the United Nations shall promote universal respect for human rights and fundamental freedoms for all ...', and Article 56 asks all members to pledge themselves to cooperate with the United Nations in order to achieve the purpose set in Article 55. Article 62 contains similar provisions to Article 13 in relation to the Economic and Social Council. Article 68 says the Council shall set up commissions in economic and social fields and for the promotion of human rights. And Article 76 makes the promotion of human rights and fundamental freedoms for all one of the basic objectives of the trusteeship system.[51] It is in the UN Charter that an individual human being first appeared as entitled to fundamental human rights and freedoms. However, the question arose almost immediately as to whether an individual, as opposed to a state, could be a subject of international law.

The question of whether both states and individuals are subjects of international law gave rise to much controversy. There were two main aspects to the question. One was the direct access of individuals to international tribunals and the other was the international duties of individuals.[52] As to the first, the UN Charter does not contain a provision concerning international legal procedures by which an individual can appeal to an international court in the case of violation of his/her rights. It does not, therefore, impose upon the UN members states strict obligations to grant to their people human rights and freedoms.[53] The availability of a remedy is the hall-mark of legal rights. But in international law the correlation of a right and a remedy is not as close as within a state. It can be argued, however, that while the absence of such a remedy may reduce the status of an individual in international law, it does not negate it. [54] The second aspect is the relation between individuals and international duties. The proposition that individuals are subjects of international law implies that they can be subjects of

international duties, for example, the duty to fulfil the obligations set out in the UN Charter. However, the duties prescribed by international law are binding upon states, as distinct from the individuals who compose them. If international legal duties do not rest upon individuals, they cannot obligate anyone. To answer this, the following comment is very telling. It was the Judgement given on 30 September 1946 by the International Military Tribunal established by four-Power Agreement, and the Charter annexed, of 6 August, 1945. The Tribunal said:

> It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals... these submissions must be rejected... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[55]

The above statement indicates that persons who ordered the commissions of war crimes were liable to punishment for violating the rules of warfare. The fact that the accused acted on behalf of the state was irrelevant, because the laws of war do not distinguish between the state and those who had acted on its behalf. In this respect, the concept that only states, not individuals, are the subjects of international duties breaks down. Moreover, Article 6 of the Charter annexed to the Four-Power Agreement of 8 August, 1945 established the International Military Tribunal, Nuremberg for the Prosecution and Punishment of the Major War Criminals of the European Axis. The same Article recognised the crimes against humanity, including murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds. It did not matter whether the accused committed them by obeying or by disobeying the domestic law of his country. To say crimes against humanity must be punished means that fundamental human rights are regarded as superior to the law of the sovereign state. This can be interpreted to mean that international legal instruments which protect human rights are superior to state laws. It is possible that this result did not occur to the authors of the Charter: it was just an inevitable result as the victor enacted the legislation against the vanquished. The same outcome was repeated in Article 5 of the Charter of the

International Military Tribunal for the Far East established on 19 January, 1946. In any event, the enactment of crimes against humanity, indirectly but decisively, recognised fundamental human rights as superior to the law of a sovereign state.[56]

The UN Charter was followed by the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly on 9 December, 1948 which entered into force on 12 January, 1951.[57] The following day, 10 December 1948, the bill of human rights - the Universal Declaration of Human Rights - was adopted and proclaimed.[58] The Convention on the Prevention and Punishment of the Crime of Genocide played a major role in establishing that individuals were the subjects of international law. Article 1 of the Convention says, `genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.[59] It imposes on the contracting parties the obligation to prevent and to punish the crime of genocide or other crimes defined in Article 2 and 3. These crimes may be committed by private individuals, by a state, especially members of the government. As Article 4 says, persons committing genocide or any other crimes defined in Article 2 and 3 shall be punished `whether they are constitutionally responsible rulers, public officials or private individuals'.[60] Similarly, Article 9 refers to the `responsibility of a state for genocide or any other acts enumerated in Article 3'.[61]

This was the essential achievement of the Convention on the Prevention and Punishment of the Crime of Genocide. It was the mass murder of Jews, Poles, Catholics and members of other groups in Nazi Germany, which led the UN General Assembly to adopt the Convention on Genocide, even though these atrocities were acts of the German government or the Nazi Party which was the legal organ of the German state. [62] The argument as to how to punish the crimes of genocide if they are committed in the state responsible for the crime will be discussed at the end of this chapter. Here, it is necessary to explore the development of international human rights regime by examining the Declaration of Human Rights adopted on 10 December 1948, a day after the adaptation of the Convention on the Prevention and Punishment of the Crime of Genocide.

The Declaration of Human Rights

The Declaration of Human Rights was adopted in the UN General Assembly by 48 votes to none, with eight abstentions.[63] The abstaining states were Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukraine, USSR and Yugoslavia. The Declaration was not intended to be legally binding. Eleanor Roosevelt, the chairman of the Commission on Human Rights, predicted that the Declaration `may become in future the international Magna Carta of all mankind'. Nevertheless, she stressed that it did not impose legal obligations on states, but rather a common standard to be achieved for all peoples and all states.[64]

In this regard, Lauterpacht argues that a Bill of Rights worthy of the name cannot be complete without states surrendering their sovereignty. The essence of a Bill of the Rights of Man should be a limitation on state powers. Lauterpacht continues, there is no country entitled to an absolute conviction of the excellence of its law and its institutions as not to consent to some change in its legal and constitutional system.[65] Humphrey comments that Lauterpacht, a dedicated human rights partisan, was disappointed that the UN General Assembly had not immediately adopted a legally binding human rights convention. As Humphrey points out, Lauterpacht wanted to move faster than political realities would permit. Nevertheless, as subsequent events have indicated, the Universal Declaration of Human Rights is now part of the customary law of states. Customary law is simply the consensus of states as to what the law is according to their official statements and practices.

The Universal Declaration of Human Rights has acquired the force of custom accepted as law through general practice.[66] For example, the Declaration has been reaffirmed on numerous occasions within the UN. The Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the General Assembly on 14 December, 1960 says in its Article 7, `all states shall observe faithfully and strictly the provisions of the Charter of the UN, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States

and respect for the sovereign rights of all peoples and their territorial integrity'.[67] With the exception of South Africa, all the countries that had abstained in the vote on the Universal Declaration in 1948 voted for this article. The UN Declaration on the Elimination of All Forms of Racial Discrimination of 20 November, 1963 says in its preamble, `Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights...'.[68] It was unanimously adopted by the General Assembly including the countries, except South Africa, that had abstained in 1948. Again, the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 which entered into force 3 January 1976[69] and International Covenant on Civil and Political Rights of 16 December 1966 which entered into force on 23 March, 1976,[70] both refer to the Universal Declaration of Human Rights in their preambles. Similarly, the Proclamation of Teheran of 13 May 1968 repeats that the Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable right of all members of the human family.[71]

In the world outside the UN, the Universal Declaration has also influenced profoundly more than forty state constitutions such as those of Guinea (1958) and Madagascar (1959), together with the regional human rights treaties.[72] The European Convention for the Protection of Human Rights and Fundamental Freedoms, for example, adopted by the Council of Europe on 4 November 1950 which entered into force on 3 September 1953 says in its preamble, `Considering the Universal Declaration of Human Rights...'.[73] The Charter of the Organisation of African Unity Convention on 25 May 1963 says in Article II, `having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'.[74] The 1969 American Convention of Human Rights which was signed on 22 November, 1969 and entered into force in 1978 makes a reference to the Universal Declaration of Human Rights in its preamble.[75] Humphrey says, therefore, he is satisfied in his mind that the Declaration is now binding on all states. It is arguable, however, that it has become an international norm, as the events described in the following chapters of this thesis will reveal.

HUMAN RIGHTS versus SOVEREIGN STATES

A number of conclusions can be drawn from the examination of the three international human rights instruments, the Charter of the UN, the Convention on the Prevention and Punishment of the Crime of Genocide and the Universal Declaration of Human Rights. First, a common thread is `people', individuals who constitute the international community. That is, while states still constitute the membership of the international community, the human rights instruments have added the needs and interests of individuals and groups other than states.[76] Second, the recognition of human rights and the recognition of an individual as a subject of international law have become synonymous.[77] This is so because the struggle for human rights is always a struggle against authority. To protect human rights means to liberate a person from his/her government. Humphrey says, `if the protection of human rights does not mean that, it does not mean much'. If so, it is reasonable to assume that the protection of a person from his/her government requires legal instruments other than domestic law. Humphrey continues that there was, therefore, something paradoxical about what the UN was trying to do since the international bill of rights was being drafted by the representatives of governments.[78] In fact the growth of human rights after 1945 was a movement against state authority but one taken in the name of sovereign states. It was fuelled by a desire to protect people not only from their own governments but also any governments that may act wrongfully towards individuals. This implies that there was a recognition that limitations must be put on state sovereignty for the protection of people.

It is also necessary to consider in this context the existence of nuclear weapons. During the Second World War nuclear weapons were developed, with an atomic bomb dropped on Hiroshima on 6 August, 1945 and the second on Nagasaki on 9 August 1945. The nuclear age had arrived. It threatened - and still does - the very existence of the human race. Moreover, these absolute weapons were in the hands of leaders of governments. This was the crucial difference between the pre-war and post-war period: the existence of nuclear weapons fundamentally challenged how we thought about human rights. In

this situation it was argued that the direct subjection of the individual to international law was essential in order to strengthen the ethical basis of international law and of its effectiveness at the time when the power of the machinery of the state threatened the very existence of human life.[79]

Limitations put on state sovereignty for the protection of people are also stated in the Vienna Convention of Law of Treaties. Article 6 (5) of 1969 and 1986 explains: the principle of reciprocity - the principle that one country's observance of treaty conditions requires other signatory countries' reciprocal observance - does not apply in the case of human rights conventions:

> Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human persons contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.[80]

The principle of reciprocity does not apply in the human rights conventions because all rules of this particular character are intended not so much for the benefit of states, but for the benefit of individuals. That is, the human rights conventions involved absolute obligations that are not dependent on a reciprocal or corresponding performance by other parties.[81] The treaties are not there to set up a compromise on diverging interests, but rather to defend the common interests of mankind.[82] Human rights conventions thus contain elements that transcend some of the limitations of agreements undertaken between states. In this sense, international human rights law inevitably erodes the traditional concept of state sovereignty.

It would be wrong, however, to assume that this was accepted by the members of the international community. In the world after 1945 when the Cold War was growing stronger, state sovereignty continued to dominate. Nevertheless, it was possible to see that there was an underlying current moving towards the fulfilment of the unrealised goal of universal human rights transcending state borders.

This sense of direction in the development of human rights is well expressed by R. J. Vincent.[83] He presents three contrasting views of the nature of international relations and human rights. They include `morality of states', `realism', and `cosmopolitanism morality'.[84] First, the idea of the morality of states is that states are not only morally responsible but also the only bearers of rights and duties in international society. Individuals and groups have access to international community through states. In other words, they are objects not subjects of international law. This is described in the form of an `egg-box' conception of international society. Sovereign states are the eggs and the box is international society which has a compartment for each egg. The function of international society is to separate and cushion relations among states. The second view of international society is realism. Realism relates to inter-state relations based not on moral positions but on power. Realism is here the fried egg or American version of sunny side up. Human rights are used to advance the interests of winners, while they impose obligations upon losers. For example, Edward S. Herman and Noam Chomsky argue, the connection between US commercial interests and human rights violations by other regimes in the Third World is systematic and not accidental.[85] If so, human rights can be said to be used to deceive. Yolks convince whites that they would relate to them according to the conditions of fried eggs. Third, the cosmopolitanism morality view is the belief that individuals are involved in a world society in which they are all vulnerable to nuclear disaster, lack of resources, environmental pollution and population growth. Vincent argues that behind this conception of interdependence, a core belief of commitment to the value of human life exists. He adds: `if it is a commitment to human life, then it is not reasonable to allow this value to be diluted by the mere boundaries which human beings happen to have constructed against each other'.[86] Therefore, cosmopolitanism morality has brought us out of the egg-box. It cracked and made into omelettes.[87]

From the above analysis, Vincent suggests what should be rejected and kept from each of these models. From the idea of the morality of states we should reject the notion of the exclusiveness of states. A morality which is blind to the central moral issue of the treatment of individuals or groups would be a third-rate morality. From the idea of

realism, we should reject the stubborn argument which would ignore the positive aspects of human rights. From the idea of cosmopolitanism morality, we should reject the idea that we already live in a cosmopolitan world, so we can start the world government straightaway. We keep what is left from these three perspectives. From the morality of states we keep that awareness that political power is concentrated at the level of the state and any plan for moral improvement has to find its way in the world of states. From realism, we keep the suspicion of any so-called universal doctrine as it may have a hidden agenda. From cosmopolitanism morality we keep the sense of direction, the commitment to the value of human life.[88] The points made by Vincent, particularly two of them, the emphasis on the worth of individual life and the awareness of power in the hands of states indeed gave the direction of development of human rights after 1945. And it was NGOs that played an important role to give this direction. The next section will examine the rise of NGOs and the civil society in order to understand the evolution of human rights in the 1990s.

It will first discuss the trend of the increasing importance of roles played by NGOs. NGOs that operate today from the grassroots to the global level, are all self-governing, private institutions which are engaged in public purposes outside formal states. This rise of NGOs has important implications in theories of international cooperation. First, the policy of governments is increasingly influenced by the opinions of NGOs. Second, NGOs are more involved in the implementation of programmes which may imply a less direct role by governments. The rise of NGOs in general is, therefore, seen as the vehicle for `democratisation', that is a process to a more open, more participatory and less authoritarian society by accommodating the diversity of people's interests. NGOs are seen as the essential components of `a civil society' that is, creating democratic groups from which social movements are organised. Analysis of these developments then leads on to consideration of theories of international cooperation and democratic theory which incorporates activities of UN agencies, donors, a host government and in particular NGOs.

THE RISE OF NGOs

It is said that the rise of NGOs on the world scene is not an accident, reaching 16,142 between 1993 and 1994.[89] Each operated in three or more countries and drew their finances from sources in more than one country. This number was constantly increasing, with the figure more than doubling between 1991 and 1994.[90] This expansion of NGOs is largely attributable to four reasons: the end of the Cold War; technological developments; growing resources; professionalism of NGOs.

First, as former Secretary-General Boutros Boutros-Ghali explains, before 1990 it was not possible to have any contact with NGOs in the Soviet Union, because this would be seen as neo-imperialist intervention. Similarly, in the West, activities of NGOs were often seen as left-wing pressure. With the end of the Cold War, the reluctance of many diplomats and UN practitioners to engage in cooperation with NGOs largely evaporated. The end of the Cold War has opened new possibilities of communication and cooperation between governments and NGOs while the UN has become an obvious forum for their discussions. NGOs are emerging as a special set of organisations that are private in their form but public in their purpose.[91] Second, this development of NGOs is further fostered by technological developments which have made information flows, interaction and networking among NGOs and individuals more feasible. Internet and fax communications have contributed to the creation of formal and primarily informal communities across state boundaries. These links were unthinkable in the past except through expensive air travel or telephone calls. Third, the NGOs - local or transnational - are attracting more resources from individual donors, governments and the UN system. In 1994 over 10% of public development aid ($8 billion) was given to NGOs. In 1995, about 25% of US development aid went to NGOs. Western governments frequently turn towards NGO projects as they have a reputation for cost-effectiveness.[92]

Fourth, a large number of staff, for example, in UNICEF and UNHCR have worked in NGOs. For example, applicants for employment in UNICEF and UNHCR are required to have prior NGO work experience. There are two reasons for this: if they work in

NGOs first, it would make them cooperate easily with NGOs when they become UN staff[93], and second, UN officials recognise the increasing professionalism of NGOs, making them valuable training and experience resources. For these reasons, the popularity of NGOs is increasing among governments and UN agencies. Keeping this trend in mind, the next section will examine theories of international cooperation and how these have been affected by the rise of NGOs.

THEORIES OF INTERNATIONAL COOPERATION

There are two broad types of international cooperation theories. One is based on states as the only significant actors. The other begins with the proposition that all social organs are made up of people who have complex relationships with others. The former is called as `the states as actors' approach and the latter as the social approach.[94]

`States as Actors' approach - confrontation

In the `states as actors' approach, there are two explanations, both based on the promotion of national interest. The first is that international cooperation is induced by the use of persuasion or coercion by one state over another based on military power. It is not in any state's national interest to be defeated militarily, and therefore it yields to superior military force. International cooperation is thus based on a hierarchy of military power. The second explanation is that international cooperation exists because of market, rather than military, calculations. States realise that there is more to gain from cooperation than from conflict; they search for material advantages. The `states as actors' approach perceives NGOs and UN agencies as the creatures of national interest, who must be regulated to conform to state objectives. Criticism of the `states as actors' approach argues that even if one accepts that international cooperation exists based on national interest, it cannot properly explain autonomous NGO activity within the framework of international cooperation. Moreover, this approach ignores the social base of the state which consists of people, a point that NGOs emphasise. [95]

Social Approach - Cooperation

The social approach focuses on informal links among people. These are a number of social approach frameworks, one of which is organisation theory. Although organisational theory is said to have a general application to the analysis of international cooperation, it has been infrequently used.[96] It abandons the traditional view of organisations as formal and self-contained units, in favour of perceiving them as social organs made up of people who have complex informal relationships with others. For example, all diplomats and political leaders seek personal contacts with people who have the ability to influence others within their own circles. Moreover, organisations can be bound together to form new, meta-organisations.

Within this framework, international organisations such as the UN system can be viewed as meta-organisations, as can federations of NGOs. Organisation theory looks at the kind of interorganisational relationships that have particular relevance to the behaviour of international NGOs. Interorganisational relationships, like those within organisations, are based on people. A common foundation of organisation theory is, therefore, that informal links among organisational participants exist alongside formal structures. In transnational organisations such as NGOs, informal links develop around issues taken up in the formal structure. These informal links can in turn be explained by network analysis. In a transnational social network, links among formal organisations - private or public - depend on long-term contacts among people from different countries and organisations. In other words, social approach theories stress horizontal organisational forms in contrast to hierarchical authority in the `states as actors' approach.

It can be seen from the above analysis that there is a marked difference between two approaches. The `states as actors' approach perceives international cooperation as military and economic competition whose essence is the management of confrontation. The social approach shifts the very nature of competition into cooperation whose baseline is humanitarian, `soft-power' competitiveness. It must be noted, however, that although horizontal organisational forms are readily associated with NGOs, hierarchy

exists within the circle of NGOs, particularly placing the large and long-established ones above the rest. Nevertheless, by positioning themselves in the centre of informal networks, NGOs are in a better position to maintain horizontal organisational forms of international cooperation.[97]

Although these theories - `states as actors' approach and social approach - are potentially useful. Their emphasis on the actors, however, does not relate to the people who are their primarily focus. In other words, the theories are not firmly placed in the context of people for whom the actors are supposed to serve, in the form of delivering services or influencing the policy of governments. In such a contest, the rise of NGOs can only be properly explained in terms of international cooperation, because the very nature of NGOs is to focus and represent the voices of people. The following section will, therefore, discuss applied democracy theory which tries to overcome the shortcomings of the above theories.

Applied democracy theory

Applied democracy theory begins by defining civil society as being made up of democratic components. It then goes on to show how civil society can support or constrain democracy. International cooperation among NGOs, donors and host states is examined from a model of two basic strategies that donors employ and in which NGOs and host states participate.[98]

As Harry Blair emphasises, civil society exists in the area between individuals (families) and the state, and is made up of groupings of all kinds. In its widest sense, civil society ranges from political parties on the more public side to business corporations on the more private side. It includes groups who aim to influence public policy as well as groups who have no concern for the public domain at all. In its narrow sense, however, civil society is said to embrace mainly groups that try to influence a state and its public policy. Thus, political parties whose primary purpose is to take over state power and business corporations whose main concern is to make a profit may be excluded from this perspective, which is concerned with groups trying to influence the state. In Blair's

analysis, a characteristic institution of civil society is called a `civil society organisation' (CSO). It can be defined as a group which has as one of its primary purposes the influencing of public policy. On the other hand, a purely service-oriented group is not a CSO, but could become one if it decides to add policy advocacy to its agenda. By the same token, a CSO could become an NGO if it dropped its policy advocacy in order to concentrate on service delivery. All CSOs are, therefore, NGOs, but not all NGOs are CSOs. In short, civil society comprises those social organisations that enjoy autonomy from the state and have as one of their important goals the influencing of the state on behalf of their members. [99]

In employing civil society organisations to strengthen democracy, Blair argues that donors have two basic strategies. Basic strategy 1 is system reform (BS1). Donors focus on the creation of an `enabling environment' by working to improve conditions where civil society can function effectively. Basic strategy 2 is concerned with sectoral agendas (BS2), where donors work within a given civil society environment by supporting specific CSOs. BS1 logically precedes BS2 in that the conditions for civil society should be in place before it can function effectively. But in the past, donors such as USAID tended to support BS2 even where there was only a weak civil society. There are at least three reasons for this tendency. First, during the Cold War, it was not a feasible policy for USAID to press host governments to open up their political systems to create enabling environments for CSOs' participation. As a result, USAID could only follow BS2 by supporting specific CSOs. Second, in the context of the Third World, donors including USAID tended to perceive their operation in the context of a technology transfer model of development. That is, donors focused on economic growth as the main goal and emphasis was placed on specific projects rather than overall policy. In other words, donors were not very interested in influencing the overall policy of governments. Third, donors took the political view that supporting BS2 could itself be a transforming approach, a way to create an enabling environment for civil society. This approach is labelled as the `trickle-up strategy'.

After the end of Cold War, however, supporting BS 1 became more feasible. In addition, donors had already been thinking for some time about overall policy strategies in relation to economic development. As a result, donors started engaging in BS1 as well as BS2.[100] BS1 can be broken down into two components, both directed to policy advocacy: participation; responsibility and accountability. A strong civil society directly supports democracy by widening participation in several ways. First, it educates and mobilises citizens to exercise their right to participate. Second, it encourages previously marginalised groups such as women, minorities and the poor into the political arena. Thirdly, it builds a complex net of groups who have members with overlapping multiple affiliations in many organisations. This avoids the destabilising effects of single memberships in exclusive groups that are based on ethnic, religious territorial or economic groups. A strong civil society also supports democracy by involving citizens in policy. That is, citizens must be able to play a role in influencing policies so that the state is responsive to their needs and wants. This can be done in a number of ways. First, it facilitates a constant input from citizens in order to remind the state of what they want. Second, it encourages pluralist competition by encouraging all groups to press their agendas, which forces the state to accommodate conflicting voices in ways that prevent it from surrendering to any one voice.[101] Conflicting voices are a positive thing if they promote democratic development without becoming a destabilising and destructive factor.

The present study is an essential and innovative contribution to the realistic assessment of what NGOs, IGOs and donors can achieve, and to the understanding of how the civil society can promote negative and destructive conflicts just as they can foster a constructive pluralism. In a situation where the ineffective state discards the responsibility for protecting the rights of its citizens, NGOs take an significant task to promote a process to a more open, more participatory and less authoritarian society. The present study is an essential and innovative contribution to the realistic assessments of what NGOs, IGOs and donors can achieve, and to the understanding of how the civil society can promote negative and destructive conflicts just as they can foster a constructive pluralism. The lesson to be drawn from the above analysis is that the voices

of people are becoming important in our society. This in turn affected the evolution of human rights. The rise of NGOs has opened up a path of human rights further in the 1990s. The next section will analyse the development of human rights in the 1990s in the context of state sovereignty.

HUMAN RIGHTS AND STATE SOVEREIGNTY IN THE 1990S

While human rights do not as yet override state sovereignty, the actions of the UN General Assembly and the Security Council nonetheless represent significant milestones along the path of protecting human rights. In August 1991, the UN Observer Mission in El Salvador (ONUSAL) became the first military-civilian operation with the task of monitoring human rights abuses. This operation turned out to be an important contribution to the January 1992 cease-fire and peace treaty between the government of El Salvador and the communist group of Farabundo Marti National Liberation Front (FMLN). ONUSAL were deployed even before a full political settlement had been reached, to verify the undertakings made both by the government and the FMLN to respect human rights. Improved humanitarian and human rights practices gave the political impetus to the negotiations which led to the conclusion of the Peace Accords in January 1992, which in turn has helped to stabilise the situation of the returnees.[102]

In the Agenda for Peace of 1992, Boutros Boutros-Ghali, the former UN Secretary-General states that 'the time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality'.[103] In the same year, Sadako Ogata states:

> Through the principles of international human rights, growing emphasis is being placed on the obligations of sovereign governments towards their own people and greater recognition is being given to the notion that sovereignty carries with it certain responsibilities.[104]

In the following year, the World Conference on Human Rights took place in Vienna from 14 to 25 June. On 25 June, the Vienna Declaration was adopted.[105] Article 1 states that the protection of human rights is the first responsibility of governments. Article 28

says that the perpetrators of massive violations of human rights, especially in the form of genocide, should be punished. The International Commission of Jurists (ICJ) has welcomed the provision of the Vienna Convention which calls upon states to `abrogate legislation leading to impunity for those responsible for grave violations of human right'. But, at the same time the ICJ is said to be seriously concerned with Article 39 that says NGOs are free to carry out their activities `within the framework of national law' and Article 39 refers to the involvement of the media `within the framework of national law'. ICJ says that they hope that these `negative' points would be corrected in future.[106]

M.C. Patricia Morales of the International Centre for Human and Public Affairs has summarised the important points of the Vienna Declaration. The Vienna Declaration emphasises that the human person has become the central subject of human rights. If state sovereignty is in conflict with individual human rights, then restrictions to the principle of sovereignty are considered necessary. For example, that `the human rights have priority over the principle of sovereignty of the states'.[107]

Thomas G. Weiss states, however, that many governments still try to cling to the seventh paragraph of the second article, `Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...'.[108] In spite of this article, governments agreed to respect individual human rights `without distinction as to race, sex, language, or religion' stated in the UN Charter.[109] In this sense, states had already accepted international scrutiny of their national policy in the field of human rights.[110] Similarly, the OXFAM (UK. and Ireland) Briefing of 13 January 1995 states that, with regard to the UN response to conflict emergency situations, `the principle of upholding national sovereignty should not be used to block the protection of the basic rights of individuals'. OXFAM claims that the principle of state sovereignty should not override the protection of human rights.[111]

As the above statements indicate, in the 1990s a strong belief has come to exist among the UN, NGOs and lawyers that the protection of human rights takes precedence over a

claim to sovereignty of states. This belief is supported and followed by practice. Jose Ayala Lasso, the UN High Commissioner for Human Rights, says that the UN encourages improvements in national legislation and in administrative and judicial practices related to human rights, and tries to convince governments to stop violations. In order to achieve this goal, the UN Advisory Services and Technical Assistance Programme was created. This programme is action-oriented. Its activities include assisting governments to set up human rights centres, providing experts to formulate legislation which meet international human rights standards, and training administrators of justice on human rights issues. Other activities include the creation of human rights fellowships and internships, the establishment of law libraries and law faculties of human rights, and the translation of human rights instruments into local languages. It is also evident that assistance provided by the Programme is `tailor-made' to meet the needs of the government concerned.[112] The concrete and pragmatic actions taken by the UN, to strengthen the national institutions for the protection of human rights, connotes the international legal criteria to which governments must accord.

Christian Tomuschat says, however, that, despite much debate, individual entitlements under international law has not been clarified. Treaties for the protection of human rights are generally implemented by national authorities and become applicable to the individual through domestic legal systems. Tomuschat asserts that it is only when the individual has a right to a remedy from an international body, that human rights law goes beyond the confines of national law. On the other hand, as we saw above, Lauterpacht argues that the correlation of right and remedy in international law is not as close as that within the state. With regard to a remedy in international law, there are earlier conventions, before the 1990s, which provide examples of provisions for individual remedies. They are the European Convention of Human Rights and the International Covenant on Civil and Political Rights.[113] The Foreign Ministers of the member states of the Council of Europe signed the European Convention of Human Rights in Rome on 4 November, 1950 which entered into force on 3 September, 1953. The Convention creates the European Commission and Court of Human Rights at Strasbourg. There they have provided a model for other human rights systems. Article

25 guarantees petitions of individuals who claim to be the victims of violations by one of the contracting parties of this Convention. [114] These are formal procedures for submitting claims, and the applicant must show that all domestic remedies have been exhausted within the specific time limit. Then the application and other necessary papers are sent to the Commission for its review.[115]

The International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966 which entered into force 23 March 1976, also has the Optional Protocol that allows individuals, as opposed to states, to apply for a remedy, through Article 1. Under Article 4 the Committee will consider any communications submitted to the attention of the State Party alleged to be violating any provision of the Covenant. Within six months, the receiving state has to submit to the Committee written explanations. Out of 126 states parties, not less than 76 are bound by this Optional Protocol.[116] Similarly, Article 44 of the American Convention on Human Rights[117] says that any person may file petitions to claim a violation of this Convention by a state party.

Claims to human rights involve the checking of the performance of national legal systems against external standards. Consequently, it potentially erodes the domestic jurisdiction of states.[118] This means it is increasingly difficult for states to claim domestic jurisdiction to oppose international obligations with regard to the treatment of their subjects.[119] A claim to state sovereignty implies certain unavoidable humanitarian obligations. In other words, state sovereignty is to be judged by its responsible and humane exercise.[120] These developments in international law and custom do not mean, however, that states will abide by them or implement them effectively. To do this, international structures and mechanisms are necessary. The following section deals with this issue.

TRIBUNALS AND THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT OF JUSTICE

In spite of the revolutionary advance in human rights, international mechanisms to implement these rights are still weak. However, a series of events in 1990s led to a major change. The atrocities committed in Bosnia and Rwanda set a precedent to create an international criminal court of human rights with jurisdiction over individuals, an idea which had been discussed over the previous 50 years.

The first move came from Europe when, on 23 May 1993, an international ad hoc tribunal was created to prosecute war criminals in the former Yugoslavia. This arose from the Security Council's action in unanimously adopting Resolution 827(1993) to create an international criminal tribunal in the Hague.[121] On 8 November 1994 a second tribunal, to prosecute war criminals in Rwanda, was established, through Security Council resolution 955(1994), with 13 votes in favour, 1 vote against and 1 vote abstaining. It was later agreed that the tribunal would be situated in Arusha, Tanzania. Rwanda opposed the Security Council resolution because it was not satisfied with the fact that the Statute did not take into account acts of genocide committed prior to 1 January 1994.[122] The two international tribunals were significant in that it was the first time, since the Nuremberg and Tokyo trials at the end of the Second World War, that individuals were charged with crimes against humanity, genocide and war crimes.

There was a recognition, however, that for political and legal reasons, ad hoc tribunals could not be a substitute for a permanent international criminal court. The Security Council might not always have the political will to respond to massive human rights violations in the way it did with regard to the former Yugoslavia and Rwanda. Moreover, establishing these bodies by the Security Council's decision, rather than by treaty, opened up ad hoc tribunals to accusations of political bias and to suspicions concerning their judicial independence. From a legal perspective, ad hoc tribunals could not hope to achieve the desired consistency in the interpretation and application of

international law because their statutes were inevitably tailored to meet the demands of specific situations.[123]

Another legal issue was whether the Security Council had authority to set up judicial bodies in the first place. To establish a legal forum, there are basically two options. One is to draft a convention that is then opened to all governments to join. The other is to create a tribunal under the Security Council pursuant to the peace enforcement provisions of the UN Charter (Chapter VII).[124] Given that governments would need to pass implementing legislation to bring their national legislation into line with that of the tribunal, and also cooperate in extraditing suspects to the tribunal, there was a strong argument for seeking consensus to draft a formal treaty. The main problem with this approach was that it would take time to agree a treaty, and years before enough governments ratified it. Even then it was highly unlikely that, for example in the Balkan case, Serbia would join. The other alternative was to establish a tribunal by a vote of the Security Council. This would have the advantage of being binding on all governments, and could be passed in a short space of time. It raised the question, however, as to whether this was a legitimate role for the Security Council, given it had no authority to make or change existing international law - a legislative role that belongs to the UN General Assembly.[125]

In recognition of the legal and political problems raised by the establishment of ad hoc tribunals, the Lawyers Committee for Human Rights stated that the establishment of an international criminal court is essential for the following reasons: 1) the time has come to end states' impunity by creating a permanent criminal court. Impunity not only encourages the recurrence of abuses, but also strips human rights and humanitarian law of their deterrent effect, 2) a international criminal court is able not only to hold individuals accountable for crimes against international humanitarian and human rights law, but will also provide legal redress to the victims of such crimes, 3) practice has shown that governments are rarely willing to call their own citizens to account, especially when the individuals involved have positions of political or military authority. War crimes are a case in point. The ad hoc tribunals for the former Yugoslavia and

Rwanda were established precisely because domestic authorities would not or could not punish those responsible for committing or failing to prevent violations of both domestic and international law. Moreover, situations of international or internal conflict may lead to the disintegration of domestic legal systems, with no government capable of dispensing justice. In such instances the international community needs an instrument through which it can act to restrain and punish offenders. There are two further justifications for an international criminal court. One is that it is needed to overcome one of the main failings of international criminal law - the lack of a permanent and effective enforcement mechanism. The final reason is that an international criminal court could serve as a model of justice and act as a standard-setting institution in the implementation of human rights norms at both the international and national levels. [126]

A concrete measure was taken at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome from 15 June to 17 July 1998.[127] This conference, which invited 237 non-governmental organisations, adopted the Rome Statute on 17 July 1998 for the establishment of an International Criminal Court. The Rome Statute applies to both internal, as well as international war crimes. The Statute does not adopt the use of the death penalty. These two points are important. First, the Statute makes the strong claim that human rights issues are international and global by applying its provisions to internal war crimes. Second, without the use of the death penalty, one can see that the intent of the Statute is to bring justice based on punishment rather than revenge. This is appropriate, given that the use of death penalty would perpetuate the problem of controlling the chain of revenge.[128] The above two points indicate a move from an age in which power is justice to an age in which justice is power, in which the guiding principle is the respect for people's lives.

Seventy-five states have so far signed the Rome Statute. Senegal has become the first to ratify it. Sixty ratifications are required for the Rome Statute to enter into force. The Rome Statute will remain open for signature until 31 December 2000.[129] The UN Secretary-General Kofi Annan says that the establishment of an international criminal court would be a fitting way to inaugurate the new millennium. It would put the world

on notice that crimes against humanity would not go unpunished in the next millennium. Annan goes on by saying that the best chance humankind has ever had to end the culture of impunity is within grasp and we must not let it fall.[130] Hans Corell, the UN Legal Counsel also said that the Rome Conference was a historic event and the actual establishment of an International Criminal Court would have manifold effects on international law and international relations. [131] From these developments, one may say that human rights issues are no longer restricted to the scope of any single state; concrete action has been taken to deal with human rights through international efforts. It must be noted, however, that there are problems with regards to international efforts of creating the society founded on human rights within a state. The following section will look at a danger involved in such international efforts.

GOOD GOVERNANCE

Participation and responsibility are key components of democracy. For citizens, participation accompanied by responsibility and accountability is an essential part of `good governance'. For states, good governance means to define, guarantee and regulate entitlements on the one hand and to deliver them on the other. But a government (especially a poor one) may not have its own competence to carry out good governance. In such a case, NGOs, UN organisations, management companies, consultants and education service institutions may become legitimate alternatives to an incompetent government. Under such circumstances, one aspect of `good governance' in effect franchises state responsibility to other organisations.[132]

The aim of franchising state responsibility to other organisations is to bring more orderly and reliable responses to social and political issues that go beyond the capacities of the state. That is, various organisations take responsibility for providing citizens with good governance as a surrogate government. It is argued that in order to achieve this aim, a form of `exogenous governance' is required. Exogenous governance implies that, where there is no single central authority within a country, then there is a need for cooperation among NGOs, IGOs, donors, and a host government. In other words, the provision of

some form of extended governing capacity is required when there is no effective government within a country.[133] Problems start when many organisations take up a specific project, because participation of a large number of organisations fragments responsibility and accountability of the project. [134] That is, if a large number of organisations participate, their responsibility and accountability become diluted and obscure. For example, the function of resource allocation and public expenditure may be performed sometimes by non-public, non-transparent agencies insulated from a universal system of responsibility and accountability. As a result, exogenous governance would create a situation where there is no one to blame for the poor implementation of programmes.[135] This is precisely what happened in Cambodia in 1994 which Chapter 9 will demonstrate.

CONCLUSION

Human Rights have gone through a revolutionary process since 1945. International legal orders that were once exclusively among states are becoming concerned, at least partly, with individuals. The granting of legal personality to individuals may be not only the most radical but also the most important event in the history of international law in the 20th century. And the very name, international law, is now no longer appropriate for the legal order that reaches down to the individual.[136] Together with the political change of the end of the Cold War, there are more attempts in international law to place responsibility on states for the protection of the human rights of their own nationals. A human person has become the central subject. In retrospect, however, the rapid development in human rights influenced international relations and helped to bring about the end of Cold War. These developments have been advocated by the increasing numbers of NGOs.

In the 1990s, this is reflected not only in the rise of NGOs but also in growing interests to develop a theory of NGOs placed in the context of civil society. After having examined the evolution of human rights and the rise of NGOs, the present chapter examined the human rights in the 1990s in the context of state sovereignty. In the 1990s,

the ad hoc tribunals for the atrocities committed in Bosnia and Rwanda set a precedent to create an international criminal court with jurisdiction over individuals. But any efforts to protect human rights tend to be viewed by states as attempts to limit their sovereignty. This is the reason why states such as the US resisted becoming a signatory to the establishment of an international criminal court.[137] The history of the UN, however, tells us that over the years states will, in order to improve their world image, accept international obligations which they earlier rejected.[138] The time has arrived for us to revise the view that guaranteeing human rights are purely national domestic issues. Human rights must be regarded as international and global.[139] The present chapter recognises, however, that there are also problems with regards to international efforts for creating the society founded on human rights within a state. Responsibility and accountability become obscure due to a large number of participants involved in such efforts.

This chapter considered the evolution of human rights in the context of state sovereignty. It showed how human rights have developed and changed. With help from NGOs, the evolution of human rights has affected international law that now considers individuals as the subjects to international law. It concludes, however, by asserting that human rights and state sovereignty still exist in a state of tension, but that this tension must not prevent human rights mechanisms from continuing to try to meet the difficult situations posed by the issue of refugees and internally displaced persons..

ENDNOTES

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CHAPTER 8

STATE VIOLENCE IN RWANDA

`the question is one of justice and humanity. Will the rich countries keep tolerating the slaughter of thousands of human beings because their deaths are no threat to them? If so, let us say it clearly'. Gerard Prunier[1]

INTRODUCTION

As discussed in the Introduction chapter, the two studies, Rwanda and Cambodia, were selected deliberately in order to explore the theoretical analyses made in the previous chapters. The logic used in the following two chapters is based on the diversity. This diversity approach is that the different types of illustration may be found in multiple studies. It can be useful for multiple studies which are intended to be descriptive and which are not oriented towards testing specific theoretical propositions. Together with the diversity approach, the methodology used within a case study is ethnography. The ethnography method is characterised as 1) gaining a close-up of detailed description of the real world, 2) claiming that all evidence is relative and therefore cannot be independent of a researcher; this favours participant observation as the main mode of data collection, 3) encouraging fieldwork to continue for long periods of time and in an unstructured manner, so that the regularities and rituals of everyday life can surface in a natural fashion.[2] The use of ethnography is defended on the grounds that it describes the close-up detailed real world and assumes multiple realities. By contrast, the other methods such as grounded method, quasi-experimental and case study method, assume that there is only a single objective reality. It must be clarified here that `the case study method' is different from `case studies'. The case study method is one of research methods used in case studies.

Participant observation was used for the data collection technique. This participatory technique, however, involves potential problems of invalidity and bias. To overcome such problems, triangulation was used. That is, using information from interview, documents and my own observations. With such converging evidence, the conclusion of study has more validity.

In the two studies, Rwanda and Cambodia, a number of similar and contrasting features have been found, as the following chapters will demonstrate. The main point of similarity is that people were displaced because their right to life in the name of right to live in peace was threatened. Having said that, the main point of contrast is, however, that in Rwanda, it was the repressive state that threatened the right to life in the name of right to live in peace, while in Cambodia, it was a situation of anarchy that violated the same right. This contrasting feature is inevitable partly due to the different stages of displacement examined by a researcher. The Rwandan case study was carried out at the initial stage of displacement, while the Cambodian case study was conducted at the stage of repatriation and resettlement back to the homeland after 13 years of the initial displacement. One of the important findings from the two studies is, however, that both an oppressive state and a situation of anarchy can be `equally' a great threat to the human rights of displaced persons.

I start this part of the thesis with an analysis of the Rwandan case. Refugees/displacement problems can arise, as this case study shows, from the violence of a state against its own citizens and can amount to the crime of genocide. It is placed in the background of an analysis of the country in both colonial and immediate post-colonial times, and it looks at the state violence that occurred in that country in 1994. One of major findings is that the ethnic massacre was not the result of acts committed by two ethnic groups which the state of Rwanda could not control, as is often argued by the media. It was the result, rather, of the conscious practices of a highly centralised state. The case study is also set in the context of Johan Galtung's works on the concept of state violence. Such a perspective considers the issue of how a state with an authoritarian system of social control imposed

from above deteriorated to the point of the extreme violence of the mid 1990s. It is argued that this situation reveals the difficulties in using references to state sovereignty in situations where states deny the obligations implied by sovereignty to provide protection and good government to all their citizens. The chapter ends by asserting that it was the state that violated the right to life of Rwandans in the name of state sovereignty. If proper governance is provided, Rwandans are willing and able to maintain orderly civilian life. The lesson to be drawn from Rwanda is that our society needs a philosophy upon which proper governance should be founded. That is, people's lives are more important and more sacred than states, religions and even a monothelitic God.

Dilys Hill poses a question, `How can universalistic human rights be incorporated into the foreign policy of sovereign states?' Hill continues that the starting point is the position that reference to human rights implies a society of mankind. On the other hand, foreign policy is concerned with the world of states by which humanity is divided into separate entities. Those who speak for governments act for the states not for the totality of mankind. Hill argues that the great purpose of states is the security and welfare of their citizens. States themselves are maintained by patterns of defence arrangements and of international trade. Neither concern, however, is advanced by paying attention to human rights. For states must give priority to international security particularly, in the period between 1945 and 1989, within the context of East-West relations. That is to say, states must maintain relations with governments in spite of their violations of human rights.[3]

After the end of the Cold War, regional conflicts attracted increased attention and concern. In the case of Rwanda, violence erupted on 6 April, 1994. It is estimated that 800,000 to one million people lost their lives and those who survived lost their trust in humanity. The question arises as to why this utter tragedy was allowed to happen in an age when the principle of human rights has been discussed, developed and recognised in international law. Establishing international human rights law does not automatically mean its implementation. If states have obligations to protect human rights as stated in international law, however, they should be bound to it by their agreements or by custom and practice. The standards internationally recognised must be met by domestic practice.

In this regard, Hill presents the view that if there is a correlation between rights and obligations, then there must be a correlation between rights and implementation, because the obligation defines what it is to implement the right.

Similarly, as R. J. Vincent says, human rights play a part in deciding the legitimacy of a state in international society. This means that it is not enough for a state to be sovereign, nor to be in accordance with the principle of self-determination. The state must act domestically not to offend the basic rights of individuals within its territory.[4] Focusing on the above statements made by Hill and Vincent - the relation between human rights and sovereign states and the implementation to protect human rights on the part of states, this chapter will explore the following three points: the historical development of the situation in Rwanda; the field research carried out on the border between Rwanda and Tanzania in July, 1994; and the lessons to be learned from the state violence in Rwanda, a state which had acceded to the Convention on the Prevention and Punishment of the Crime of Genocide on 16 April, 1975.[5]

HISTORICAL FOUNDATIONS

Nobody knows the exact origin of the Hutu, Tutsi and Twa peoples. What is understood is their common roots. They speak the same language, share the same territory and follow the same traditions. Divisions, however, had existed historically. The first German travellers in the late 1800s noted that the three groups acknowledged the Tutsi king (the Mwani), as the ultimate ruler. The Tutsi king Rwabugiri (1860-1895), in particular, imposed a harsh regime by introducing a feudal labour system (labour in return for access to land), that was restricted to Hutu peasants while exempting the Tutsi.[6] The Tutsi were cattle raisers and the Hutu worked as labourers. The chiefs and sub-chiefs were usually Tutsi who demanded labour and agricultural products in return for the protection of the Hutu. The Twa, a minority of pygmies who lived off hunting and foraging in the forests were regarded as inferiors by both the Hutu and Tutsi. Thus, the hierarchical order was the Tutsi, Hutu and Twa. Furthermore, the Tutsi were regarded as superior in their intelligence and beauty.[7] In 1948, J. Sasserath, a Belgian doctor, described the Tutsi as

tall, slim, having straight noses, high foreheads, thin lips, reserved, polite and refined. On the other hand, Sasserath described the Hutu, the majority of the population, as having flat noses, thick lips, low foreheads, brachycephalic skulls, and as being child-like, shy, lazy and dirty.[8] Though clearly conceived in biased and now unacceptable terms, it is clear that the German and Belgian colonial rulers also accepted distinctions between the groups. Intermarriage was not forbidden, but was very much disapproved of, although it did and does happen. The ethnic status of children of mixed marriages have always followed their father.

In 1885 the Berlin Conference decided that Rwanda should be under the responsibility of the German Empire, but kept only a minimum presence in the country. In 1914, the Germans had only five civil servants who covered the whole country; they supported the 'superior race theory'. By giving military assistance to the Tutsi, they controlled the country, thus intensifying the tensions between the groups. However, it was the Belgians who reinforced Tutsi domination. In 1924 after the First World War, Belgium accepted the League of Nations mandate to administer Rwanda and Burundi.[9] The Belgian trustee administration and the Roman Catholic church agreed that they would rule Rwanda indirectly through the existing political system which the Tutsi already dominated. The Roman Catholic Vicar Apostolic of Rwanda stated that 'the greatest harm that the Belgian government could do to itself and to the country would be to suppress the Tutsi caste'. It is said that his statement was influential in deciding to give preference to the Tutsi.[10] From 1930, the Belgians introduced identity cards including an ethnic categorisation, Tutsi, Hutu or Twa. Hutu who were successful in terms of wealth might be placed in the Tutsi category. On the other hand, Tutsi who failed would fall to the Hutu status. Identity cards determined liability for forced labour for Hutu and qualification for entry to the administrative school for Tutsi. After 1962 the cards were also continued under the independent Hutu republic, and which later used the identity cards to single out Tutsi for genocide in 1994.[11]

In 1931 the Belgians also abolished the system of chiefs: the land chiefs, cattle chiefs and army chiefs. They replaced it with Tutsi administrative chiefs effectively giving this

group overall administrative control of the country under the Belgian rulers. Many of the abolished land chiefs were, however, Hutu who were the heads of Hutu clans. Although the Hutu were oppressed in general in the traditional system, this Belgian policy made the relationships between the Hutu and the Tutsi more rigid and the divisions even more caste-like.[12]

The Belgian colonisers exploited the differences between the Hutu and the Tutsi for their own administrative purposes.[13] As a result, by the mid-1930s no Hutu held political office. Filip Reyntjens of the University of Antwerp has shown how the Belgian administration reinforced ethnic membership and turned the ethnic groups into political categories, such that the Tutsi were rulers and the Hutu were subjects. Reyntjens also notes that Rwanda and Burundi are among the few African countries with only two major ethnic groups (given the very small numbers of Twa people). The Hutu make up 85-90 per cent of the population in Rwanda while the Tutsi represent 10-15 per cent and Twa only 1 percent. By contrast, many other African countries have several ethnic groups that prevent bipolar opposition. A bipolar situation often breeds a manipulation of ethnicity for political purposes as the `enemy' is easy to identify. This is exactly what happened in 1994.[14]

In the early 1950s the UN put pressure on Belgium to prepare Rwanda and Burundi for independence. The UN criticised Belgium's colonial policy by which only a handful of the local population received adequate training to become high level national administrators. This policy appeared to reinforce a position whereby local people would not be capable of running their own countries. As African nationalism was rising in the continent and the colonial powers were retreating from it, the Tutsi began to question the power of the church and the Belgian authorities in Rwanda. At the same time, a group of Hutu educated in Catholic seminaries launched the Hutu Manifesto in 1957 in order to gain political power. They felt frustrated because their future was limited only to taking holy orders or becoming teachers in mission schools. Administrative employment was blocked to the Hutu.[15]

Being confronted with a rising tide against them, the ruling Tutsi asked the UN for early independence while they were still in power. As far as the Belgian administration, church leaders and missionaries were concerned, they felt let down by the Tutsi, whom they had supported for years and who now questioned their authority in the country. Thus, the Belgians suddenly shifted their support to the Hutu and embraced the idea of Hutu emancipation. There was also another factor that facilitated the shift of support. Swiss bishop, Monseigneur Perraudin, who held Christian socialist ideas of equality, democracy and social progress, boosted the Hutu cause. Rwanda was a model of colonial Christianity with almost 65 per cent of the population converted.

In 1959, the Hutu launched many violent attacks, which were supported by Belgium, against the Tutsi chiefs. 20,000 Tutsi were killed and many others fled the country. In January 1961 the Belgians supported a coup d'etat by the Hutu which proclaimed a Hutu republic. At the same time elections were held which were boycotted by the Tutsi monarchist party in the hope that the UN would invalidate them. Their protest, however, was ineffective. The Hutu were appointed to replace the former Tutsi chiefs and sub-chiefs throughout the country although most of them were unprepared and unfit for the positions. For the above reasons, the independent Hutu republic was not internationally recognised until 1 July, 1962.[16]

It should be noted that this outcome was the complete reversal of the previous policy of the Belgian administration. In any event, 100,000 Tutsi became refugees during 1960-61. They left for the neighbouring countries of Congo, Burundi, Tanganyika and Uganda. [17] It was at this time that the Hutu myth emerged. This myth held that the Tutsi were illegitimate invaders from the north (Ethiopia) who had tricked the Hutu into giving up their land and political autonomy in exchange for cows and beautiful women.[18]

As to these 1960s Tutsi refugees, Meeren raises the question as to why it took three decades for their children to win their way back to Rwanda from the countries to which they had fled. Meeren lists three reasons for this situation. They are 1) factionalism among refugee leaders, 2) border raiding, 3) Habyarimana's Regime. First, different

refugee leaders emerged in the four host countries of Congo (Zaire), Burundi, Tanzania and Uganda. Some of them were conservative Tutsi elite, members of the royal clan. Others were moderate and educated Tutsi who supported Hutu emancipation. Those who were moderates put their faith in the UN and refuted the use of violence which the conservatives advocated. Second, the border raids by the refugees gave rise to anti-Tutsi sentiment in Rwanda. Every raid was followed by reprisals against the Tutsi who still remained in Rwanda. Consequently the reprisals caused more refugees. Thirdly, in 1973 the northern (Hutu) leader Habyarimana gained power in Rwanda by overthrowing the former President Kayibanda. The country was split between the north and the south.

The former President Kayibanda from the south had favoured the central and southern regions while Habyarimana from the north accused the southerners of complying with the Tutsi as more Tutsi lived in the central and southern parts. In fact, the northern Hutu were independent until the first decade of the 20th century, when they were militarily defeated by the combined German and Tutsi-led southern Rwandan troops. To this day, the northerners are aware of a pre-Tutsi past. President Habyarimana, the northerner was, therefore, deeply suspicious of any reconciliatory gestures towards the exiled Tutsi community and also hostile to the Hutu political groups which favoured a dialogue with the Tutsi-led Rwandan Patriotic Front (RPF). It is said that this intra-Hutu division was the reason for the slow and flawed democratisation process in Rwanda. [19]

Nevertheless, in the early years of Habyarimana's rule (1973-1994), the position of Tutsi who still remained in Rwanda improved. Many held civil service employment or started import/export businesses. In fact, Habyarimana introduced a 10 per cent quota to accept Tutsi in schools, universities, civil service and teaching posts.[20] In the 1980s the situation, however, changed. The price of coffee collapsed and the IMF insisted on a programme of structural adjustment, which made it more difficult for Habyarimana to satisfy both the mainly Hutu northern people of his own, and the central and southern people of the Hutu and the Tutsi. As Meeren reveals, the northern Hutu extremists claimed that only the northern Hutu of the Gisenyi and Ruhengeri regions were pure Hutu, unaffected by Tutsi intermarriages and cultural influences. They also asserted the claim that the central and

southern Hutu, particularly those wealthy, educated and in opposition to President Habyarimana were `Tutsi-ized'. They were, therefore, traitors. In Meeren's view, the ethnic categories and the boundaries between the north and the south were manipulated for purely political purposes which tried to cover the abuse of dictatorial power by Habyarimana. Moreover, the impoverished country was suffering from the highest population density in Africa. Together with the scarcity of land, political manipulation was used by Habyarimana to justify excluding the Tutsi in Rwanda as well as refusing the repatriation of Tutsi refugees. [21]

Bonaventure Rutinwa notes that before 1994, Rwanda had gone through three major political crises which occurred in 1959, 1964 and 1972. All involved violence between the Hutu and the Tutsi and caused the loss of many lives as well as creating more refugees. The event leading to the genocide in Rwanda in 1994, however, is traced specifically to the attack launched by the Rwandan Patriotic Front (RPF) on 1 October, 1990. This attack did not succeed in overthrowing Habyarimana's government, but forced it to discuss power sharing with the Tutsi. The question remains, however, as to why the desire to return to Rwanda had been sustained and eventually achieved by the second generation of refugees who had never known Rwanda as their home, and who spoke English rather than French? Moreover, Rwanda was still, after all, a poor country, with the highest population density in Africa, yet without any resources for non-agricultural economic development and suffering from ethnic tensions as acute as ever.[22] To answer this question, we must first examine the background of the Rwandan Patriotic Front (RPF) which consisted of the second generation of refugees in Uganda, and attacked Rwanda on 1 October, 1990.

THE RPF IN UGANDA

By the beginning of the 1990s there were about 200,000 Tutsi refugees in Uganda. Many had settled in Ankole, where there was a similar ethnic pattern to that of Rwanda. In Ankole, the minority of cattle-owning Hima monopolised political power over the

majority of Iru who were farmers. The Tutsi refugees who had come with cattle settled in refugee camps. In 1960 they were accepted without any problems by the locals, but in 1969 and again the early 1980s they were victimised by President Obote of Uganda who was looking for an enemy against whom he could unite his party, the Protestant Uganda Peoples Congress. He targeted the Tutsi refugees in Ankole who were mainly Catholic and opposed to his party. In 1979 the Tutsi refugees formed the Rwandan Patriotic Front (RPF) in Uganda with the intention of overthrowing the Habyarimana regime in Rwanda. In 1982 Obote who felt threatened by the existence of the RPF expelled many of its members. In addition to the political conflict, there was a second reason why the Tutsi refugees were not happy with Obote. The Tutsi living in the refugee camps with their cattle had turned a large area in the south-western part of Uganda into a virtual desert, which, in turn, intensified poverty among them. In the meantime two generations of children had been born and had grown up without any access to adequate primary education. As a result, many Tutsi refugees supported Obote's opponent, Museveni, in his struggle for power and joined his opposition party of the National Resistance Army (NRA) to overthrow Obote.[23] It is said that Museveni is of Tutsi origin.

In 1986, Museveni's NRA captured the capital city, Kampala and overthrew Obote. At that time, 3,000 out of the 14,000 NRA militiamen were Rwandan. In the same year, the new Ugandan government considered offering citizenship to the Rwandan refugees, but this became diplomatically difficult as the Rwandan government saw such an action as a threat. In 1988 the Rwandan and Ugandan governments set up a joint ministerial commission to solve the refugee problem either by repatriation or resettlement in exile. Habyarimana agreed to have refugees repatriated if they had independent means of support and on the condition that they would make no claim to land. He refused mass repatriation, however, on the grounds that Rwanda was too overpopulated. Uganda was, however, also suffering from a land shortage, particularly in Ankole where many Tutsi refugees had settled.

The land shortage in the Ankole region of Uganda was also one of the main factors for the tension between Ugandans, the minority of Hima and the majority of Iru. This tension

also affected the Tutsi refugees. In 1989, in order to alleviate the growing tension in Ankole, the UNHCR was requested to investigate whether refugees would prefer to be repatriated or to remain in Uganda with eventual naturalisation. But before the investigation could be carried out, the Rwandan Patriotic Front (RPF) attacked Rwanda on 1 October 1990. Meeren explains the attack as resulting from a situation where the Tutsi seized their chance of defecting from the NRA with weapons, knowing that their future in Uganda would not be bright despite the fact that they had supported and helped Museveni gain political power. The second generation of Tutsi refugees felt that they did not have any alternative but to return to Rwanda because of their victimisation in Uganda. 24

It should be noted, however, that the research conducted in 1992 by the Refugee Studies Programme (Oxford) has shown that nearly all heads of households interviewed hoped for local integration in Uganda, following the example of Tanzania where more than 50% of the Tutsi refugees had entered a process of naturalisation. None implied a future predicated upon repatriation and only 8.5% indicated that they knew they had the right or possibility of repatriation to Rwanda some day.[25] Reyntjens gives an alternative explanation as to why the RPF attacked Rwanda on 1 October, 1990. The RPF, he argues, had always justified their violence on two grounds. One was that of democracy, human rights, and the rule of law. The other was the repatriation of the Tutsi to Rwanda. As Reyntjens points out, however, this justification of the need for violent attack is called into question since the two issues of democracy and repatriation had already been the subject of debate in Rwanda. In this regard, Destexhe says, in the previous two or three years prior to the attack of the RPF, an impressive movement in favour of a multi-party system, the rule of law and a respect for human rights had emerged in Rwanda. In addition, the monopoly of a one-party system had been questioned and independent human rights organisations had been set up.[26]

By the early 1990s Rwanda, then, was going through a similar process of democratisation to that in other African countries. Moreover, a `Special Commission for the Study of the Problems of the Rwandan Emigres' had been at work since February 1989 and published

its first report in May 1990. In addition, a joint Uganda - Rwandan ministerial commission on Rwandan refugees in Uganda had been meeting since February 1989 and had actually arranged a visit to Rwanda by refugees, which was to take place in early October 1990. It can be concluded, therefore, that the possibility of democratic progress and the repatriation process threatened the RPF with the loss of the solid ground of their cause against the dictatorship in Rwanda.[27] The RPF, therefore, had to attack when it did because they would have lost the legitimacy of their cause if progress was made on these two points in Rwanda. The attack of 1 October 1990 caused the loss of several hundred lives and many thousands were arrested. The RPF was aware of the danger to which the Tutsi who remained in Rwanda were exposed, but they were willing to accept sacrifices as many of them felt that the Tutsi in Rwanda were traitors.[28]

THE ATTACK OF RPF OF THE 1 OCTOBER 1990 AND ITS AFTERMATH

The RPF attack on 1 October, 1990 aggravated ethnic tension and united the Hutu around the Rwandan President, Habyarimana. Habyarimana then started a series of counterattacks against the Tutsi and his opposition Hutu by forming the militia and manipulating the media, both of which later contributed to the genocide. Habyarimana justified the anti-Tutsi programmes as self-defence for the Hutu. 'Dress rehearsals' for the 1994 genocide had, thus, started.[29] The two Hutu political parties, one called the Movement Republican National for Development (MRND) and the other called the Coalition for the Defence of the Republic (CDR) were formed by the extremists, both promoting a racist ideology. The militia were formed from the youth wings of the MRND and CDR in order to spread terror. They were given arms and military training by the Rwandan Armed Forces (FAR). Furthermore, the document issued by FAR headquarters was clear about who was the principal enemy and its supporters. The first was described as the Tutsi inside or outside the country - extremists who hoped to return to power - who had never recognised the 1959 revolution when the Tutsi were thrown out of power. These people, FAR argued, would take back power in Rwanda by any means including the use of arms. The second enemy was described as anyone who gave any kind of support to the main enemy.[30]

As a result of these assertions, the militia terrorised the Tutsi as well as the Hutu who supported democracy and negotiations with the RPF. Destexhe stresses that the MRND and CDR regarded the Hutu democrats as traitors because the racist parties had the most to lose if political change and reconciliation with the Tutsi were realised, and everything to gain if they were prevented. At the beginning of 1991, more than 1200 Bagogwe, a clan stemming from the Tutsi, were killed in the north west of the country by the armed militia close to the government. In March 1992, in the region of Bugesera in the south, the Hutu killed around 300 Tutsi. At the beginning of 1993, 300 civilians, mainly Tutsi, were killed by the Hutu militants in the north of the country.[31]

In March, 1992, after the events in Bugesera, the five Rwandan Human Rights associations published statements which claimed that the massacres appeared to be the result of a strategy which aimed at setting the country in turmoil for the government's hidden political agenda. Janvier Afrika, the director of **Umurava** magazine, published an article which described in detail the way in which people close to the President were manipulating the situation. He stated that some 25 members of the death squads actually included President Habyarimana himself, three of his brothers-in-law and a son-in-law. In addition, on March 8, 1993, the International Fact-Finding Commission on Human Rights in Rwanda which was sponsored by the International Centre For Human Rights and Democratic Development in Canada, released its report in Montreal, Brussels and Paris. The report stated that human rights violations had been massive and systematic with the deliberate intent to target a particular ethnic group and political opponents. It also pointed out the responsibility of the head of the state and his immediate entourage, which included his family, for the grave actions of the `death squads'. It called upon President Habyarimana to respect human rights and urged the Rwanda Patriotic Front to stop attacks on civilians. Upon the release of the Commission's report, Belgium withdrew its ambassador to Rwanda and announced it would reassess its policy toward Rwanda. The report also urged Canada to cut its $17 million aid to the Habyarimana regime and to withdraw its ambassador to Rwanda following Belgium's lead.[32]

In this tense political climate, on 4 August 1993, the Arusha Accords were signed in Tanzania. Tanzania played a major role as mediator, dealing with the root causes of violence and conflicts in Rwanda.[33] This attempt was said to be novel and timely when the major Western powers and the UN were paying less attention to African problems and 'turning their attention to the crises closer to them in Bosnia and Eastern Europe'.[34] All the concerned parties were involved in negotiations for reconciliation and the establishment of democracy in Rwanda. The provisions included political power sharing with the members of the RPF, the repatriation of the refugees and the deployment of an international force to supervise their implementation (the UN Assistance Mission for Rwanda- UNAMIR).

President Habyarimana and the extremist Hutu parties, however, managed to delay the implementation of the Accords.[35] Habyarimana and his political supporters aimed to preserve their control of the state and the means to accumulate wealth which that control provided. In fact between 1993 and 1994, the number of militia members had increased from 5000 to 40,000. Besides strengthening the militia, however, there was another important factor which contributed to the genocide of the Tutsi in 1994. This was the impact of the radio broadcasts. In many parts of Africa, a transistor radio is still the only source of information. In Rwanda, Radio Mille Collines was set up in 1993 by two associates of Habyarimana (his brother-in-law Alphonse Ntimavunda and his son-in-law Felicien Kabuga). The station began broadcasting terrible messages of hate such as 'the grave is only half full. Who will help us fill it?' The monthly journal **Kangura** also contributed by spreading anti-Tutsi racism.[36]

In spite of many indications available through international as well as local NGOs and through the increasing violence and propaganda by the media in Rwanda, no judicial or police inquiry was made by the UNAMIR until early 1994. In January 1994, the police force of the UN peacekeeping operation UNAMIR was tipped off by an insider that an extermination plan was in place. He mentioned arms caches, ammunition depots, the training of military and militiamen, logistical support from the army and the security forces and the organisation of death squads. The UNAMIR investigated and confirmed

these allegations. For the city of Kigali alone, a network of about 30 cells existed, each of which had about 20-30 armed militiamen who were ready to strike if the order was given. This was so well-organised that they were able to kill one thousand persons per hour within one hour of the initial order.[37]

Similarly, Gerard Prunier states that some people had knowledge of `death lists' and some public figures such as the former manager of the Central Bank, Jean Birara tried to warn foreign governments. But the impeding violence was regarded as the Rwandan problem, deeply embedded in the ambiguous folds of the national culture. `Hutu popular culture' was always on the same theme, that is the evil role of the Tutsi in Rwanda history. The period between the Arusha Accords and the genocidal explosion is called `Igihirahiro' (the time of hesitation and uncertainty) - which it was.[38]

The UN Force Commander General R. Dallaire was also convinced of the seriousness of the information and warned the UN, asking for permission to search and disarm the militiamen. The reply from New York was that such an operation would be `offensive' and inconsistent with the UN mandate.[39]

On 6 April, 1994, Habyarimana flew to Dar-es-Salaam to meet President Ali Hassan Mwinyi of Tanzania, Vice-President George Saitoti of Kenya, Provisional President Cyprien Ntaryamira of Burundi, and President Yoweri Museveni of Uganda. The main topic was the situation in Burundi, but the discussion soon turned to Rwanda and became an indictment of Habyarimana's refusal to implement the Arusha Accords. The attack was led by Museveni and Ali Mwinyi, but even Ntaryamira, `Hutu brother', spoke up to reproach the Rwandan President. Habyarimana faced the criticism that implied threats in case he failed to implement the Arusha Accords. President Museveni accompanied the distressed Habyarimana back to the airport and asked him to honour his signature.[40] The presidential jet, a four-year-old Falcon 50 flown by a three-man French crew, a gift of President Francois Mitterrand to the state of Rwanda, was waiting for Habyarimana. As President Nataryamira was tired and as his own propeller-driven aircraft was much slower and less comfortable than the Falcon, he asked Habyarimana for a lift. It was then

decided that the two heads of state would fly first to Kigali, Rwanda. Then, after dropping Habyarimana there, the plane would go to Bujumbura, Burundi. This was never to be. At about 8:30 p.m. local time as the Falcon 59 was coming in low to Kigali airport for landing, two missiles were fired from just outside the airport. The aircraft received a direct hit, crashed in the garden of Habyarimana's house and burst into flames, killing all on board. There are several theories of the murder of Habyarimana. Prunier holds the view that Habiyarimana was killed by members of his own circle who began to fear (or perhaps knew) that the President was going to comply with the Arusha Accords. But it is not yet known who was behind this assassination.

The plane was shot down at 8:30 p.m. and by 9:15 p.m. there were already roadblocks everywhere in town and houses were being searched. Even before the national radio station announced the death of the President, death lists were circulated to identify Hutu opponents who supported the democratic movement and human rights.[41] Reyntjens argues that the genocide was initially presented as `ethnic warfare' by the international media. But the violence was based on political motives. People who were killed were `opponents', Hutu and Tutsi alike: politicians opposed to the president or supporting the Arusha Accords; persons active in human rights; leaders of civil society, journalists and the Tutsi, all were considered to be allies of the RPF. So, not only the Tutsi but also their political sympathisers were victims of the genocide.[42]

With regards to the term, genocide, the Convention on the Prevention and Punishment of the Crime of Genocide reads:

> genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, such as: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[43]

According to Gregory Stanton, the Convention deliberately avoided prohibiting extermination of political groups.[44] This may lead to the interpretation that genocide is not an elimination of members in whole or in part because they are political enemies, but because he or she was born into a certain ethnic group.

In fact, ethnic identity cards were used in order to single out the Tutsi in the 1994 genocide.[45] As physical characteristics do not always provide sufficient identification, it was the identity cards that were demanded at the roadblocks set up by the militia. Because control of the road could not alone ensure that no Tutsi escaped, the militia divided up the territory under their control so that one man was allocated to every ten households to search for Tutsi. In this way, every Tutsi family could be denounced by someone who knew them personally. Students were killed by their teachers, shop owners by their customers, neighbours by neighbours, wives by husbands in order to save themselves from their own deaths. Churches where Tutsi sought refuge were targeted and 2800 people in Kibungo, 6000 in Cyahindam, and 4000 in Kibeho were killed.[46]

These are only a selection of examples. As stated earlier in this chapter, in Rwanda the children of mixed marriages take the ethnic group of their fathers. Radio Mille Collines stated at the end of April, `By 5 May, the country must be completely cleansed of the Tutsi' and `We will not repeat the mistake of 1959. The children (of mixed marriages) must be killed'.[47]

In my view, what happened in Rwanda was genocide. The members of a certain group had become political enemies and a threat to the existing political establishment. As a result, the government carried out the killing of Tutsi with an intent to destroy them as a whole. Political leaders who wanted to keep power, manipulated ethnic tensions among people in order to achieve their political agenda. It was, therefore, political as well as ethnic. It should be noted here that the International Convention on the Prevention and Punishment of the Crime of Genocide had been ratified by Rwanda in 1975.[48]

When the massacres began in Kigali, French and Belgian troops evacuated their own nationals within a few days. The UN called for a cease-fire before the main body of UNAMIR troops pulled out. The UNAMIR forces were reduced from 2500 to 270 men while the genocide was reaching its peak. By the end of April, it was estimated that 100, 000 people had been killed. By Mid-May 200,000 and by the end of May half a million. Although there was no way of knowing the actual death toll, thousands of corpses were washed away towards Lake Victoria through the River Nyaborongo. It was described by the Hutu as the shortest way back to Ethiopia which was considered the origin of the Tutsi. At this time, no international action was taken because of the unwillingness of the US. The events in Iraq, Somalia, and Bosnia made the US unwilling to act as the police force to the world. The Clinton administration began to refuse some of the demands made on it by the UN. Furthermore, the US aimed at reducing the contribution which consisted of 30 per cent of the total budget for the peacekeeping operations. As a result, the Security Council refused to acknowledge the massacres as genocide for this would have obliged them to intervene under international law.[49] The UN was prepared to act only for humanitarian aid. But as Medecins San Frontieres has said, `Genocide cannot be stopped by doctors'.[50] As a result of the genocide, millions were seeking refuge in villages in Rwanda, Zaire, Tanzania and Burundi. The Tutsi who had survived either fled the country or were internally displaced in the areas held by the RPF. With the RPF troops advancing, the architects of the genocide organised a mass exodus of the Hutu population. In July 1994, they broadcast their propaganda over the radio, and forced everyone to leave Rwanda or the French-controlled security zone inside the country. It is said that this was a deliberate strategy to empty the country of its people by the time when the RPF advanced into Rwanda.[51] The RPF claims that the previous regime tried to move people to an area where it would be possible to organise and train them for another war against the RPF.[52]

FRENCH INTERVENTION

It was two months after the genocide had begun before France intervened. Although Belgium had ended military cooperation in Rwanda in 1990 and reduced non-military

assistance in 1993, France did the exact opposite and tripled its aid from 1990. On 1 October, 1990, when the RPF launched its attack, Belgium intervened to protect and later evacuated its nationals and then withdrew all military troops. On the other hand, France remained in Rwanda and supported President Habyarimana by stopping the RPF advances. In fact, France increased the number of soldiers of its elite Rapid Action Force, which totalled 700. In 1993 Rwanda, with a population of seven million, was receiving 55 million French francs or $10 million as military aid annually. This placed it sixth on the list of African countries which received such aid after Cameroon, Central African Republic, Ivory Coast, Djibouti, Gabon and Senegal.[53]

The link between France and Rwanda is explained by the French historical relationships with Africa in general, the increasing English-speaking influence in Africa, and the personal relationships between French politicians and businessmen and individual African leaders. In any event, France decided to put an end to military aid, when the UNAMIR arrived in Rwanda, at the end of 1993. In spite of its links with the former regime of Habyarimana, however, France was the first to launch humanitarian operations on 22 June 1994, two months after the beginning of the genocide. For this action, Destexhe says, France must at least be credited for having attempted something when the international community was indifferent to the tragedy, although he points out several negative factors in the intervention. First, it was limited to a humanitarian operation, therefore it did not contribute to resolving the political problems. Second, it did not control the propaganda of the assassins. Radio Mille Collines was able to continue broadcasting until mid-July, three weeks after the arrival of the French. Nor did French soldiers try to arrest the perpetrators of the genocide. Destexhe asserts that this was what France should have done in order to restore its credibility by demonstrating a desire for justice. When France finally left, the situation in Rwanda was chaotic and caused further displacements of refugees into Zaire.[54] The study of the historical development of the situation in Rwanda is helpful to an understanding that the causes of human tragedies in Rwanda are very complex. One factor builds a block for the next and all actors and factors interrelate and interact contributing to the total picture.[55] After having examined

this historical background, the following section will present the study which examines displaced people as a result of violence which erupted in Rwanda on 6 April, 1994.

OPERATIONS IN THE REFUGEE CAMPS IN NGARA DISTRICT

In the Ngara District near the border between Rwanda and Tanzania, there were three camps, Benaco (190,000 refugees), Lukole (8,500 from Burundi) and Lumasi (40,000). The reasons for visiting Ngara and talking to refugees, NGOs and UNHCR personnel were as follows: 1) to see the extent of the horror caused by the genocide through my own eyes as mass media often exaggerates or marginalises a refugee situation, 2) to understand in depth why a large scale of killing erupted in Rwanda, 3) if there was any feeling that the state-violence could have been avoided. The population in question consisted of Hutu and Tutsi who had fled Rwanda since 6 April 1994 and settled in Benaco refugee camp. Despite its importance, the study involved no direct observation of Rwandans in their own country where their lives were exposed to violence. This shortcoming of the study was due to the limited resources and dangerous situation which made it difficult for the researcher to enter Rwanda in July 1994. The study, therefore, relied on unstructured interviews for this data. Informants included refugees, Tanzanian locals, delegates and representatives from the UN Children's Fund (UNICEF), World Food Programme (WFP), Care International (CARE), Concern, International Federation of Red Cross, Tanzanian Red Cross Society, Oxfam, African Education Fund (AEF), Medecins Sans Frontieres (MSF) of France, the UNHCR and the ECHO. In speaking with refugees, our conversations were interpreted chiefly by two UNHCR officers from Chad and Somalia who were fluent in French. Due to the urgent situation confronting many international workers in Ngara, there were a few written reports available (in contrast with the situation in Cambodia); one I had an access to was a document written by the UNHCR officer in Ngara District.

This study first looked at the whole operations in Ngara District which were conducted by the UNHCR and NGOs so that one could understand the magnitude of the effect caused by genocide. For operations in refugee camps, the NGOs normally receive their

funds from the European Community Humanitarian Office (ECHO) in Brussels. However, in the case of Ngara, because of the urgency of the influx of refugees, ECHO channelled its funds through just two UN agencies, the UNHCR and the World Food Programme. These two major programmes were chosen because of their proven record in the field and because of their ability to respond rapidly to the crisis.

They, in turn, allotted funds to the various UN agencies and NGOs. The number of NGOs were limited by the UNHCR from the very start to avoid the duplication of services and each NGO had a specific responsibility according to its own expertise.

In Ngara, the UNHCR had, without question, the authorisation to organise and coordinate all the operations of the UN agencies as well as NGOs. They included the UN Children's Fund (UNICEF), World Food Programme (WFP), Care International (CARE), Concern, International Federation of Red Cross, Tanzanian Red Cross Society, Accion Internationale Contre la Faim (AICF), Oxfam, International Rescue Committee (IRC), International Committee of Red Cross (ICRC), African Education Fund (AEF), Medecins Sans Frontieres (MSF) of Spain, France and Germany. There was a debate when I was there as to whether the UNHCR should also take the leading role inside Rwanda to help internally displaced persons. Some argued that the UNHCR should not be involved with internally displaced persons as there were many NGOs that were capable of providing services to them. Such a situation raises the issue of fragmentation, cooperation and effective delivery of aid among the NGOs. The role of UNHCR would appear to be to give an overall lead, to organise effective action, and provide legitimacy for intervention. This last-named function is crucial, given the theoretical and practical issues of sovereignty and intervention in the internal affairs of a state. This crisis situation of the Rwandan conflict gave the UNHCR an opportunity to assert its legitimate intervention. It was dependent, however, on the NGOs already in the area for the actual implementation of its aid. As a result, cooperation between such bodies was crucial. Observing this cooperation - or attempted cooperation - in action was an important part of this field study. If the groups were to give a real constituent to relieving what was a crisis situation, then they had to cooperate and provide a comprehensive service. How did they achieve this?

The UN officials and the NGO staff in Ngara stated that they had an unusually harmonious working relationship among themselves. They worked as one large unit with differing skills and expertise. This success was, it was said, was partly due to the personality of Maureen, the UNHCR officer in charge of the entire operation in Ngara District and partly due to the size and urgency of the influx of refugees, which made every agency willing to sacrifice its own visibility in providing services to the refugees. For example, the UNICEF official said that he had received several phone calls from its headquarters in New York asking him, `Where is UNICEF? We saw Benaco Camp on CNN, but did not see any sign post of UNICEF'. Such pressures were resisted in the urgency of the situation.

Some 200,000 Rwandan refugees, predominantly Hutu, had fled into Ngara District, Kagera Region during a 24 hour period on 28 April. The Government of Tanzania permitted the entry of all those who arrived. Furthermore, it identified a site for the camp near Benaco, on a tarmac road, 17 kms from the Rwandan border, which had the only available surface water in the area. During the first week after the influx of 200,000 refugees, their needs were dealt with by some 25-30 staff of 3-4 voluntary agencies and the UNHCR. Within 24 hours of the influx of refugees, Medecins Sans Frontieres (MSF) of Spain and France started the construction of an emergency water supply. The first food distribution was made within 96 hours of the refugees arriving. In the following week all the UNHCR's implementing partners in the Ngara emergency operation arrived. The Tanzanian Red Cross set up an emergency medical post on site, and within 3-4 days other medical agencies joined them. These actions demonstrate the administrative capacity of the major NGOs to deliver services with a degree of effectiveness and urgency. It was crisis that brought staff together and provided the immediate collaboration effort needed.

The daily influx of the refugees was approximately 500 when I was there. The Kobero Joint Venture, constructing the road funded by the EU to the Burundi border, also undertook a contract with the UNHCR for the refugee camp site development. There was evidence that collaboration was proving effective. The Kobero Joint Venture dug

drainage channels and latrines, with additional inputs from International Red Cross. The NGO agency of Care International (CARE) managed food storage, and another NGO Concern was responsible for its distribution. The fact that only CARE was responsible for food storage turned out to be highly efficient in taking food out of the storage to distribution points as there was no need to get the approval of other NGOs. UNICEF was trying to develop an educational programme in cooperation with UNHCR and UNESCO. The same agency was also considering a programme to help the children who suffered from psycho social trauma. Oxfam and UNICEF were working on permanent water supply including well drilling. With the help of Ugandan drilling teams, 24 wells were made in the refugee camps and two were in Ngara town for Tanzanian local residents to keep them less hostile towards refugees. MSF of France and Spain provided refugees with medical care. It seemed that food, water, and medical care were not a problem between refugee and host country, and Tanzanian locals opened markets inside the refugee camps to sell other daily necessities such as raw meat and bottles of soda. What did give rise to difficulties, and which led to complaints from the Tanzanian government, was deforestation. The refugees had cut many trees for fuel for cooking which compelled the Tanzanian government to start a programme of planting to avoid deforestation. Other problems observed were poor hygiene due to shortage of toilets and looting due to lack of a trained security force in the refugee camps. The conclusion that can be drawn here is that direct amelioration of the suffering experienced by refugees can be effectively provided where international agencies and NGOs work together in the field. What is more problematic are relations with the host country, in this case Tanzania.

BENACO CAMP

The Ngara district was used to evaluate the role of UNHCR and NGOs in addressing an international human rights crisis. Benaco Camp was used to examine a different aspect of the refugee situation. The aim was to try to find out why such a large scale killing erupted in Rwanda and if there was any feeling that the state-violence could have been avoided. Benaco refugee camp was selected out of three camps in Ngara District for the purpose of the case study. It was situated one and half hours away from the town of Ngara. The

reason for its selection was the sheer size of the refugee population (190,000) which was not only the largest refugee camp in Ngara but also in the world at that time. It was considered by the researcher that this refugee camp might reflect the society of Rwanda and the diversity of population and opinions better than other two smaller camps. The case study required almost daily visits to Benaco refugee camp between 5 July and 18 July 1994 for unstructured interviews with refugees, UNHCR and NGOs personnel.

The Hutu and the Tutsi lived together in Benaco camp with the Hutu in the majority. This cohabitation did not seem to cause a major problem. One Hutu man explained through the interpretation of the UNHCR officer from Chad, that the Hutu and the Tutsi used to live harmoniously in his village, in fact he was married to a Tutsi. Although it was very important to ask if his Tutsi wife was with him in Benaco camp, I was afraid to do so. The fact that the Hutu and Tutsi were able to live together in Benaco refugee camp as well as in Rwanda in the past indicates that the genocide was an example of the terrible breakdown of the society and state violence directed from the top rather than civil wars breaking out between themselves.

The camp was a structured society and a town in itself. Out of the 190,000 refugee population, approximately 50 community leaders participated in a community meeting held at the UNHCR office every Tuesday and Friday. It was said that community leaders in a refugee camp were the chiefs of the tribes in Rwanda. Some stated that they used to work as farmers, teachers and a medical doctor. In one meeting, women's participation was discussed; as a result eleven female community leaders came forward to subsequent meetings. Their selection process remained unknown to outsiders. These women argued for more involvement of women in decision making process because they were the ones who had information on family members and other children. The other topics in the community meeting included the selection of a `police force' and volunteers to help registration exercises to count the number of refugees in the camp. Again, female leaders said that there was only one female among three hundred members of the `police force' and only eight were female out of forty-six volunteers for registration exercises. They also talked about the problem of those sick people who did not seek help from the hospitals

available to them, a situation which remained inexplicable to outside observers. At the end of the meeting, a male leader questioned a UNHCR staff member if they could be paid as representatives of the community. The reply was, if they were paid, that meant they were working for the UNHCR. It was, therefore, not right for them to get paid. The atmosphere in the meeting was cheerful and high-spirited as everyone was eager to contribute to the improvement of living conditions in the camp. But one UNHCR staff member explained to me that many of these community leaders had taken part in the genocide in Rwanda. The community meeting in the camp showed that with the proper guidance, in this case that of the UNHCR, Rwandans were willing and able to live in a harmonious way. During my stay, the UNHCR staff were very busy with the task of issuing family cards to refugees. This card covered the whole household so that a family could receive an adequate amount of food at the distribution points according to its size. The UNHCR staff felt that this task should not be entrusted to refugees nor to Tanzanian staff, due to a fear that they might make a deal to add several extra members of the family who did not exist. As the UNHCR was suffering a lack of staff of its own, I was considered to be useful and worked from 9:00 am to 6:00 p.m. every day for two weeks. This experience brought me into close contact with refugees and the way in which they lived. Each family member had to appear in person to verify the actual number of family members. As they were counted, we used scissors to cut a plastic band which had been placed on the wrist of each refugee by the UNHCR staff previously so that they would not reappear to claim the family card again or join other families simply to help them increase the amount of food distribution to be received. Some families brought their dying family members on stretchers as they also needed food to eat. In the course of close physical contacts with refugees, their poor hygiene was observed. It was explained by the UNHCR field officers that this was attributable to the lack of toilets in the camp in general and the densely populated site.

The process of issuing family cards was not as fast as the refugees wanted partly because of the shortage of the staff and partly because of the lack of cooperation from refugees. As they had to wait in queue for a considerable time, they became increasingly agitated. In fact, it was almost impossible to keep them in a queue in spite of the fences created for

its purpose. At one point, a large group of young Rwandan men threatened to riot and attack us by claiming that they could not bear to wait any longer. One of the UNHCR field officers from Somalia told them that they could not frighten her with such a threat. And she immediately phoned on a mobile telephone to ask for help. The UNHCR field officers in charge of security arrived and persuaded them to calm down.

There were also some other incidents. While issuing family cards, several children came over the fences running towards the plastic bag which contained disposed wrist bands, stole them and ran away before being captured by the UNHCR officers. Despite the difficulty to wear a wrist band which was once cut by scissors, their intention was to gain more family cards so that they would receive more food which could then be sold in exchange for money or other goods.

These incidents showed that the atmosphere in the camp could be at times very tense, in spite of the attempts to organise camp life around community leaders and through community meetings. It very much depended on the structure that the NGOs and the UNHCR were trying to make as a surrogate government for Rwandans. This is the key observation to understanding part of the complexity of the Rwanda situation. The argument of this thesis is that the breakdown in human rights and the subsequent genocide was a top-down, ruling elite induced conflict. Where the possibilities of structured administration, or `governance', existed, as in the refugee camps, then some orderly civilian life could be maintained.

On 10 July, the head of the UNHCR, Sadako Ogata visited Benaco Camp from Geneva. She said the operation in Ngara district was considered the best among all the UNHCR operations in the world. She continued by saying that her view was not based just on the written reports which she had received, but was also based on her talks with many who had visited the camps. It was said that the main purpose of her visit was to raise another $100 million in order to continue to provide the services to the refugees for another 6 months in Ngara District. It should be noted that over the period April to December 1994,

approximately $1.4 billion was allocated by the international community to respond to the crisis situation of displaced Rwandan people.[56]

Meeting people in the camp revealed the extent which many people had foreseen the breakdown of Rwanda. One of them was the Belgian representative from ECHO. After having visited the camps in Ngara, he said that the EU should have intervened and helped to resolve the conflict in Rwanda before the genocide occurred. He continued by saying that the EU had foreseen two or three years previously that Rwanda would be involved in the civil war partly because of the radio propaganda against the Tutsi and partly because of the RPF preparing in Uganda to overthrow the Habyarimana regime. He also asserted that the reason why the government in France had supported the late President Habyarimana was that he had made financial contributions to the political party to which Francois Mitterrand belonged. He continued, this kind of practice was very common among all African state heads. Then, he proceeded to say, he would report to ECHO that after having considered the scale of human sufferings which had been inflicted on Rwandans and the amount of money to be spent, political action should have been taken by the international community before such a catastrophe was allowed to happen.[57] It should be noted that most of NGO personnel who were involved in the Rwandan situation in the past, held the same position.

THE NEW FLOW OF REFUGEES INTO ZAIRE

On 14 and 18, July, it was reported that about 850,000 refugees crossed into Goma, Zaire. As a result, my departure was delayed two days because all the airplanes were scheduled to fly to Goma for the emergency operations. When it was finally possible to board the Red Cross plane, it first had to make a stop at Goma Airport so that it could unload food supplies for the Red Cross staff. From the plane, one could see Goma being a very crowded town even without refugees. Therefore, with refugees, it was extremely `packed' and appeared almost ready to `explode'. The pilot in our plane said that a few days ago when he had tried to land at Goma Airport, bomb shells had been flying nearby. There was a sight of refugees `residing' along the airport runways as that was the only spot left

for them. It appeared that they had not yet been provided with tents, food nor water. The only sign to indicate that they were `residing' not just sitting down on the ground for rest, was smoke rising into the sky while they cooked.

After the Red Cross plane unloaded its provisions, our plane was not allowed to take off. This was due to our pilot who refused to pay bribery to the airport officials, therefore we had to remain there for a while. During the waiting time at the airport, a large plane of Medecins Sans Frontieres and many other small planes of other NGOs arrived. A few hours later, our plane was finally allowed to take off while the pilot was fuming with anger and cursing in the plane. Seeing this operation myself highlighted the difficulties inside Zaire and the problem of trying to ensure Zairian officials to behave in non-selfish ways. In fact, the corruption among them made the operations to help and save 850,000 refugees even more difficult. It was reported later that in one camp in Goma, 4,000 refugees died as a result of violence at the hands of the undisciplined Zairian soldiers and other refugees. 50,000 refugees also died as a result of a combination of cholera, dysentery, dehydration and violence within the first month in Goma.[58] After having glimpsed the situation in Goma, these numbers were not surprising.

Participating in the refugee situations in Tanzanian and Zaire showed the extent of the horror of the breakdown of civil society in which refugees flow occurred. Refugees were living in situations far more severe than I could possibly have imagined through the media at home. In the end, the experience shared by a survivor of the genocide in Rwanda must be told. This is not to inspire, though it does inspire, but to give an idea of a kind of experience which people in Rwanda had gone through.

He was working as a driver for one of the aid organisations in Tanzania when I met him. Although his nationality was Tanzanian, he had lived for many years in the capital city of Kigali, Rwanda with his wife, children, brother and his parents until genocide emerged. The family had a successful transport business there. According to him, the airplane in which Habyarimana boarded was shot around at 9:00 p.m. on 6 April 1994, but he did not know the news until 11:00 p.m. on the same night when his friend in Burundi phoned

to inform him. Then, he heard shooting outside which started around 1:00 am and lasted all night. In the following morning, the outside became quiet. So, he went out only to find his neighbours, a Tutsi family, all lying dead in blood. Consequently, he and his family had stayed inside the house for 14 days because killing continued in Kigali. Although his family members were not Tutsi nor Rwandan, it did not matter who they were. They had lived in a constant fear of being killed by the soldiers who often visited to loot their home during this period. One of the most difficult things was, he said, not knowing whom to trust. After 14 days, his family were instructed by the soldiers to go to the stadium. On their way to the stadium, they saw a huge number of dead bodies lying along the street which made him think at least one million people must have been killed. He said he did not believe the estimated number of the dead, (200,000) which the foreign press later reported as a result of the first two weeks killing in Kigali. When his family were near the stadium, they met the Libyan ambassador who was their family friend who suggested that they should not go to the stadium and assisted them to come to stay in his embassy. After having spent one week there, the family decided to cross the border to take refuge in Tanzania. When they succeeded in crossing the border with every family member being alive, he felt as if he were the richest man in the whole world, although he lost everything material in Kigali. Then, he added, he would never be able to trust anyone again. I suggested, `time may heal'. He said, `if it does, it would take a long time.' I thanked him for sharing his experience with me.

ACTOR-ORIENTED PERSPECTIVE AND STRUCTURE-ORIENTED PERSPECTIVE

The documents of pre- and post-colonial history of Rwanda, the genocide in 1994, my observation in Benaco Camp, and unstructured interviews conducted during my field trip illuminated one thing. That is, a small number of greedy and aggressive leaders are able and willing to kill millions of innocent, ordinary people and to forcefully displace them in order to maintain power and wealth. Along a similar line, Mikhail Gorbachev says, a lesson to be drawn from the twentieth century is that depending on the will of political

leaders, it is either possible to maintain the democratic path or to let the entire world sink into chaos.[59] Needless to say, Rwanda belonged to the latter.

Galtung may argue, however, that this kind of perceptive is almost infantile. It focuses on concrete entities such as individuals, whom it sees as evil. Galtung calls such an approach an actor-oriented perspective and says that it is too simple and concrete to capture a permanent state of repression, or the slow transfer of wealth known as exploitation or the slow death known as starvation. Galtung takes the view that human affairs need to be looked at from the structure-oriented perspective as well as actor-oriented perspective. The former catches types of evil, material, or non-material repression without presupposing that individual actors are evil. For example, an imperialistic structure can have disastrous consequences, and there are actors around to operate it. However, those actors that are particularly visible may only be doing their jobs. It is millions of such people doing their jobs in a certain manner that constitute a structure such as the imperialistic one. So if harm is being done to somebody, where can one find the evil actor in it? Galtung answers that nowhere and all is `business as usual'. One perspective tends to be structure-blind, but the other tends to be actor-blind in the sense that one is insensitive to the peculiarities of actors by categorising them merely as `bourgeois', `proletariat', or `centre' versus `periphery'.[60]

The point Galtung tries to make is that both perspectives are complementary and necessary in order to make for a rich explanatory framework. If the case of Rwanda is seen from the structure-oriented perspective, it was a society developed over the centuries into a highly organised state with an authoritarian system of social and political control from above. This was not only the case with the Tutsi-dominated pre-colonial feudal kingdom but also with the German and Belgian administrations. They ruled and strengthened control from above through layers of chiefs who regulated the economy and the life of the peasants. And this highly organised and centralised social control facilitated policies aiming at the manipulation of the rural people who received instructions from above without the means to disobey.[61] The events which had unfolded in Rwanda were, thus, not the collapse of the state structure, but the systematic refusal of the government to provide the state's protection to all the citizens of a country.[62] From the actor-oriented

perspective, however, the series of events in Rwanda were the direct result of corrupt political leaders who encouraged mistrust among people through the manipulation of the media so that they could maintain power and wealth. In my view, corrupt leaders breed corrupt structures and vice versa. Moreover, corrupt leaders and structure both breed corrupt collaborators. The three are inseparable.

The study on Rwanda illustrates the centrality of the problem of human rights violation by states against their own citizens. As Chapter 5 showed, a key issue in refugee and displacement situations is the basic one of the right to life and the duty of states to protect it. The right to peace, I argue in Chapter 5 and repeat here, is a natural extension of the right to life. The government of the Rwandan state violated this right on a massive scale.

CONCLUSION

The violence in Rwanda has shown how hollow the reference to state sovereignty has become as the state denied its obligations implied in sovereignty. That is, to provide protection and a good government to all citizens of a country. The same term was also frequently cited by the international community to explain its lack of concern and commitment.[63] It should be noted, however, that these violations come not only from states themselves, but may arise from different sources. The phenomenon of terrorism, although often the direct consequence of state actions, is exercised on other occasions by individuals acting not under the orders of a state but in opposition to it. Individual rights, that is, are subject to violation from both state and non-state sources. It is, therefore, not possible to say that a state was necessarily the only source of violations of human rights. But it cannot be ignored that the state, which should be the first to guarantee the rights of man, remains the main and most serious source of violations of the rights of the individual.[64] And, in Rwanda, it was the state that violated the basic human right - the right to life of its citizens.

The study used in this chapter has sought to show how the particular events of displacement of people in Rwanda can be set in the context of state violence and a

complete disregard for the international order of human rights despite that fact that it had ratified the International Convention on the Prevention and Punishment of the Crime of Genocide in 1975. It has illuminated what the abusive and selective exercise of state sovereignty can do to its own citizens. The government authority in Rwanda manipulated and intensified ethnic difference between the Hutu and the Tutsi so that a handful of leaders in the government could justify and retain political power and wealth. As the situation of Benaco Camp revealed, where the possibilities of structure administration or `governance' existed, some orderly civilian life could be maintained. It very much depended on the structure that the NGOs and the UNHCR were trying to make as a surrogate government for Rwandan refugees. The lesson drawn from Rwanda is that the right to life cannot not be violated in the name of state sovereignty. To put it more clearly, this basic right cannot be violated in the name of religion nor in the name of God. In order to create good governance, we do need a philosophy which clearly states that people's lives are more important and more sacred than states, religions and monotheistic God himself.

It must be noted here that the Steering Committee of the Joint Evaluation of Assistance to Rwanda, in its evaluation of 1996, reported on several human rights initiatives taken by the UN. Three key areas were essential to the promotion of the process of national rebuilding: establishment of the International Tribunal for Rwanda, reconstruction of the justice system and assistance to the UN human rights field operation. With regards to the first of these factors, in January 1996, thirteen months from its establishment, the Tribunal issued its first indictments of suspected war criminals - eight alleged leaders of the genocide. Secondly, several initiatives were set up to re-establish the justice system of Rwanda. This was a difficult task: creating a new political culture in which differences are settled through discussion and not through violence. Furthermore, with assistance from ICRC, the Netherlands and UNDP, the conditions of Rwandan prisons and jails in which approximately 60,000 detainees remained did improve to some extent. Finally, the UN human rights field operation in Rwanda went through a re-examination in order to make its operation more relevant and effective. It had previously been perceived as a failure in the first stage of its operation, due to an

ambiguous mandate, inferior recruitment procedures, limited logistics and resource support and poor coordination between headquarters and field staff. In addition, difficulties arose because of the apathy, if not hostility, of the Rwanda government and a highly politically-charged environment.[65]

This re-examination has already changed UN practice generally. Although the UN has been trying to promote human rights in Rwanda, it is too early to tell the outcome for this country. However, in the words of this press release from the Steering Committee, 'If the world community cannot learn from Rwanda, it cannot learn at all'.[66]

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CHAPTER 9

CAMBODIA

INTRODUCTION

> `Everybody's persecuted. The poor by the rich, the rich by the poor, the black by the white, the white by the black, the men by the women, the women by the men, the Catholics by the Protestants, the Protestants by the Catholics and of course all of them by the Jews.... And what's really amazing is that you can't find anybody who's persecuting anybody else.'
>
> Arthur Miller, Broken Glass[1]

The Rwandan case study has revealed that the right to life in the name of right to live in peace, was violated by the state in the name of state sovereignty. A second case study, Cambodia was chosen in order to show that this basic right can be violated by not only oppressive states but also where the state apparatus has broken down. John Gray states that most of those who died by violence in the 20th century were killed by the agents of states. It seems, therefore, reasonable to conclude that the state should be the first priority of anyone who cares about human rights. Gray goes on to say, however, that this is a view far removed from the realities of the post-cold war world. Some of the worst violations of the past decade occurred in circumstances where the state was fracturing or had disintegrated.[2] In other words, the anarchy which lacks a central authority can be as great a threat to human rights as oppressive states.

The case study in this chapter is based on a study of Cambodia culminating in two week field trip in February 1994. The Cambodian case was chosen for the following reason. When I had worked in refugee camps on the border of Thailand and Cambodia in 1992, repatriation was about to take place. My personal feelings at that time were, to put it simply, `if the High Commissioner for Refugees, Sadako Ogata had her own family members as Cambodian refugees, she would never encourage them to go back to

Cambodia'. There were too many risks involved in the repatriation process. For example, many land mines remained in Cambodian soil and the Pol Pot military force was still active in rural areas. This raised a question of the `right to life'.

One of the main findings in this chapter is that in the situations where the state had disintegrated, the right to life could be violated as Gray suggests above. For example, in the course of `voluntary' repatriation, Cambodian refugees were forced to leave the camp as it was closing down. The UNHCR could not intervene in the involuntary repatriation because the subjects were under the state sovereignty of Thailand. When they returned to Cambodia, the situation of availability of land was constrained by the landmines, and the resources were under the state sovereignty of Cambodia. Thus, the UN and NGOs fell between sovereignty on the one hand and international humanitarian aid on the other. This led to the outcome in which no-one assures responsibility given the fragility of the legally established government, although the UN and NGOs were supposed to play a role of surrogate government to provide `good governance' to citizens. This is the result of lack of central authority in a situation where many participants are involved. In such circumstances, the UN and NGOs seem to lose sight of the people they are supposed to serve in the first place. The chapter concludes by asserting that even the UN and NGOs, with purposes embedded in humanitarian ideals, lost sight of the people they are supposed to serve.

The field trip was divided between two cities, the capital city of Phnom Penh and the city of Battambang in Battambang Province, in the north-western part of the country. The type of case study (descriptive), the method (ethnographic) and the data collection technique (participant observation, interviews and documents) have already been explained at the beginning of the previous chapter. The subjects in question were refugees, returnees and internally displaced persons in Cambodia in 1994. The chapter first examines Cambodian history. Second, it describes the field operations of NGOs and UN agencies and the efforts for creating good governance founded on human rights. Thirdly, the problems of exogenous governance are analysed.

POLITICAL DEVELOPMENT AFTER THE PARIS AGREEMENTS SIGNED IN 1991

Political development in Cambodia at the time of visit by the researcher was as follows. On 23 October 1991, the Cambodian peace treaty was signed in Paris. The Paris Agreements created a system which was based on two main aspects. The first aspect was the Supreme National Council (SNC) which consisted of six people from the Phnom Penh regime installed since 1979 and another six people from the three factions which fought against the Phnom Penh regime: the supporters of Pol Pot, Norodom Sihanouk and Son Sann. The SNC was headed by Prince Sihanouk. The second aspect was that the UN would be responsible, during a transitional period, for controlling the creation of peace and for dismantling 70% of the various military forces, in order to organise free and fair elections. The UN was also responsible for controlling the existing administration in Cambodia while creating a neutral political environment. The involvement of the UN took effect in two stages to achieve these goals. In the first stage, immediately after the Peace Agreements, a preparatory mission of 268 men from 23 countries created the structure for the good offices offered by the UN-Secretary General. This was called the United Nations Advance Mission in Cambodia (UNAMIC). Its task was to receive all information regarding the number of the protagonists, their personnel and equipment, to launch prevention programmes against mines and to provide all information necessary for setting up the United Nations Transitional Authority on Cambodia (UNTAC). In the second stage, UNTAC was deployed six months after the Peace Agreements to implement the programmes and to achieve the goals set by the Paris Agreements.[3]

UNTAC was the largest United Nations operation in history. It involved 22,000 UN personnel: 17,550 military personnel, 3,600 civilian police and 850 civilians. International support for reconstruction and rehabilitation amounted to US $880 million which far exceeded the US$595 million requested by the UN Secretary-General in his Appeal for Cambodia in April 1992. [4]

Four main parties contested the elections in Cambodia: the FUNCINPEC[1], the Cambodian People's Party (CPP), the Khmer Rouge[2] and the KPNLF[3]. FUNCINPEC, Norodom Sihanouk's party, was headed by his son, Prince Ranariddh. Its strength was Sihanouk himself, who still embodied the image which could move the people into action, the great majority of whom considered him to be the saviour of Cambodia. FUNCINPEC was a true party of the expatriates. Among them were young intellectuals who were competent but said to be cut off from the day-to-day reality which the majority of Cambodians faced.

The second main party, the Cambodian Peoples' Party (CPP), was born from the Vietnam-backed installation of the regime on 7 January, 1979. The party was called the Peoples' Revolutionary Party of Kampuchea, later changed to the Cambodian Peoples' Party (CPP) on 18 October 1991. The renamed party adopted new political platforms to advocate democracy, human rights and a market economy. Any reference to communism or socialism was abandoned. Despite the change, it is said that the leaders of the party still held to a political culture of communism. Hun Sen, a pragmatic reformer, was the prime minister. Nevertheless, his political success was not enough to enable him to resume the leadership within his own party. The real head remained Chea Sim, the effective master of Cambodia who controlled the army, the police and the security and administration services.

The third major party was the Democratic Kampuchea Party (Khmer Rouge), whose leadership had been responsible for the deaths of between one and three million Cambodians between 1975 and 1979. Pol Pot, Neon Chea, Ieng Sary, Khieu Samphan, Son Sen, Ta Mok and other political or military heads controlled some 13, 000 to 15,000 soldiers. The party was gaining support in the poor rural areas and recruiting young people, in particular the 16-18 age group who did not remember the period of 1975-1979. The Khmer Rouge based their stance on opposition to the Phnom Penh regime,

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[1] The Front Uni National Puour un Cambodge Independant, Neutre, Pacifique et Cooperatif.

[2] The Democratic Kampuchea Party.

[3] The Buddhist Democratic Liberal Party (KPNLF).

characterised by widespread corruption, and a growing gap between the rich and the poor. It refused to take part in the elections. The fourth and final party was the Buddhist Democratic Liberal Party (KPNLF), also a party of the expatriates. Some of them had fled the country around the time when the former President Lon Nol and his entourage left Cambodia for Hawaii on 1 April, 1975. It was established among the Cambodians exiled to the US and in control of Site 2, which was the most populated refugee camp (141,214 refugees)[5] in Thailand. The KPNLF was divided deeply between two leaders, Son Sann and Ieng Mouly. The party was identified as the one which lacked a single charismatic leader.[6]

The field trip took place from 2 to 16 February 1994. It was two years and two months after the Paris Agreement was signed, nine months after the repatriation of 365,000 refugees was completed and eight months after the national elections were held. Under the supervision of UNTAC, more than 4.7 million Cambodians, or some 96% of those estimated to be eligible, registered to vote. Nearly 90% of the eligible voters cast their ballots on 23-28 May 1993. As a result, Prince Sihanouk's party, FUNCINPEC, headed by his son Prince Ranariddh, won 58 of the 120 seats in the Constituent Assembly. The Cambodian People's Party (CPP) won 51 seats and the Buddhist KPNLF obtained 10 seats. Out of the other 17 parties who were registered for the elections, only one party, Molinaka, won a seat. The Khmer Rouge, which did not fully participate in the peace process, also refused to take part in the elections. After the elections, the Constituent Assembly was expected to adopt a new constitution by September 1993 under which a new government would be formed. The Supreme National Council of Cambodia (SNC) which had functioned as the authority embodying the sovereignty of Cambodia, would then end, and the mandate of UNTAC would also cease.[7]

Immediately after the victory of FUNCINPEC, Prince Sihanouk announced that the party would form a coalition government with the Cambodian People's Party (CPP). Although some criticised this move as a sign of ignoring the result of the elections, the others recognised its merits. First, in order to frame and adopt a new constitution, a two-thirds support in the Constituent Assembly was required. FUNCINPEC did not win half of the seats, therefore it seemed inevitable it would have to form a coalition government with

the CPP. Second, given its military power and political experience of ruling the nation, the CPP was far more experienced. In fact a feeling prevailed in Cambodia that FUNCINPEC finally became equal to the CPP only because it gained more votes in the elections. That is to say the popularity of FUNCINPEC among Cambodians enabled it to stand side by side with the CPP. Furthermore, what FUNCINPEC feared most was a military coup by the CPP. If the soldiers and police officers thought that they would lose their jobs after the electoral victory of FUNCINPEC, they could have readily supported a CPP military coup.

Sihanouk's announcement of a coalition government with the CPP, therefore, had a great effect in easing the tensions among the soldiers and police officers and in suppressing a possible coup. Furthermore, after the election, UNTAC immediately made an announcement that it would help to pay salaries to government employees. This was regarded by some observers as an excellent combination play between Prince Sihanouk and the UNTAC in order to stabilise the political situation. A coalition government normally has a fragile political base, it is, therefore, often considered an unfavourable option. But for Cambodia, where the chief aim was to achieve national reconciliation after years of violence and hatred, one might say that a coalition government was appropriate in a period of transition.[8] Such was the political climate under which the study of refugees and internally displaced persons was conducted.

THE HISTORY OF CAMBODIA

Before the examination of refugees and internally displaced persons, the following section will set the historical context, an essential component in understanding the problems of displacement. The history of Cambodia is very complex. It is said that the Khmers'(Cambodian) civilisation reached a peak around the 9th century. King Yasorvarman I (889-990 A.D.) built the first city of Angkor, northwest of the Great Lake. King Yasorvarman also created intricate canals and dams. As a result a series of canals linking every town in the country was created, and ships were able to reach even the least accessible areas. This successfully controlled irrigation system also enabled the Khmers to produce three or four harvests a year. This strong economic power afforded

the following kings of Angkor to become expansionists in the region. In the 12th century, Angkor Wat, the most famous `temple-mountains' of all, which each Khmer king had erected to his own glory, was built by Suryavarman II who waged wars on all his neighbours. However, the peak period was followed by the decline of Angkor during the 13th and the 14th century. In the following centuries, Thailand and Vietnam expanded their kingdoms by eroding Angkor. In the early 19th century, Cambodia was reduced to the point where the king received his crown from Thailand and paid tribute to Vietnam.[9]

In the 19th century, France made Cambodia her protectorate, which assured the continuing existence of Cambodia in the region. France, however, used Vietnamese personnel as officials to rule Cambodia. This French policy intensified the hostility that had always existed between Cambodia and Vietnam due to the territorial disputes in the past. In a sense, it was a successful colonial policy to redirect the resentments of the colonised towards another country, Vietnam. In 1941, France selected Prince Sihanouk as the crowned king of Cambodia because of his flamboyant youthfulness and as someone who could be easily manipulated. In 1941, Japan occupied much of Southeast Asia. In March 1945, as the Allied forces approached Indochina, Japan ordered the Emperor of Vietnam, the King of Laos and the King of Cambodia to declare independence. However, their independence evaporated with Japan's defeat. Nevertheless, Sihanouk was able to profit from France's struggle with the post-war resistance movements in Vietnam and, on 9 November 1953, claimed Cambodia's independence from France.[10]

On 21 July 1954, the Geneva Conference agreed to the temporary division of Vietnam into north and south and also recognised the independence of Cambodia. It also guaranteed that the Viet Minh, communists from North Vietnam, would withdraw from the eastern areas of Cambodia that they had used in their war against the French. It seemed that Cambodia was lucky to gain international recognition of its independence from France, given that Vietnam was divided into two. The provision that all-Vietnam elections would be held within two years was never honoured, and later became a source of controversy.

There was, however, a dark side to the Cambodian settlement. The Geneva Agreement created a split among Cambodian communists. The North Vietnamese accepted the terms of the Geneva Agreement, which required the Cambodian communists to integrate with Sihanouk's political structure. As a result, some of the Cambodian communists went to Hanoi with the Viet Minh while the others stayed in the jungles and hills inside Cambodia. The latter group saw the Viet Minh's acceptance of the Geneva Agreement as a betrayal of the Cambodian revolution. This group later became the main body to form the Khmer Rouge.[11] Furthermore, on 8 September, 1954, the Southeast Asia Treaty Organisation (SEATO) was created as the regional defence organisation by the Collective Defence Treaty. This treaty was signed by the representatives of Australia, France, New Zealand, and Pakistan, the Philippines, Thailand, the UK and the US, and it entered into force on 19 February, 1955. The formation of SEATO was a response to the demand that the area be protected against Communist expansionism. Vietnam, Cambodia and Laos were not considered for membership in SEATO for the reasons largely relating to the 1954 Geneva Agreement which ended the fighting in Vietnam.[12] In any event, it is evident that in Southeast Asia political tensions between the East and the West intensified during this period.

Subsequently, Sihanouk tried to establish an autocratic monarchy which was non-aligned in foreign policy and neutral in the Vietnam War in order to preserve Cambodia's independence from its neighbours and the superpowers. This, however, became very difficult after 1965 when the US decided to increase its political and military commitment to the anticommunist regime in Saigon. The Nixon-Kissinger administration became irritated by the Vietnam War, which had been dragging on in an increasingly contentious situation, and considered Sihanouk's neutral policy intolerable. Moreover, Sihanouk turned a blind eye to the Vietnamese communists who sought sanctuaries in the eastern areas of Cambodia.

On 18 March 1969, the US Air Force began a secret B-52 bombardment of Vietnamese communist sanctuaries in the rural areas of Cambodia. Exactly one year later, on 18 March 1970, Sihanouk was overthrown by General Lon Nol, while Sihanouk and his wife were on a trip to Moscow and Peking. Simultaneously, the peaceful era in

Cambodia, which had managed to maintain unity as a nation, ended. Next day, on 19 March 1970, the US government stated that Sihanouk had been legally deposed and that there was no question of recognising the new Cambodian government. In the following month, on 30 April 1970, American and South Vietnamese troops crossed into Cambodia and attacked the communist bases. The US Congress was shocked by the White House's intervention in Cambodia. On 11 May, 1970, the US Senate took the first step to approve an amendment introduced by Senator John Sherman Cooper (R-Kentucky)[13] and Senator Frank Church (D-Idaho)[14] to prevent any future US military operations in Cambodia. On 22 December, 1970, the Cooper-Church amendment became law and prohibited the use of authorised funds for sending US troops into Cambodia.[15]

Publicly, the White House accepted this law, but secretly continued bombing in Cambodia from 1970-1973. During this period, the Khmer Rouge used the devastation and massacre of Cambodian civilians as propaganda to recruit new members and to gain more support from the people.[16] As a result of bombing and fighting, two million of the eight million Cambodian population became internally displaced.[17]

In November 1972, Nixon was elected President for a second term. On 27 January, 1973, the Paris agreement on ending the war in Vietnam was signed.[18] In 1974 and 1975, the US started cutting aid to the Cambodian government. It was a fatal decision for the Lon Nol regime. The Khmer Rouge had more arms than ever before, provided by China. On the other hand, nothing had changed for the Lon Nol forces except less ammunition.[19] On 1 April 1975, as the Khmer Rouge forces advanced, Lon Nol and his entourage left Cambodia for Hawaii, via Indonesia. Eleven days later, the US embassy was evacuated. On 17 April 1975, five days after the US embassy's evacuation, the Khmer Rouge entered Phnom Penh. (Thirteen days later, on 30 April 1975, Saigon fell to the North Vietnamese)[20]. 'The years, that will long be remembered as the years of unprecedented horror and suffering' in the history of mankind, started.[21]

Cambodia (the Khmer Republic) was renamed as Democratic Kampuchea. Under the Pol Pot regime, the country was cut off from the outside world. All foreigners were expelled

from the country. Schools and hospitals were closed and the nation's currency, wages, and markets were abolished. All the city dwellers were forced to relocate in villages and made to work hard under deplorable conditions with little food and no western medicine. Many families were separated. The educated class of professional and civil servants were considered `bourgeois' who could not work hard as peasants. Many became the victims of genocide. All religions and ethnic cultures were destroyed. The groups of Vietnamese, the Chinese and the Muslim Chams were either driven out of the country by the Pol Pot regime in the first year after its victory or murdered.[22] As a result, Cambodian's infrastructure collapsed. In the end the state, which had acceded to the Convention on the Prevention and Punishment of the Crime of Genocide on 14 October, 1950[23], killed one to three million of the nearly eight million population.[24]

In this period, Vietnam and Kampuchea (Cambodia) had quarrelled over the offshore islands and their promised oil deposits. Fighting along the border between the two countries worsened. In January 1978, the Vietnamese launched a massive invasion. The situation in which a communist nation invades another communist nation stemmed not only from the rivalry between two countries, but also the deteriorating relations between Vietnam and China which supported the Pol Pot regime. In fact, China was the only country which was allowed to have access to Cambodia during the Pol Pot regime. On the other hand, China's relations with Vietnam had deteriorated after Hanoi's takeover in Saigon on 30 April, 1975, with Peking apprehensive of the power of a united Vietnam.

As a result, Vietnam turned to the Soviet Union for support. Vietnam claimed that China was encouraging the Khmer Rouge's fight along the border with Vietnam and feared an invasion by Cambodia that was backed by China. Kampuchea was also afraid of an invasion by Vietnam supported by the Soviet Union. It was in this context that on 25 December, 1978, Vietnam launched an attack toward Phnom Penh. And on 7 January, 1979, Phnom Penh was captured and a new Cambodian government was installed on Hanoi's terms. Cambodia (Democratic Kampuchea) was renamed as the People's Republic of Kampuchea.[25]

The Vietnamese invasion created streams of refugees toward Thailand. Until then, Cambodian `society' was held together by fear and force. When the Vietnamese arrived, everything collapsed.[26] Although many in the first wave were pushed back by the Thais, more people started gathering near the border on the Cambodian side. More than 60,000 emaciated dying persons were given extensive media coverage, which caused an outcry of sympathy in the world. As a result the Thai authorities opened the border with Cambodia, and the thousands who had waited on the Cambodian side entered to receive food, medical assistance and shelters. By early 1980, about 160,000 people stayed in the UNHCR holding centres from where resettlement to third countries was processed.[27]

The Western nations (and Southeast Asian nations and Japan) and China would not recognise the Vietnam-backed Phnom Penh regime for different reasons. They continued to recognise the Pol Pot regime which escaped to the Thai border. Furthermore, they imposed a development aid embargo on Cambodia to protest against the Vietnamese occupation.[28] But in 1982 as the massacre committed by Pol Pot was revealed to the world, the West did something unthinkable. In order to avoid international criticism of support for the Khmer Rouge, it assisted in the creation of `the coalition government' of three political factions, Son San (former Lon Nol supporter), Sihanouk, and Pol Pot, and managed to give `the government in exile' a seat within the UN. In spite of the protest by the Eastern block nations against the presence of the Khmer Rouge's delegation in the UN, its credentials were approved by the UN General Assembly resolution 38/2 on 20 October, 1983 without a vote.[29]

For the US, China was no longer the enemy, but Vietnam was still an enemy. It was the same situation with China. For China, the US was not an enemy but Vietnam was a reactionary nation hostile to China. Southeast Asian nations also considered Vietnam as a dangerous communist nation in their region. Moreover, China and the US were the major powers with whom they would prefer to align themselves. For Vietnam, Pol Pot was not only an extreme nationalist but also a follower of the interventionist, China. For the Soviet Union, `the coalition regime' of three political factions was nothing but a by-product of conspiracy between US imperialism and Chinese ideology which was likely to threaten the Soviet Union's base in Asia - Vietnam. Japan, for its part, was the nation which always tried to behave as a friend of the US. In the case of Cambodia, by doing so,

Japan gained support not only from Southeast Asian nations but also from China. This very complex political situation, however, changed after the end of the cold war.[30]

In the post-Cold War period, there was no longer a reason for fighting in Cambodia. Indochina looked as though their economy was turning around. China was prospering economically. The superpowers considered Cambodia as an obstacle to improving relations between them and wanted to benefit from China and Indochina economically. For this reason, the US withdrew its support from 'the coalition regime' of three factions and became hostile to the Pol Pot faction. The US was eager to restore relations with Vietnam which was attracting many overseas investors. By the early 1990s, the former Soviet Union, China, Thailand, and Vietnam also wanted to strengthen economic ties with the US and to establish their own economic interests in Indochina. As a result, these nations were keen to bring peace to Cambodia. In addition, the former colonist France, which had strong economic interests in Indochina, together with Indonesia, Australia and Japan, embarked on a mediation in the peace process in Cambodia.[31] Then, as stated earlier in this chapter, on 23 October, 1991, the Cambodian Peace Treaty was signed in Paris. One can conclude that this tragic history was that of a small nation which had been tossed about by the superpowers.

REFUGEES

In the Cambodian Peace Treaty, there were three humanitarian tasks relating to the peace process: repatriating and rehabilitating some 370,000 refugees living in the border camps in Thailand and other countries; resettling 186,000 internally displaced persons; organising the return of 200,000 soldiers to civilian life. The deadline for these tasks was May 1993 so that everyone could participate in the elections which were expected to be held at the end of that month.[32] The following section will examine the first two humanitarian tasks: refugees (returnees) and internally displaced persons. This analysis is based on participant observation, informal interviews and the documents obtained in Cambodia. As was indicated in the Introduction to this chapter, the purpose of the Cambodian case study was to examine the problems of refugees and displaced persons in the context of the human rights and state sovereignty and how this is affected when the

governance of a society virtually collapses. During the field trip to Phnom Penh and Battambang, the returnees (refugees who returned to Cambodia) and internally displaced persons were interviewed as well as personnel from UN agencies and NGOs. The UN personnel interviewed included those from the United Nations High Commissioner for Refugees (UNHCR), the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF) and the United Nations Educational Scientific and Cultural Organisation (UNESCO). NGOs personnel interviewed were from American Refugee Committee (ARC), Association to Assist Refugees (AAR), Cambodia Family Development Services (CDFDS), Cooperation Committee for Cambodia (CCC), Handicap International (HI), International Federation of Red Cross and Red Crescent Societies (THE FEDERATION), International Rescue Committee (IRC) and Japanese Red Cross Society (JRCS).

Under the Paris Agreement of 23 October 1991, the UN had the task of organising and implementing the voluntary repatriation of some 370,000 Cambodians living in the seven border camps in Thailand and other countries. The Memorandum of Understanding among Thailand, Cambodia and the UNHCR to this effect was signed on 15 November 1991. In the following month of December, a sub-office was opened in the city of Battambang which, in turn, facilitated the opening of three field offices in the cities of Pursat, Sisophon and Siem Reap. Along with the office of the Charge de Mission in Phnom Penh, these offices provided the administrative and operational support to six reception centres, Otaki and Tuol Makak in Battambang Province, and one each in Siem Reap Province, Sisophon, Pursat and Phnom Penh.[33]

The UNHCR also maintained its presence in the three areas of the northwestern province, Banteay Meanchey, which were under the administration of the political parties of the KPNLF, FUNCINPEC and the Khmer Rouge. These areas were located in Thmar Pouk District (KPNLF zone), and Ampil District (FUNCINPEC) and Yeah Ath in Sereisophon District (Khmer Rouge). It was said that the UNHCR presence was possible because it was able to establish an early and close cooperation with the four Cambodian political parties which were signatories to the Paris Peace Agreement. As well as setting up the field offices and reception centres, on 15 March 1992 the UNHCR became

integrated into the UNTAC repatriation component. This integration was beneficial to the UNHCR in gaining support of the UNTAC military, civilian police, electoral, human rights and civil administration.[34]

In the repatriation programme, there were other UN agencies and NGOs which greatly contributed to the operations. The UN agencies included the UNICEF for assisting women and children, providing village wells and water pumps in Cambodia, the World Food Programme (WFP) for the distribution of food, the World Health Organisation (WHO) for controlling and eradicating diseases such as tuberculosis and leprosy, and the UNESCO for literacy training to demobilised soldiers. NGOs included Christian Outreach (CO) and Concern which were involved in building accommodation and service facilities at the reception centres, the Cambodian Red Cross (CRC) helped administer the assistance options which refugees wished to choose, CRC and Care International (CARE) for transportation to final destinations, Japan Volunteer Centre (JVC) supervised the maintenance and repair of the vehicles involved in the operation, and Handicap International (HI) was engaged in demising the areas where a group of people wished to return. In addition, the International Federation of the Red Cross and Red Crescent Societies (IFRC) advised on reception centre management, distribution of assistance and transport in the faction zones, and mobile health teams. Holt International, the Women's Association of Cambodia (WAC), Help the Aged and Handicap International, for their part, assisted vulnerable individuals (handicapped, amputees, aged, mentally or physically ill) by conducting interviews, counselling, direct assistance or referral to other agencies at their final destinations.[35] In the repatriation programme, the UNHCR and the UNTAC co-ordinated and organised the operations. The merits and demerits of their implementation of the programme will be discussed later in this chapter.

The first official movement of refugees returning from the Thai border camps took place on 30 March 1992, and completed by the end of April 1993. As a result, some 362,200 refugees and externally displaced persons had returned from the Thai border camps under UNHCR auspices. Nearly all of them returned in time to participate in the elections and all the border camps in Thailand were closed at the end of April 1993. In

addition, during the same period some 1,129 Cambodians were repatriated by UNHCR from Indonesia, 633 from Vietnam, 214 from Malaysia, 1 from Singapore and 1 from Hong Kong. Nearly all of them returned in time to participate in the elections.[36] I concluded that, after having interviewed some of the returnees and NGOs staff involved, the UNHCR repatriation process was on a whole was a success, taking into account all the problems such as the deep-rooted animosity and suspicions prevailing among Cambodians. In fact, many observers did not believe that such a large repatriation could be safely completed in such a short period. For example, in the report written by Raoul M. Jennar on 15 March 1992 - 15 days prior to the first official repatriation of 30 March 1992 - he states that the UNHCR repatriation plan was 'unrealistic and unworkable'.[37]

Evidence gathered for the case study, however, supported the belief that the repatriation was successful, both for the refugees and the international agencies. For example, if questions were asked of the returnees about their lives, they said that it was very difficult to live in Cambodia and that they missed being taken care of in the Thai refugee camps. However, when asked further if they wished to go back to camp life, they said, 'NO'. There were, however, exceptions to the rule in the case of the returnees who faced much harsher environments in Battambang (their situation will be discussed later in this chapter.) Nevertheless, it seemed that the returnees in general were experiencing more freedom in their own nation. I understood this only too well, as I had worked for three months in the largest Thai border refugee camp called Site 2 just before the repatriation began. On many occasions, I witnessed how terrified the Cambodian refugees were of the Thai police force which was in charge of the refugee camp. The evidence from international agencies was also generally positive. The NGO delegates from Handicap International(HI), the International Federation of Red Cross and Red Crescent Societies (FEDERATION), and the Association to Aide Refugees (AAR) as well as the UN representatives from the UNICEF, the UNESCO and the UNDP all stated clearly that repatriation was successful. This observation is important. What initially seemed impossible - the task to repatriate 3,7000 refugees - was successfully carried out by the NGOs, UNHCR and UNTAC. But, if objectivity made the researcher recognise and accept the positive aspect of the repatriation, it is also important to note some serious problems which took place during and after the process.

PROBLEMS WHICH SOME REFUGEES FACED ON RETURN TO CAMBODIA

It was a large scale repatriation which was completed in a very short period, though it was reported by the UNHCR that it had already started the preparatory work by studying the absorptive capacity of Cambodia and setting up a repatriation structure and plan in 1990 when political reconciliation in Cambodia was likely to be achieved.[38] Even so, it took only one year to implement the plan which required setting up reception centres, registering nearly 370,000 refugees, uniting them with their relatives, protecting vulnerable individuals and preparing the areas of agriculture, health, education, communications, demising, security and food distribution. This was a massive task and, as a result, problems arose from the speed at which the process was implemented.

Voluntary Repatriation?

As far as the protection of human rights was concerned, the UNHCR had created, according to its own report, a system what ensured the voluntariness and freedom of choice of all returnees. In the case of refugees who did not wish to return to Cambodia, the UNHCR sought to establish whether they had a well-founded fear of persecution.[39] In the case of refugees who did not wish to return to Cambodia, but did not qualify for the category of `well-founded fear of persecution' for resettlement in a third country, they had no other choice but to return to Cambodia since the Thai border refugee camps were closing down. This situation raised the issue of forced or involuntary repatriation.

The UNHCR fax of 15 April 1993, obtained by the researcher in UNHCR Phnom Penh office, suggested that more people would come forward as the refugees felt that this was a more desirable option than being booked on illegal immigration charges and being sent to police station jails. On 23 April, a further UNHCR fax describes the situation in the largest Thai refugee camp of Site 2. It says that there were some 400 individuals (later it was restated as 700 individuals) who refused to return to Cambodia. While a number of

refugees came forward, many others were still `trapped by their leaders or spokesmen'. The same fax says that the Thai authorities indicated that it would apply Thai `policy' and not law to these refugees who insisted on staying in the refugee camp at the end of the repatriation period, i.e. on 28 April 1993. This Thai `policy' included imprisonment, fines, and deportation.

On the 27 April, UNHCR sent a fax to the chief of mission in Phnom Penh who, the previous evening, had requested UNHCR buses and trucks to pick up people in Cambodia who had been forced by the Thai authorities to repatriate against their will from Site 2. The UNHCR staff rejected this request by saying that the UNHCR would not participate, in any capacity, in the non-voluntary repatriation of Cambodians from Site 2. The following day, 28 April, a UNHCR fax announced that the Cambodian repatriation operation from the Thai border refugee camps was completed. There were, however, `700 individuals' who remained in the camp. The same UNHCR fax goes on to say that it expected that the Thai authorities - primarily police and immigration - would begin their action against them within days. On the 29 April, the third UNHCR fax explains what happened to the individuals who remained in the camp, based on information passed on from the Thai authorities, since the previous authorisation to allow four UN staff to be stationed in Site 2 had been rescinded the night before. According to the Thai authorities, some 20 unarmed Thai policemen entered the camp to arrest a number of refugees on charges of illegal immigration. Several of them fled and others resisted arrest. Some, in seeing their fellow members being placed on police cars, laid themselves on the road to block the departure of the police cars. Eventually two individuals were arrested. No injuries were reported. Two arrests were said to be symbolic and were meant to send a message to other individuals in the camp according to the Thai authorities.

Later, in the afternoon of the same day, 117 persons decided to repatriate with the UNHCR who agreed to provide two buses and four trucks to send them to the Sisophon reception centre. After the buses had left the camp, the UNHCR staff had an opportunity to ask Cambodians as to what had happened. It was confirmed by them that no arms or weapons were used and the Thai authorities used patient persuasion to convince these

people to repatriate. There were still 400 people who remained in the camp. According to the fourth fax (30 April), UNHCR had been asked the night before by the Thai authorities to provide 10 buses and 10 trucks since more people `volunteered' to return to Cambodia with the UNHCR. And the UNHCR replied that it would do so only if the UNHCR staff would be allowed to be present at the point of departure in Site 2 in order to verify `the voluntariness'. In the end, two UNHCR officers were permitted to enter the camp. The researcher could not find the copies of fax as to what happened later in the camp (see Appendix).

From the series of documents above, one can sense the atmosphere that prevailed among the UNHCR staff who were engaged in the repatriation programme. First, UNHCR did not wish to get involved in the forced repatriation in any capacity. When the UNHCR operation ended, it was the responsibility of the Thai authorities to exercise their state sovereignty. Second, UNHCR believed that the people who had refused to return to Cambodia did have options available to them. One was to return to Cambodia in safety and dignity with the UNHCR. The other was to be deported by the Thai authorities. One may say that it was a poor choice.

From a series of events explained by the UNHCR faxes, one can point out how difficult and ambiguous it is to imply the voluntariness of every refugee to return home. Voluntary means one's free will. In fact, people who refused to leave the refugee camp did not have a choice. They had no choice but to return to Cambodia, either in the form of the repatriation with the UNHCR or in the form of the deportation by the Thai authorities. Their return to Cambodia was, therefore, not voluntary. The other factor of importance relates to UNHCR and state sovereignty. UNHCR had no remit or power to oppose the actions proposed by Thailand. As shown in Chapter 6, the concept of state sovereignty arguments meant that a state exercises in practice either the primacy of national law or primacy of international law depending on its political circumstances and moral preferences. In this case, although the Thai authorities had stated in the fax that they were applying `policy' not law, to force refugees to leave the camp, it was clear that the implementation of this policy was based on the concept of primacy of national law in order to justify the closure of the refugee camp. And UNHCR felt that it could not claim

any responsibility for those refugees under the authority of Thailand even if they were forced, i.e. `involuntarily', to return to Cambodia.

Availability of land

Another serious problem arose after the refugees returned to Cambodia. The refugees were offered five options of assistance. Option A(Agriculture) was a plot of land up to 2 hectares per family and wood for the construction of a house ;2.8% of the total refugee population chose this option. Option B(Building) was a plot of land for a house and wood for construction of a house with sufficient space for vegetable farming and poultry raising (6.7%). Option C(Cash) was US$50 per adult and US $25 per child under 12 with no additional material aid but not excluding the eventual allocation of agricultural land, once identified (87.6%). Option E(Employment) was employment with UNTAC or another organisation and reintegration money as per Option C (1.2%). Option F(Family reunion) was transportation to the distribution point closest to where immediate relatives were located and reintegration money as per Option C (0.1%). There was no information as to the remaining 1.6% of the refugee population. In addition to the chosen Option, each refugee family expected to receive a household and agricultural kit which consisted of tools and materials for initial basic needs, a large plastic sheet and a 90 litre water container.[40]

It became evident later, however, that those who chose Option A (Farm Land) and Option B (Housing Land) could not obtain any land when they returned to Cambodia. The evidence comes from a survey conducted by the World Food Programme (WFP) from May to November 1993 when the 400 days of food assistance was reaching its end. WFP interviewed 7,524 families in 15 provinces. The families in the sample were chosen because they were due to leave the food assistance programme. The 7,524 families represented 9.1% of the 82,316 officially repatriated families. The survey took into consideration land availability, income sources and possessions and type of head of household. The survey was based on the Wealth Index to assess the economic status of the family. The survey results showed that 73.8% fell into the categories of `needy' or `at risk'. 38.7% of the total sample families were vulnerable in terms of type of head of household. For example, 20% of them were headed by a single woman, 11.3% by a

handicapped man, and 7.5% by an elderly man. Moreover, while over 87% of those who chose Option A (Farm Land) and Option B (Housing Land) had not yet obtained any land, the families in the sample who chose Option C (Cash) reported successful land access.[41] The reason why the families of Option A and B did not have any access to the land was not explained in the WFP survey report.

According to information given to me by UNHCR personnel in Phnom Penh, farm land was more scarce than UNHCR had expected and the process of clearing and demining the land was still going on. In Battambang Province, I had an opportunity to visit the village of Pannum, one and a half hours away from the city of Battambang, with the UNICEF representative. In Pannum, UNICEF was helping to drill wells for the returnees. I interviewed three families in the area through the UNICEF interpreter. The female head of household was living in the hut without a roof with her six children. She clearly said that she wanted to go back to the refugee camp where her life had been much easier. She also stated that she often heard the fighting going on between the Khmer Rouge and other political factions. In another household, a girl of school age was left at home so that she could take care of her young sisters and other families' children while their parents were at work. She said that her parents were working on land owned by another Cambodian. It appeared that fertile land existed in the area, but was owned by those Cambodians who had never left the country. Those returnees who could not obtain land as they had been promised, ended up being hired as labourers by Cambodian landlords. A male head of another household explained that he planted banana trees besides the hut but these did not grow due to the barren conditions of the land. He also tried to cultivate other land several metres away from his hut, but this meant taking a risk of stepping on a mine.

As to the land mines, the representative of Handicap International (HI) in Phnom Penh stated that there were up to 10 million mines in Cambodia. He told me about the problem which he had encountered at the beginning of demining operations. In 1992, the UN set up a system to train Cambodian military personnel for demining, and within a few months had trained 600 of them. There was, however, no agency which was willing to contract them to work in the fields. So, Handicap International made an agreement with UNHCR, UNAMIC, and the UNTAC to hire those personnel, pay for their insurance,

and take care of the administration and the logistics of the teams. The UNTAC provided supervision. The average number of people who stepped on mines per month were reported to be between 120 and 180. But it was difficult to know the exact number. There were people who stepped on mines and came to hospital for amputations, but there were also people who died instantly in the minefields, and whose death was never recorded. HI was also working with Cambodian Mine Action Centre (CMAC) which was the Cambodian institution at the time of the interview. This example indicates two points. First, cooperation between NGO (HI) and UNTAC worked. Second, the minefields severely restricted land availability.

Mines constituted a real danger and this clearly affected how refugees could be resettled. A figure of 300 amputations a month was regularly quoted in 1991. The danger was evident above all in the four provinces of the North West (Siem Reap, Battambang, Banteay Meanchey, Pursat). The problem arose in 1992 when 71.80% of the refugees who agreed to return to the country wished to settle in the provinces of Banteay Meanchey(14.47%) and Battambang (57.33%), the areas covered with mines.[42] These were the provinces closest to Thailand where a great number of refugees had originated. The soil in the area was also considered to be most fertile, but this could only be resettled if the mines were cleared. As Jennar notes, the ICRC and UNHCR were particularly aware of this situation, but had no influence over policy. As UNAMIC had pointed out when it arrived in Cambodia, removing the mines was not part of its mandate. As a result, UNHCR's control of the situation was limited to turning to a specialist NGO like the Halo Trust (HT). This can be contrasted with the situation after the Gulf war. In the Gulf, the West had removed mines. In fact French para-state organisations were fighting over mine disposal contracts in the city of Kuwait.[43] By contrast, even five months after the beginning of the repatriation of refugees, no one wanted to remove the mines which had been provided to Cambodia by the US, China, USSR, UK.[44]

The report prepared for the International Committee on the Reconstruction of Cambodia says that demining activities, which were both time-consuming and dangerous, were carried out in the areas of highest priority by HT. These areas included National Routes 5 and 6, secondary and tertiary access roads, rural areas with returning refugee populations,

school yards and around hospitals and health clinics.[45] This statement was made four months later, on 8-9 September 1993, after the UNHCR repatriation was completed. This example illuminates how the UN agencies as well as NGOs involved undermined the most basic human right, that is, the right to life of Cambodian individuals. As indicated in the Introduction of this chapter, the UN as well as NGOs with humanitarian ideals often lose sight of people whom they are supposed to serve in the first place. It reminds one of Jennar's comment, `A Cambodian does not weigh as much as a barrel of oil'.[46] All of these problems, particularly the `voluntary' repatriation and land availability in Cambodia, indicate the severe obstacles which refugees and returnees faced.

To summarise the above accounts, the refugee situation had arisen from extreme conditions of civil war exacerbated by Cambodia's international position in the clash between the major powers. Alleviating the refugee situation then suffered from two further difficulties. The first was the inability of major international agencies, including the UNHCR, to determine the process under which refugees would be repatriated. This fell under the `state-sovereignty' aspect of Thailand's policy to close the camps, allowing few refugees to claim asylum status and remain in Thailand. The second difficulty was that there was no major organisation operating in the area, neither international agencies nor NGOs, that could effectively ensure that the promise of land and other support actually existed or could be made available. Those resources were under the state sovereignty of the Cambodian authorities and again the agencies had no remit to intervene.

A related problem was that the availability of land was severely constrained by the widespread contamination by land mines. Again, the problem was one of responsibility and remit. UNAMIC firmly stated that mine-clearing was not part of its mandate. As a result, NGOs were approached to take over the process. In this situation, this thesis argues, the international agencies and NGOs effectively fall between state sovereignty on the one hand and international humanitarian aid on the other. Where refugee resettlement programmes are concerned, the outcome may be that no-one assumes responsibility (given the fragility of legally established government, as in the Cambodian case). The result is that the processes and outcomes of refugee situations like that of Cambodia

depend on negotiated action on the ground between those actors immediately involved. This is one of the major findings of this chapter and will be referred to again in the conclusion. The next section will explore the internally displaced persons who faced similar situations to those of the refugees.

INTERNALLY DISPLACED PERSONS

As stated in the section on Cambodian history, the US bombing and fighting which started in 1969 led to many people being internally displaced. The Cambodian Ministry of Health estimated that, by the end of 1971, more than two million of nearly eight million Cambodians were displaced internally.[47] The current history of internal displacement, however, dates from the end of the September 1989 in the western provinces of Battambang and Banteay Meanchey. One should note that during this period, the Vietnamese started withdrawing troops from Cambodia as a result of fighting the Khmer Rouge. It was the end of the cold war which affected international relations between Vietnam (supported by USSR) and the Khmer Rouge (supported by the US, China and Thailand). In any event, in early October 1989, with the well reported outbreak of fighting between the Khmer Rouge and the Vietnamese troops in the Pailin area of Rattanan Nondol District, Battambang Province and Thmar Pouk and Serey Sophon Districts in Banteay Meanchey Province, increasing numbers of villagers began fleeing their homes.

There were similar outbreaks of fighting between September and November 1989 in the northern provinces of Siem Reap and Preah Vihear, which also caused displacements. It is reported that these internally displaced persons were the result of fighting, shelling, increasing troop movements and mines in different regions. Many were caught between opposing forces. In addition, some of those displaced were given prior notice by the government to move to safer areas as the fighting was likely to break out near their villages. As for assistance to internally displaced persons, it was in the first few months of 1990 that humanitarian agencies inside Cambodia learned of their existence. While the Cambodian government appealed for assistance at that time, many NGOs asked the government for guarantees of access to the areas where internally displaced persons

lived. In late May 1990, as the access in the west opened up, direct visits to the displaced became more regular and assistance efforts started. As the assistance operations were carried out in the first three months of 1991, the total number of displaced persons reported increased from 140,000 to 186,000.[48]

My interview data, obtained from the representative of the International Federation of Red Cross and Red Crescent Societies (THE FEDERATION) in Phnom Penh, indicated that internally displaced persons (IDP) were not dealt with by the UNHCR as they did not fit into the category of refugees as defined by the 1951 Convention. Thus, although the UN General Assembly resolution 48\116 adopted on 20 December 1993 reaffirmed that UNHCR would be involved in situations of internal displacement[49], at the time of interview of 8 February 1994, UNHCR had not implemented the resolution. It should be noted that, in 1994, the UN Executive Committee recognised that `the internally displaced are present alongside refugees, returnees, or a vulnerable local population in situations where it is neither reasonable nor feasible to treat the categories differently in responding to their needs for assistance and protection'.(EXCOM Conclusions- No. 75 (XLV)).[50] Nevertheless, in the case of Cambodia at the time of my field visit, the agencies which dealt with IDP were principally the World Food Programme (WFP) and the Cambodian Red Cross (CRC). Their principal assistance to internally displaced persons was in the form of food. From late 1989 through 1990 and 1991, the WFP provided assistance through CRC to the fluctuating numbers of IDP, the largest number of which was 190,000. This was a major challenge to the aid agencies. Since WFP and CRC were already dealing with internally displaced persons by shipping rice and medicine to them, distribution points had already been set up. So, when the refugees returned in 1992, the UNHCR asked the WFP if it could provide food assistance. 370,000 returnees were expected, all of whom were entitled to 400 days supply of food. As a result of the UNHCR's request, the WFP and CRC simply extended their work to provide assistance to 370,000 returnees on top of the estimated 190,000 internally displaced persons.

At the time of the field work in February 1994, the food assistance programme was changing. The last returnees came back to Cambodia in May 1993. This meant that, for

this group, the end of 400 day of food supply would fall due in the middle of 1995, when the food assistance would be terminated. Simultaneously, the number of internally displaced persons was declining. The internally displaced had either gone back to the place from which they originated or they were no longer defined as internally displaced because they had integrated with the local population and economy. The WFP was now moving from the policy of free food handouts to a policy of food assisted activities, that is, food for work projects. The representative of THE FEDERATION also pointed out that the problems of displacement were ongoing - new Internally displaced persons were being created due to fighting in Battambang, Siem Reap and Kompong Thom. The only way to respond to such situations, and a localised one at that, was the existence of a network of Cambodians who knew their local communities very well and who could alert the WFP and CRC if they foresaw any possibility of internal displacement in their communities.

I was able to visit the site where internally displaced persons lived, accompanied by a Cambodian officer from the United Nations Development Programme(UNDP) in Battambang. The site was fifteen to twenty minutes away by motor-bike from the centre of Battambang city. Next to the site, there was a huge rice field with a beautifully extended irrigation system. Though this appeared to offer good opportunities for returnees, in practice, as the UNDP officer explained, it belonged to a Cambodian landowner. To the untrained eyes of the outsider, it was difficult to distinguish the site for the internally displaced persons from other areas where ordinary Cambodian residents lived: the issue was, of course, land ownership. One difference, however, was that all the huts were built close together and the site itself seemed to be quite isolated from the rest of Battambang city. The IDP resettlement appeared to be treated differently from the rest of Cambodian society. It is not surprising, therefore, that the IDP of the resettlement site appeared very dependent on the UNDP site officer for support.

The Needs Assessment Report of the internally displaced persons of March 1991 states that approximately 41% of internally displaced persons in Cambodia were living in such sites and the remaining 59% were scattered among villages. In many areas the health and socio-economic status of the villagers surrounding or mixed in with internally displaced

persons corresponded closely with that of the settled population. They were all poor and required relief and development assistance. The main problem was, therefore, that to assist internally displaced persons without taking into account the surrounding villagers was both difficult and impractical.[51] This situation was recognised in Battambang.

The UNDP representative in Battambang revealed that UNDP's contribution was to set up a programme of integrated village development. That is, in each village, specialists worked on water sanitation, school construction, health programmes, skill training, credit programmes, road construction, and agriculture. The first stage of integrated village development begins with the construction of a road. The community development team then visits the village to establish a contact with local leaders in order to establish a needs assessment and set up the programme. The programme includes building a clinic, providing training to improve the skills of doctors and nurses, all with the help of the World Health Organisation. There is also a credit programme which supports self-help activities such as buying rice, fishing and setting up small shops. The aim of the skill training programme is to teach women how to sew and in some areas, how to type. In the process of implementing such village integrated programmes, however, two problems remain. One is a lack of funds from the overseas donors and the other is a lack of management skills among villagers.

The examination of the returnees and internally displaced persons revealed that the events which caused the displacement of both groups were similar - the long term effects of war and the lack of protection provided by their own government. There were, however, certain differences between them in the case of reintegration. The UNDP representative said that in general, it was much harder to help poor refugees who returned to Cambodia than to help poor internally displaced persons. This was because the returnees tended to have much less capital and less skills than internally displaced persons, so that it would probably take years for them to be accepted as village members and to be integrated within Cambodian society. The conclusion is that refugees and internally displaced persons share the similar situation - violence caused by political factions and lack of protection by government - when they were displaced. That is, the

right to life in the name of right to peace was violated. But the process of reintegration for each group may take place at different speeds depending on an individual skills and capital.

The Cambodian people went through the experience of French colonialism, Sihanouk's autocratic monarchy, the US bombing during the Lon Nol regime, the Pol Pot regime which tore apart the fabric of the society and human psyche, and the Vietnam-backed government which was never recognised by the West. It is not an exaggeration to say that the Cambodian people have never enjoyed the protection implied by the concept of a sovereign state. In spite of this reality, a general sense prevailed in Cambodia in 1994 that the nation was, step by step, emerging from a state of war into that of peace. Many buildings were repaired, reconstructed and built anew. Thai businessmen were investing in the construction of new hotels for foreign tourists in Phnom Penh. In the countryside, the landscape was filled with green rice fields and herds of cattle. In fact, one could not see any traces of the war and the Pol Pot regime. This situation demonstrates, as did the case of Rwandan refugees in Benaco refugee camp in Tanzania, that if a proper governance is installed, peaceful situations could be maintained.

GOOD GOVERNANCE FOUNDED ON HUMAN RIGHTS

In Cambodia, there is considerable evidence to indicate that efforts were made to create good governance based on human rights by UNTAC, NGOs and local people. For example, Cambodia's judicial structure had collapsed completely in 1975 when the Khmer Rouge took over power. As a result, one of the most important operations for UNTAC was to create a judicial apparatus to meet the needs of `the new Cambodian democracy'. To this end, the Supreme National Council adopted a set of transitional provisions on 10 September, 1992 in relation to criminal law and judicial procedures. These included procedures for arrest and detention which were consistent with UN standards. It also reformed the judiciary to provide for the independence of magistrates and for the conditions of a fair trial. Thus, the provisions which were under UNTAC's Civil Administration component were an important step toward the respect for the rule of law and the administration of justice founded on human rights. Moreover, to assure the

success of the new measures, UNTAC provided training courses for judges, defence lawyers and the police.[52]

A second UNTAC mandate required the improvement of prison conditions, but although some improvement was made as a result of intensive programmes, problems continued to arise. The Paris Agreements called on the factions to release all political prisoners. Three of the four factions stated that all political prisoners had been released; the Party of Democratic Kampuchea (Khmer Rouge), however, claimed that it did not hold any political prisoners. This claim could not be verified due to the lack of transparency and accountability in the management of the Party of Democratic Kampuchea. Despite such obstacles, however, the measures taken to create the rule of law and effective state institutions helped to nurture Cambodian human rights movements.[53]

As to citizen participation, the Cambodian people clearly demonstrated their ability and maturity to carry out the democratic act - political choice. As stated earlier in this chapter, under the supervision of the UNTAC, nearly 90 % of the eligible voters casted their ballots on 23-28 May 1993. [54] Following the elections, the Cambodian Constituent Assembly began to discuss a draft constitution. Ponleu Khmer, an association of individuals as well as civil organisations, held information meetings in the provinces in order publicly to discuss the draft constitution as an attempt to promote civil participation in government. The Constitution was adopted on 22 September, 1993 and two days later Norodom Sihanouk became the first Constitutional King of Cambodia.

There could be little question that Cambodians wanted to see the return of law and to move towards building a civil society founded on human rights.[55] This strong desire enabled UNTAC to mount human rights education programmes on a nation-wide scale. The purpose of this programme was twofold. First, it nurtured indigenous human rights organisations by providing them with training and facilitating regional and international links. Second, it raised people's awareness of human rights. Such efforts were tailored to Cambodian society. For example, televisions and radios were extensively used as well as leaflets and posters. They explained what human rights meant and where violation complaints should be filed. In addition, provincial human rights officers met with

teachers to help them introduce human rights curriculum materials in schools. The subject of human rights was also introduced at the University of Phnom Penh in journalism and law courses. Informal education also proceeded with training for administrative officials and professional activist groups.[56]

The UN Human Rights Commission also made the unprecedented decision to authorise the UN Human Rights Centre to establish an operational presence in Cambodia for two years and to appoint a local Special Representative for Human Rights. This provided a support mechanism for human rights organisations. The UNTAC also called on the Cambodian government to commit itself to international human rights standards. The Cambodia's Supreme National Council (SNC) signed the two International Human Rights Covenants on 20 April 1992. On 20 September 1992, the SNC acceded to the following international human rights instruments:

1. the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment;[57]
2. the Convention of the Elimination of All Forms of Discrimination against Women;[58]
3. the Convention on the Rights of the Child ; and,
4. the Convention relating to the Status of Refugees and its Protocols.[59]

UNTAC compiled all the instruments including the two human rights instruments to which Cambodia had already been a party (the Convention on the Prevention and Punishment of the Crime of Genocide[60] and the International Convention on the Elimination of all Forms of Racism and Racial Discrimination[61]), translated them into Khmer, and disseminated them to governmental officials and human rights activists. Human rights NGOs were trained to monitor government compliance.[62]

Despite such efforts by UNTAC and NGOs, a civil society which centred on human rights cannot be realised if the politicians who speak in the name of Cambodians are only concerned with their political survival which brings them wealth. Corruption among them was widespread at the time of my field research. As one example, many of the NGOs' vehicles were stolen which were later found being used as state official vehicles.

There were also rumours that some politicians sold state buildings for their personal gain. In the same regard, Raoul Jennar states:

> The Cambodians are capable of democracy. They demonstrate a real ability to carry out the ultimate democratic act; political choice... The problem of installing a democratic regime in Cambodia is not at the level of the citizens. It is at the level of those who claim to speak in their name or of those who will ask for their votes. In most cases, these people appear little motivated by real concern for the general interest. [63]

Relating to corruption, there is a further problem: the psychological damage to the Cambodian people. Those who have worked closely with Cambodians over the last decade have witnessed the frequent incidence of depression and the inability to plan and invest in the long term development of the nation or to place trust in other human beings. Having lived through so much trauma and fear, it seems irrational to think beyond surviving the present situation.[64] Apathy arising from traumatic experiences allowed politicians to continue to abuse power for their own personal gains.

The history of Cambodia still weighed heavily on the shoulders of Cambodians. The 1994 UNICEF reports indicate that Cambodia's rural population was among the poorest in the world. This was reflected in health indicators, which included high infant and maternal mortality rates and a life expectancy of 49.7 years. These indicators also reflected decades of inadequate diet, poor water, poor sanitation, a lack of basic health services, a shattered infrastructure, and land mines. In addition, as the educated Cambodians chiefly perished during the Pol Pot regime, the nation suffered from a total lack of trained people in all socio-economic walks of life. And, in a population estimated from 8 to 9 million, approximately 45% were under 15 years old. More than 50% of adult women were illiterate and between 23% and 33% of households were headed by women. The nation was also one of the most heavily mined countries in the world. Estimated amputees were 20,000 in number.[65] The above was the reality which Cambodians faced in 1994. A question then arises as to what is the solution to create the civil society founded on human rights in a state like Cambodia? Is there any solution to it at all?

EXOGENOUS GOVERNANCE

Before we discuss the above question, the roles of UN agencies and particularly those of NGOs must be examined because they were the essential components to create the civil society founded on human rights as Chapter 7 has demonstrated. The total number of NGOs in Cambodia had grown from 27 in 1988 to over 200 in 1994.[66] The NGO assistance to Cambodian reconstruction from 1992-1993 is estimated at no less than US $135 million.[67] The overall international support for reconstruction and rehabilitation in Cambodia amounted to US$880 million, exceeding the US $595 million that had been requested by the UN Secretary General. This resulted in the largest UN operation in the UN history. But the implementation of the programme suffered. Among many participants, there were no major international organisations which had power to intervene to protect the refugees who insisted on remaining in the refugee camps in the face of Thailand's policy to close them down. Moreover, the land ownership scheme promised for returnees was controlled by the Cambodian authorities. This created a situation where UN agencies or NGOs could not deliver the assistance to returnees that had been promised. In this situation it is clear that the problem was made worse, not better, by the number of NGOs involved and the lack of coherence and leadership among them.

The limited availability of land was even more constrained by the widespread contamination by land mines. UNAMIC claimed that mine-clearing was not part of its mandate, and NGOs were approached to take over the job. The problem again was remit and responsibility. The international agencies and NGOs fell between state sovereignty and international humanitarian aid: that is, a situation where no-one assumed responsibility and accountability. In order to ease and improve such a situation, the Cooperation Committee for Cambodia (CCC) was established in May 1991 to facilitate communication and co-ordination among NGOs and to enhance their collective capacity. But CCC was not able to solve the following problems: a project-by project approach which lacked a longer term vision; undervaluing local knowledge and skills; a reluctance to hand over control to Cambodians; weak managerial capacity and lack of evaluation and analysis of their experience; competition between NGOs and tendency to be

territorial; bypassing Cambodian government institutions and underestimating the importance of linkages.

The last two problems of the working relationship among NGOs as well as between NGOs and the government institutions are particularly significant from a point of international cooperation. NGOs often fight over limited resources among themselves as well as against a host government. Part of the latter problem arises from the NGOs' concern that they would be coopted by a government and lose control over their wider agendas. Simultaneously, NGOs are also concerned with the problem that their work could be a substitute for a government's responsibility to address the needs of its own citizens. Furthermore, NGOs may be allowing donors to use them to deliver services rather than strengthening existing local structures and Cambodian capacity. NGOs, thus, become parallel structures, threatening to undermine local infrastructures.[68]

The Cambodian study has demonstrated how difficult it is to coordinate operations among an increasing number of NGOs, UN agencies, donors and a host government. This presents us with two major points: the issue of good governance within states; that is, good exogenous governance in the context of international aid on the one hand and the concept of sovereignty of states on the other. In other words, when a government passes on its responsibility to UN agencies and NGOs to provide its citizens with good governance, serious problems arise. With regard to good governance, UN Secretary-General Kofi Annan states that good governance `within a sovereign state' is an essential building block for sustainable development, prosperity and peace. The situation of no two countries is precisely alike in this respect, but Kofi Annan states that making due allowance for cultural differences, good governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights and the participation of all citizens in the political processes of their countries. In particular, human rights are seen as an integral part of good governance.[69] Good governance, therefore, means the ability to represent diverse opinions and establish civil society founded on human rights.

In Cambodia, NGOs and UN agencies had this task of providing citizens with good governance as a surrogate government in 1994. In order to understand this issue, the question of the meaning and relevance of exogenous governance needs to be discussed. What is good exogenous governance as opposed to that of a sovereign state? The issue of exogenous governance is relevant to the Cambodian case study due to the following reasons. The provision of some form of external governing capacity is required when there is no effective governance within a country. The biggest operation in the UN history was carried out by the joint efforts of UN, NGOs, donor governments, Cambodian citizens and government. This external governance without a single authority within a country may be defined as exogenous governance.

In the case of Cambodia, this raised the issue of `who is responsible and accountable to Cambodian citizens if the policy and delivery of services are entrusted to universal non-state bodies?' That is, the term is not used to describe or imply `world government'. It refers, rather, to the specific situation where external bodies (whether governmental, international agency or NGOs) provide the structure and processes of political and civil society. In Cambodia, the universal bodies which include UN, NGOs and donor governments were in theory only accountable to the ineffective or virtually non-existent state of Cambodia rather than to citizens, a situation which resulted in the poor implementation of programmes, because the responsibility and accountability became unclear as many organisations were involved. If the ineffective state discards responsibility for the policy and implementation of programmes, and exogenous governance fails to provide good governance, who will be responsible and accountable to Cambodian citizens?[70]

The question was asked earlier how a civil society founded on human rights can be established in a state like Cambodia where politicians are corrupt and incompetent. In this situation what happens is that the task of establishing a democratic state is franchised to other organisations. As this chapter has shown, the UNTAC's human rights mandate was the most extensive in the history of UN operations. Human rights' work often involves confronting the misuse of power by state authorities. That is to say that NGOs, IGOs and donors cannot ultimately rely on the cooperation of governmental bodies. Thus

there are two possible approaches to the situation of Cambodia: strengthening leadership by the UN; educating the citizens of Cambodia. First, one of the main reasons for the poor implementation of programmes in Cambodia was a lack of strong leadership of the network of different organisations which exogenous governance requires. There is, therefore, an opinion that the leadership of the UN should be strengthened to increase the responsibility and accountability of programmes. Second, the citizens of Cambodia must become educated in order to supervise exogenous governance.

Both strengthening UN leadership and educating the citizens of Cambodia are equally important in order to reconstruct civil society founded on human rights in Cambodia. Civil society means the creation of democratic groups from which social movements are organised. The organisations of civil society represent many diverse and sometimes contradictory interests. This diversity can limit civil society because too many conflicting interest groups may lead to a chaos which does not benefit citizens as a whole.[71] Nevertheless, civil society is ultimately created by the voices of people in order to accommodate diversity; that is, human rights must be gained by people, not something handed down from the top from government, NGOs, UN agencies, or donors. That means, no matter how much effort NGOs, UN and donors make to promote human rights in Cambodia, as long as they are handed down to people from the top, human rights will never put down roots. Although it is necessary for the international community to continue to create an enabling environment for human rights and for the UN to take a stronger leadership for the implementation of programmes, in the end it comes down to the participation, responsibility and accountability of Cambodians themselves. This issue will be further discussed in the next chapter of Conclusion.

CONCLUSION

In spite of the poor implementation of humanitarian aid programmes, the combined efforts of NGOs, the UN agencies, UNTAC and the will of Cambodian people are creating a sovereign state. This time, however, it is one that enjoys international recognition. The lesson to be learned from the experience in Cambodia is that the structural framework of sovereign states is in practice immutable. In fact, we have

learned only too well, through the break-up of the former Soviet Union and its aftermath, how the forced dismantling of an existing framework can lead to chaos.

Nevertheless, the developments in Cambodia indicate that `the status' of the sovereign states is undergoing a degree of change. The establishment of Cambodia as a sovereign state, assisted by NGOs, IGOs and donors suggests that the age in which the sovereign state was the strongest and the only agent of decision-making power in the international society is surely passing.[72]

Some may argue that this change is marginal and that states, markets and multinationals still dominate. Even if one assumes this proposition, he or she cannot negate that fact that the role of NGOs is becoming not only important but also essential in reconstructing a state like Cambodia. Saying otherwise is to deny the reality. This chapter has clearly shown that, without the assistance of NGOs, nearly 370,000 refugees could not have been repatriated nor the protection of internally displaced people and returnees made possible.

However, the Cambodian study has also revealed that in reality NGOs do not always represent the voices of people. In fact, Cambodian people were forgotten by not only the UN or donor states but also NGOs while the incompetent government of Cambodia discarded responsibility for its citizens. To make the situation worse, Cambodian citizens themselves were plagued by apathy to supervise the activities of exogenous governance. But such a phenomenon is not new. Barbara Harrell-Bond argues in her book **Imposing Aid** that aid work often does not assist the aid recipients and the quality or quantity of what is given is not examined by anyone.[73] This is the very reason why Kurt Jonassohn states that he has placed far too much confidence in many governmental and non-governmental organisations. He believes that they have different agendas which have a great deal more to do with money and power than most of them are prepared to admit in public.[74] If we cannot place our confidence even on NGOs, a question arises as to where our confidence must be placed. This will be discussed in the next chapter of Conclusion.

ENDNOTES

1. Arthur Miller, Broken Glass, (London: Methuen Drama, 1994), p.72.

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CHAPTER 10

CONCLUSION

The aim of this thesis has been to examine the relationship between two sets of issues: the existence, and definitions, of refugees and internally displaced persons on the one hand, and human rights and state sovereignty on the other. This thesis has analysed the history and evolution of these issues, their theoretical underpinnings, and their operation in practice. These issues are among the most important of modern inter-state actions and, despite the roles of the United Nations and other international agencies and organisations since the late 1940s, remain problematic. The present study has analysed these problems, examined two areas of conflict in the field, and presents ideas for the future.

The thesis began the analysis, in Chapter 2, by examining the limitations of the definition of refugee set out in the 1951 Geneva Convention. It did so from the two perspectives: the political circumstances in which the present definition came into existence and the legal issues surrounding it; and the regional legal instruments in Africa and Central America. At the regional level, there is a trend to adopt a broader approach to the definition and treatment of refugees, which in turn allows wealthy states to accept fewer refugees in their own countries. Even if the universally accepted definition of refugee is expanded, it is still interpreted through the domestic law of each state in order to suit their national interests. Chapter 3 considered the responsibility on the part of states to protect the human rights of their citizens. The examination revealed that within the political and legal perspectives, there is a trend to perceive the cause of refugees as the result of violations of human rights on the part of their states of origin. The refugee and human rights issues are, therefore, closely related.

Chapter 4 expanded the analysis from refugees alone to include internally displaced persons. This is necessary because the way in which such people are defined and treated

by the international community has an important effect on refugees. It analysed the problem of defining internally displaced persons and the debate over whether there should be any legal protection for them. One of the important findings was that the growing numbers of internally displaced persons have played a major role in positioning human rights at the heart of the debate. The issue of refugees and internally displaced persons in international affairs is essentially a matter of human rights. Human rights are, however, frequently constrained by notions of state sovereignty. Thus, the problems of refugees and internally displaced persons must be set in the context of both human rights and state sovereignty. The concept of human rights are, however, still open to interpretation.

Chapter 5 explored the question of basic human rights in order to understand fully the context within which human rights and state sovereignty are being analysed. The different accounts of `basic rights' were analysed. It was shown that some even question whether there are any basic rights at all. What is clear, however, is that the realisation of human rights is the necessary foundation for peace. The paradox is, however, that such rights can only be established on a foundation of peace. Without peace, human rights cannot be protected. This is the precise reason why the UN Charter took its purpose to be the maintenance of peace and security. In the nuclear age, the establishment of a lasting peace means to preserve human civilisation and to make the survival of mankind possible. [1] The existence of nuclear weapons has made the traditional preoccupation with peace and security among states change its nature into peace and security for the survival of the human race. It is this right to life in the name of the right to peace which this thesis proposes as the strong - indeed the only - way forward in protecting and ensuring in international practice the rights of refugees and internally displaced persons.

The thesis thus far argued that the essential linkage between refugees and internally displaced persons is grounded in human rights. Human rights, for their part, are often countered by the claim of states to sovereignty. As a result, understanding the complex problems of displaced persons in the contemporary international arena rests essentially on exploring the tension between human rights norms and the claims of state

sovereignty. In the context of this thesis' concern with displaced persons and human rights, we are particularly concerned with that part of the debate which relates to international law and international relations. Chapter 6 concentrated on the theories put forward by Hans Kelsen, K. W. B. Middleton, and George Schwarzenberger because they highlight the complexity of sovereignty in national and international law which in turn affects how countries deal with their refugees and internally displaced persons. Kelsen's arguments were found to be the most persuasive. His claims are that the expression: `a state is sovereign', is irrelevant. It must be replaced by the term `the primacy of national law'. This position allows a degree of interaction between the state-centred and international law perspectives. This in turn allows the problems of how displaced persons and their rights may be protected without being blocked completely by the claim of states for absolute autonomy on the grounds of state sovereignty. Moreover, `state sovereignty' assumes an existence of central authority in a state. But what should be the ground rules to deal with a situation where the state apparatus has broken down, as is the case of parts in Africa? In this case, it can be argued that primacy of international law prevails.

Chapter 7 described the evolution of human rights in the context of state sovereignty to demonstrate that this concept limits the ability of an international regime to protect human rights. Definitions of universal human rights have been evolving since the early years of the 20th century. It is that evolution, as opposed to theoretical definitions, which Chapter 7 analysed. The revolutionary developments of human rights, in particular after 1945, showed that international law now considers not only states but also individuals as the subjects of international law. This implies that human rights must now be regarded as international and global. The chapter recognised, however, that there are also practical problems as to international efforts for creating societies founded on human rights within a state. Responsibility and accountability often become obscure due to the large number of participants involved in such efforts.

Chapter 8 and 9 presented the accounts of the field studies of Rwanda and Cambodia in the belief that any universalistic analysis must be rooted in concrete experiences. A

framework of analysis was developed: that institutions of good governance are as important as humanitarian aid and outside intervention in deciding how effectively refugees and internally displaced persons will be dealt with. The studies were planned to explore this framework and to test its relevance.

Chapter 8 showed the violence of a state against its own citizens in Rwanda. The ethnic massacre was not the result of acts committed by two ethnic groups which the state of Rwanda could not control, as is often argued by the media. It was the result, rather, of the conscious practices of a highly centralised state. The study was also set in the context of Johan Galtung's works on the concept of state violence. Such a perspective considers the issue of how a state with an authoritarian system of social control imposed from above deteriorated to the point of the extreme violence in situations where states deny the obligations implied in sovereignty to provide protection and good government to all their citizens. It was the state that violated the right to life of Rwandans in the name of state sovereignty. In Benaco Camp in Tanzania, the daily life of Rwandan refugees very much depended on the structure that the NGOs and the UNHCR were trying to make as a surrogate government for them. The community meetings held in the Benaco Camp showed that with the proper guidance, in this case that of the UNHCR and NGOs, Rwandans were willing and able to live in a harmonious way. The lesson to be drawn from Rwanda is that in order to create institutions of good governance, our society needs a philosophy which clearly states that people's lives are more important and more sacred than states, religions and even a monothelitic God.

Chapter 9 explained the tragedy of Cambodia by showing that human rights can be violated not only by oppressive states but also a breakdown of states. The second of the two field studies, Cambodia, was chosen in order to show that this basic right can be violated not only by oppressive states but also where the state apparatus has broken down. The chapter showed that, even with help from the UN and NGOs, a state which lacks a central authority can be as great a threat to human rights as oppressive states. For example, in the course of `voluntary' repatriation, Cambodian refugees were forced to leave a camp in Thailand as it was closing down. The UNHCR could not intervene in

this involuntary repatriation because the subjects were under the state sovereignty of Thailand. In the situation of limited availability of land constrained by the landmines, local resources were under the state sovereignty of Cambodia. Thus, the UN and NGOs fell between sovereignty on the one hand and international humanitarian aid on the other. This led to an outcome in which no-one assumed responsibility given the fragility of the legally established government, although the UN and NGOs were supposed to play a role of surrogate government to provide `good governance' to citizens. This had come about because of the lack of a central authority in a situation where many participants were involved. In such circumstances, the UN and NGOs initially seemed to lose sight of the people they are supposed to serve in the first place. There were, however, strong attempts to establish human rights organisations (see below).

The study of Cambodia demonstrated that some orderly civil life could be maintained in a situation where the possibilities of `good governance' existed. A general sense prevailed in 1994 was that the nation was, step by step, emerging from a state of war into that of peace. If a proper governance is installed, peaceful situations could be maintained. Thus, the framework of analysis developed for the studies of Rwanda and Cambodia concluded that: institutions of good governance are as important as humanitarian aid and outside intervention in developing how effectively refugees and internally displaced persons will be dealt with.

In Cambodia, in spite of the limitations referred to above, there was a considerable evidence to indicate that efforts were made to create good governance based on human rights by UNTAC, NGOs and local people. UNTAC nurtured indigenous human rights organisations by providing them with training and facilitating regional and international links. Televisions and radios were extensively used as well as leaflets and posters to raise people's awareness of human rights. The subject of human rights was also introduced at schools as well as the University of Phnom Penh in journalism and law courses.[2] As a result, nearly 90% of the eligible voters casted their ballots in May 1993, which demonstrated their ability to carry out the democratic act - political choice.

As stated in Chapter 7, participation and responsibility are key components of democracy. For citizens, participation accompanied by responsibility and accountability is an essential part of `good governance'. The Cambodian people demonstrated a real ability to carry out the democratic act - political choice. But, this study revealed, those who claimed to speak in their name were poorly motivated by any real concern for the Cambodian people. For states, good governance means to define, guarantee and regulate entitlements on the one hand and to deliver them on the other. But a government like Cambodia does not have its own competence to carry out good governance. As a result, NGOs and UN organisations became legitimate alternatives to an incompetent government. Under such circumstances, one aspect of `good governance' in effect franchises state responsibility to other organisations.[3]

What this demonstrates is that the provision of some form of extended governing capacity is required when there is no effective government within a country.[4] It is argued that in order to achieve this aim, a form of `exogenous governance' is required. Exogenous governance implies that, where there is no single central authority within a country, then there is a need for cooperation among NGOs, IGOs, donors, and a host government. Problems start when many organisations take up a specific project, because participation of a large number of organisations fragments responsibility and accountability of the project.[5] In the end, as happened in Cambodia, there is a situation where no one assumes responsibility. As a result, there is no one to blame for the poor implementation of programmes.[6]

As stated above, participation and responsibility are key components of democracy. With regards to democratisation, the former UN Secretary-General Boutros-Ghali describes the concept of democratisation and democracy at the national level.

Democratisation is a process which leads to a more open, more participatory, less authoritarian society. Democracy is a system of government which embodies the ideal of political power based on the will of the people. Both democratisation and democracy at national level raise the questions of prioritisation and timing. For example, if democratic practices are introduced into formerly authoritarian or war-torn states, civil conflict may

arise by opening channels for free expression, including the expression of hatred. Free and fair elections can be followed by the suppression of those defeated. Another illustration is that where states are fully busy in providing basic material needs for their populations, there are risks to stability which arise in the early stage of democratisation when many interest groups clamour to be heard. The danger then is that society disintegrates into anarchy. Based on the above reasons, some argue that there is no one model of democratisation suitable for all societies, that democracy leads to disorder, diminishes efficiency, and violates minority rights. Democracy must wait until development is fully achieved. Boutros-Ghali asserts, however, that these claims must not be allowed to hide a deeper truth of democratisation and democracy. That is that they contribute to preserving peace and security, securing justice and human rights and promoting economic and social development. In order to succeed over time, democratisation and democracy within states must also be supported by a process of democratisation through the international system. In other words, democratisation within states may fail to take root unless democratisation extends to the international arena.[7]

In developing countries, many internal conflicts are caused by the belief that the state does not represent all groups in society or that it tries to impose an exclusive ideology. Thus, democratisation which accommodates diversity is the way to mediate many social interests. In the international community, similarly, the participation of all actors, and the resolution of conflicts by dialogue rather than by use of arms, must be the way forward. Decisions at the international level will increasingly be needed as problems which can only be solved globally are going to multiply.

States increasingly encounter forces beyond the control of any one country or group of countries. Such forces include the globalisation of economic activity, communications, environmental pressures and refugee problems. Boutros-Ghali states that these forces are not particularly new. What is new is their increasing scale and level of influence upon the state, which influences both governments and local people. Increased access to communications media raises awareness of problems which leads people everywhere to demand more control over their future and more say in the decisions that affect their

lives. Boutros-Ghali admits that there are differences between democratisation at the international level and democratisation at the national level. For example, at the international level there are organisations and institutions, and international decision-making and international law, but there is no international structure equivalent to that of state government. Nevertheless, Boutros-Ghali states the concept of democratisation as a process applies both nationally and internationally. And the process of democratisation internationally will need to include four elements: new actors; transformation of UN structure; increasing use of International Court of Justice; culture of democracy internationally.[8]

New actors include regional inter-governmental organisations, NGOs, parliamentarians, local authorities, academia, business and industry and the media. Boutros-Ghali emphasises the particular importance of NGOs. That is, the efforts that individual citizens are developing outside governmental structures but inside the public arena that was once considered to be exclusive work of governments. In other words, what is emerging are linkages extending from individual citizens all the way to international organisations, dealing with global problems and prospects. This force is demanding much wider democratisation of international politics and decision-making. In future, all states will increasingly have to deal with global problems in a way that is accountable to, and with the participation of, all concerned. Thus, political governance extends beyond state borders along with new non-state actors and this new from of governance may be called 'exogenous governance'. This new governance inevitably requires a reforming of the UN structure itself, which Boutros-Ghali considers in considerable detail. [9]

As one of the essential aspect of the UN structure, Boutros-Ghali states that the use of International Court of Justice must be encouraged to act more widely. Ghali goes on to say that all UN member states should accept the general jurisdiction of the International Court of Justice without exception. In the area where domestic constraints prevent this, the UN member states should provide a list of the matters they are willing to submit to the International Court of Justice. The International Court of Justice is a powerful tool for democratisation internationally. Democratic processes are designed to accommodate

diversity. The increasing use of the International Court of Justice may, therefore, reconcile the different legal systems of states. In fact, Boutros-Ghali advocates the eventual creation of a common international legal system, not to replace national legal systems but to serve as a core institution of democratic cooperation within and among states. The establishment of an international criminal court would be a monumental advance which will enforce fundamental human rights by enforcing individual criminal responsibility for grave international crimes. [10]

It is apparent that promoting `democratisation internationally' aims to create an international civil society through the diversity of many new actors including NGOs and by building peace in the international system. It is a complex task to create harmonious and coherent relationships among many actors, old and new, state and non-state, and to make them responsible and accountable. This complexity leads Boutros-Ghali to stress the creation of a culture of democracy internationally. In his conclusion, Boutros-Ghali states:

> while democratisation must take place at all levels of human society- local, national, regional and global- the special power of democratisation lies in its logic, which flows from the individual human person, the one irreducible entity in world affairs and the logical source of all human rights.[11]

What is most interesting in Boutros-Ghali's thesis are the two points on widening NGO activity and the need to broaden the culture of democracy. Jonassohn also places confidence in the decency of ordinary people. Except for a few pathological types, ordinary people are not in favour of killings, massacres and genocide. But as Boutros-Ghali appears to recognise, the need for NGOs, and for the reform of UN structure and international law, needs to go along side an international society that is both a society of states and a society of people. [12] Democratisation ultimately depends on individuals, one irreducible entity in world affairs. Boutros-Ghali, like Jonassohn, places his faith in individual human persons who may create a lasting peace through an international culture of democratisation.

To promote and defend democratisation nationally and internationally it is essential to preserve access to information and people's rights to express their opinions. This can occur only in democratic societies. Both Jonassohn and Boutros-Ghali hope that one day ordinary people will become so outraged at the indifference of their governments to global issues that they will demand action, on the grounds that their governments will either act or face defeat at the next election.

It is evident that, sovereign states will remain the key players of world affairs as the Cambodian case has shown. But there is a shift – even if only a small shift - in awareness, to the view that international society is not only a society of states but also a society of individual persons. One example is that of the `revolutionary' development of international human rights law, which seeks to link individuals to international law, as this thesis has demonstrated. Another example is the increasing influence of NGOs on policy and the delivery of services in the international arena. The case studies of Rwanda and Cambodia have both demonstrated that the development of international human rights law and the rise of NGOs are not in themselves sufficient to bring tangible improvements in the lives of individuals whose rights are being violated. In addition, exogenous governance faces its own problem of responsibility and accountability. Responsibility is fragmented among many participants, which in turn dilutes their accountability.

Performance standards and accountability are the major issues that arise in exogenous governance.[13] As a result, considerable efforts have been made to meet a pressing need for NGOs from the northern hemisphere, in particular, to develop clear guidelines for their work in disaster relief. In mid 1994, the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs involved in Disaster Relief was launched. It contains ten codes and three annexes and provides a standard against which the behaviour of the signatory agencies is measured. The purpose of Conduct reads:

> This Code of Conduct seeks to guard our standards of behaviour. It is not about operational details, such as how one should calculate food rations or set up a refugee camp. Rather, it seeks to maintain the high standards of independence, effectiveness and impact to which disaster response NGOs and the International Red Cross and Red Crescent Movement aspires. It is a voluntary code, enforced by the will of organisations accepting it to maintain the standards laid down in the Code.[14]

The Code also recognises the role played by other actors such as the governments of disaster affected countries, donor governments and intergovernmental organisations and provide them with the guidelines for each. With regards to the governments of disaster affected countries, the Code recommends:

> 1.Governments should recognise and respect the independent, humanitarian and impartial actions of NGHAs.
> 2. Host governments should facilitate rapid access to disaster victims for NGHAs.
> 3. Governments should facilitate the timely flow of relief goods and information during disasters.
> 4. Governments should seek to provide a co-ordinated disaster information and planning service.
> 5. Disaster relief in the event of armed conflict: in the event of armed conflict, relief actions are governed by the relevant provisions of international humanitarian law.[15]
> Note: NGHA = Non-Governmental Humanitarian Agency.

Bennett states that although the Code lists specific recommendations for the behaviour of host governments towards humanitarian agencies, it does not include the reciprocal obligations for humanitarian agencies towards host governments except `to co-operate with local government structures where appropriate'. In fact, the Code declares, `we [shall] formulate our own policies and implementation strategies and do not seek to implement the policy of any government, except in so far as it coincides with our own independent policy'. Bennett argues that it is insufficient that the Code does not include the reciprocal obligations for humanitarian agencies towards host governments, but the above declaration set out in the Code implies that a civil society provides state power with an counter-weight, which is precisely why NGOs are gaining support.
Although the Code is not binding and no suggestions have been made for monitoring

and enforcing it, it is an attempt on the part of the major northern NGOs to reach consensus on a number of operational principles.[16]

A more recent example was the Sphere Project launched in July 1997 with help from those involved in the initiatives to prepare the Code of Conduct. It did not set out to write new standards, rather it sought to consolidate existing ideas in order to improve the quality of assistance and the accountability of agencies. In October 1998, the Sphere Project Management Committee, with the participation of over 700 individuals from over 228 organisations in over 60 countries, completed the preliminary edition of the Sphere Humanitarian Charter and Minimum Standards (water, nutrition, food aid, shelter/site planning and health services) in Disaster Response. From 1999-2000 humanitarian agencies committed to the implementation of the Humanitarian Charter and Minimum Standards will test their application and evaluate the usefulness of the document as a working tool in relief operations. Implementation methods and complaint-handling mechanisms will subsequently be developed. It is a major inter-agency collaborative process involving NGOs, donor governments and UN agencies. The preamble of the Humanitarian Charter reads:

> The Charter is concerned with the most basic requirements for sustaining the lives and dignity of those affected by calamity or conflict. The Minimum Standards which follow aim to quantify these requirements with regards to people's need for water, sanitation, nutrition, food, shelter and health care. Taken together, the Humanitarian Charter and the Minimum Standards contribute to an operational framework for accountability in humanitarian assistance efforts.[17]

Despite the above development, the issues of performance standards and accountability are still major problems of exogenous governance.

Putting aside the problem of exogenous governance, what is clear is that a world in which states count for less is a world in which the individual person will have to count for more. This is a contested statement. Many argue that a world in which states count for less is a world in which powerful business corporations, national and international

and military elite count for more. The fundamental principles of a world dominated by states and are dominated by business corporations and military elite, are in practice identical. A world centred on states is a system centred on power. Power may be derived from authority, wealth, social status, organisation, fame, talent, and knowledge etc. Power, however, is not the central issue. The key difficulty is that both the powerful and the powerless `worship power'. We live in a society based on the `law of jungle' which makes it seem inevitable and natural that the strong dominate the weak. Thus, there is a common thread running through a world of states and a world of business corporations and military elite, that of `worshipping power'.

Since we have always lived in a power centred society, can we continue to live in it? Unfortunately, no. Even if one assumes a very optimistic view that the existence of nuclear weapons may be eradicated in future by implementing non-nuclear proliferation treaties, the knowledge to create such weapons remains which threatens the very existence of human society. If so, where can we go from here?

Henry Shue states that basic human rights specify the line beneath which no one is to be allowed to sink. They are a restraint upon economic and political forces that would otherwise be too strong to be resisted.[18] As stated in the previous chapter, the UN Covenant on Civil and Political Rights and the European and American Conventions on Human Rights, contain derogation clauses by which governments are allowed to derogate from human rights during a state of emergency. But in practice this is when the need for protecting an individual is greatest. Human rights, therefore, must rest on a foundation of peace. Without peace, other rights cannot be enjoyed. It is for this reason that this thesis argues that the right to life in the name of right to peace is the most fundamental right. The question arises, then, of `how do human rights relate to a power-centred society ?'

A society in which human rights are respected stands at the opposite end of the society in which power is respected. If basic rights are a restraint upon those economic, political and military forces that would otherwise overcome the weak and powerless,

then such a society which respects human rights is evidently not based on a `law of jungle'. In the face of the existence of nuclear weapons, a majority of us are weak and powerless. A society which focuses on the weak and the powerless is a society in which ordinary people are respected. The development of international human rights law, and the increasing importance of the role played by NGOs, significantly influenced states to extend political governance beyond their borders. What is also clear, however, is that human rights law and NGOs themselves are not sufficient to create a civil society nationally and internationally in which human rights are respected. What is needed is to create a culture of human rights among ordinary citizens. I argue that this is the key element not only for the creation of a society in which human rights are respected, but also to provide for exogenous governance where internal state institutions have broken down. This is not an easy task, given the fragmentation of responsibility among international agencies and NGOs which can result, but it has to be pursued if progress is to be made.

Some may argue that since people are social animals, then the first priority is to save a society from disintegrating into an anarchy that would make it impossible for its participants to survive. Thus, there are situations, where anarchy threatens, in which an unjust exercise of power is the lesser evil. This is why the victims of power-holders remain silent, even where the use of power is unjust.

There is another, psychological, aspect to such a situation. That is, there are many people who hope to be admitted into those powerful groups who share in whatever profits are being made. As a result it is frequently argued that the cause of abuse of power lies in that innate human predisposition of `worshipping power'. [19] The argument of this thesis is that the way forward must be, by contrast, to act as if people are concerned primarily with universal human dignity and with the support for our common humanity.

There are already signs of an emerging culture of human rights among ordinary citizens. One such sign was the establishment of the UN Decade for Human Rights Education,

1995-2004, which was born out of the World Conference on Human Rights in Vienna of 14-25 June 1993. The Conference adopted the Vienna Declaration and Programme of Action which (Vienna Declaration Part II. 79, 25 June 1993) encourages states to strive to include human rights, humanitarian law, democracy and the rule of law as subjects in the curricula of all learning institutions. In promoting human rights among ordinary citizens the question, however, arises as to how to accommodate these aims to the complex realities of modern life and to human consciousness. Francis Fukuyama suggests that the key lies in trust. He writes:

> The liberal democracy that emerges at the end of history is therefore not entirely 'modern'. If the institutions of democracy and capitalism are to work properly, they must coexist with certain premodern cultural habits that ensure their proper functioning. Law, contract and economic rationality provide a necessary but not sufficient basis for both the stability and prosperity of post-industrial societies; they must as well be leavened with reciprocity, moral obligation, duty toward community, and trust, which are based in habit rather than rational calculation.'[20]

Fukuyama believes that what seems at first glance to be an down-to- earth and even primitive quality is in fact the key to the post-modern age.[21] He argues that people's ability to associate with each other is critical not only to economic, but to every other aspect, of social existence. The ability to associate with others depends on the degree to which communities share norms and values. Out of such shared values comes trust.[22]

If trust is rooted in traditional culture and custom, however, it is only practical among those who share such traditions. What is needed is how to open up society. The Commission on Global Governance states that, in order to open up such societies, there must be certain common values. The Commission on Global Governance was established in 1992 in the belief that international developments had created a unique opportunity for strengthening global cooperation. The members include Ingvar Carlsson, the former prime minister of Sweden, Shridath Ramphal, the former Secretary-General of the Commonwealth, Oscar Arias, the former President of Costa Rica, Barber Conable, the former President of the World Bank, Brian Urquhart who was involved in

the formation of the United Nations, Sadako Ogata who is High Commissioner for Refugees in the UN and others. The Commission organises regular meetings to discuss global issues, drawing on the work of experts such as Johan Galtung, Peter Hass, James Rosenau and others. The main aim of the Commission is to mobilise political will for multilateral action and to articulate a vision of global cooperation. In the book called Our Global Neighbourhood (1995), the Commission reaffirmed its faith in common values.[23] These values must be informed by a sense of common responsibility for both present and future generations.[24] The question then arises as to what shall we choose as shared values which can underpin world affairs?

What the research and findings of this thesis have led me to emphasis is the need to expand the perception of how human rights might be effectively applied in the contemporary state system. The thesis has concluded that, as the crucial questions of refugees and internally displaced persons has aptly demonstrated, the human rights regime must be accommodated to – or indeed overcome – the allegedly prior claims of state sovereignty. These claims of state sovereignty, this thesis concludes, can no longer be accepted at face value. Instead, it is essential to promote the claims of the right to life as the right to peace as the key to future progress. Tsunesaburo Makiguchi, a Japanese educator, wrote The Geography of Human life (1903), at a time when the Great Powers were pursing expansionist and imperialist industrial and military policies in a world-wide competition for hegemony. He classified these struggles into four types of competition-military, political, economic and humanitarian. Makiguchi argued that the world could no longer afford military, political or economic rivalries but should shift its energies to competing on a humanitarian plane. Makiguchi's view is significant in that he does more than predict a shift in the modes of competition. He expresses his view that the very nature of competition must be transformed, from confrontation to cooperation. Makiguchi writes:

> There is no simple formula for this humanitarianism. Rather, all activities, whether in the realm of politics or economics, should be conducted in conformity with the principles of humanitarianism. What is important is to eschew egotistical actions, striving to protect and improve not only your own life

> but others' as well. One should do things for the sake of others, for by benefiting others, we benefit ourselves. [25]

The outcome must be to engage consciously in collective life. In other words, it is the transformation from indifference to involvement in collective life that is important. Makiguchi suggests that humanitarian competition will influence other forms of competition, which will in turn bring about a shift in people's consciousness from competition to coexistence and cooperation.

Each person develops his/her own value system. Any value, some argue, can be replaced by something else which is its equivalent. In practice, while recognising the merit of diversified values, we need to find a common value that can serve as a foundation embracing many kinds of values. Without such a common foundation, human mutual trust, coexistence and cooperation cannot be realised. The conclusion of this thesis is that the right to life in the name of right to live in peace, which all members of the world have, is the basic human right. This basic human right is founded on the dignity of life. This thesis argues that the dignity of life must be the shared value: nothing can be substituted for it. This right can be only realised by taking Makiguchi's stance: by benefiting others, we benefit ourselves. Likewise, the value of the dignity of life, inherent to all people, exists only in the action of `benefiting others, we benefit ourselves'. That is to say, if you value the dignity of life in the truest sense, you inevitably act based on the principle of `benefiting others, we benefit ourselves'. Although difficult, this seems the only possible way to transform the world of war to the world without war. It is only the first step to create the world of peace.

The conclusion of this thesis is aptly summed up in the personal experiences of Cambodians, because they illustrate what it means to live without the dignity of life, peace and hope. The unforgettable conversation was held with a Cambodian couple and some other Cambodian men at the NGO office in Phnom Penh. I had asked a general question about their experiences under the Pol Pot regime. With a smile, the woman answered in the Khmer language while sitting next to her husband. The interpreter

translated her words, also with a smile, `she and her husband were so starved during the Pol Pot regime that they killed their baby and ate it.' It was shocking to see not only that the couple did not hesitate to share such an experience, but also that those who were present accepted the couple without making any judgement against them. The interpreter explained to me that there were many Cambodians who shared the same experience. The present thesis has sought to show that, in being profoundly shocked by such a revelation, future scholarship and its applications must work to institute an international human rights regime which can respond effectively and positively to the root causes of such tragedies.

ENDNOTES

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14. Jon Bennett, 'The NGO Code of Conduct: NGO obligations towards governments', Refugee Participation Network, No.19, May 1995, p.17.

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16. ibid, p.16.

17. www.sphereproject.org

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21. Daisaku Ikeda, SGI Peace Proposal. To the UN , 26 January, 1997, p. 3.

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23. The Commission on Global Governance, Our Global Neighborhood, (Oxford: Oxford University Press, 1995), p.xiv.

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APPENDIX

UNHCR COMMUNICATIONS

NATIONS UNIES
HAUT COMMISSARIAT
POUR LES REFUGIES

UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES

Télégrammes : HICOMREF
Télex : 415740 UNHCR CH
Téléphone : 739 81 11
Télifax : 731 95.46

Case Postale 2500
CH 1211 Genève 2 Dépôt

Repatriation

14 April 1993

Dear

Your request not to return to Cambodia has been carefully considered. We have taken into account all your reasons and consulted with other UN components operating in Cambodia. As a result of these consultations and UNHCR's regular monitoring in the past twelve months of the 360,000 Cambodians who have already returned since March 1992, we consider that you do not qualify for refugee status in the sense of prevailing international law. UNHCR will soon withdraw from the border, after having fulfilled its task of protecting and assisting Cambodian refugees, especially in Khao-I-Dang, since 1979.

The following are the procedures and safeguards in place for you in Cambodia :

(i) On your arrival in Cambodia there will be a UNHCR official to meet you. At the reception centres in areas under the control of the State of Cambodia you will be jointly processed by UNHCR and the Cambodian Red Cross and issued with food coupons and other materials depending on the option you have selected. You will also be issued with a temporary identity document which will enable you to freely move, seek employment or enrol your children in school, etc. In other areas - FUNCINPEC, KPNLF and PDK - UNHCR also maintains a presence.

(ii) You are not obliged to tell anyone other than UNHCR or UNTAC personnel about your camp of origin or your activities during your stay in Thailand. If you are in any way worried about your own situation, you should bear in mind that each province has a UN Human Rights Officer present, that UNHCR visits returnees regularly and that representatives from the UN electoral component who are monitoring and supervising the election are present throughout the country. Each district has UNTAC civilian police as well as members of the military component. You can approach them at any time with your concern. They will assist you and if no UNHCR official is present, you should request them to refer your case to UNHCR.

(iii) If you wish to change your final destination after you arrive in Cambodia, consult first UNHCR or the Cambodian Red Cross. You will then be given all available information regarding security, health, availability of land for agriculture and housing, job opportunities, education etc. at your new destination. We will also then be in a better position to make proper arrangements to provide you with your future food rations if you happen to be relocating to a place where a distribution point exists.

(iv) You have been informed that emigration from Thailand is no longer possible. The Embassies of resettlement countries based in Phnom Penh have taken over this task, should you qualify and provided you have not already been rejected for resettlement. UNHCR in Cambodia will provide you with the necessary advice and assistance on how to approach the Embassies to pursue your demands for resettlement.

(v) There are UN staff in the camp who will continue to provide you with some possible counselling and advice about the situation in Cambodia and assist you with some of your personal concerns.

(vi) On arrival in Cambodia you can contact UNHCR field staff at the UNHCR office who are there to assist you. If you have a particular concern, we shall help you resolve it, if necessary through our special reintegration projects.

Yours sincerely,

Sergio Vieira de Mello
UNHCR Special Envoy for Cambodia
UNTAC Director for Repatriation

NATIONS UNIES
HAUT COMMISSARIAT
POUR LES REFUGIES

UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES

Télégrammes : HICOMREF
Télex : 415740 UNHCR CH
Téléphone : 739 81 11
Téléfax : 731 95-42

Case Postale 2500
CH-1211 Genève 2 Dépôt

TELEFAX

To: Mr. D. Conway, Representative, UNHCR Branch Office, Thailand
Mr. J. Assadi, Head of Sub Office, UNHCR Aranyaprathet
Mr. S. Ducasse, Chargé de Mission, UNHCR Phnom Penh

From: Andrew Mayne, Desk Officer, Desk IV, Regional Bureau for Asia and Oceania, UNHCR Geneva
A. Mayne

Pages: 6, including this cover page

Ref: A004/THA/ 0215
A004/THA/ 0216
A004/CAM/ 0217

Our fax: (022) 739 8676

Date: 15.04.1993

Yr fax: 00 662 280 0555 (Bangkok)
00 6637 231 792 (Aran)
00 873 175 4312 (Phnom Penh)

File: 610.THA.CAM

Subj: Attached letter from Mr. Vieira de Mello

Please find attached the letter of Mr. Vieira de Mello to the persons in Site 2 who have not registered for UNHCR assisted repatriation.

Also attached is the unofficial Cambodian translation of the original draft, which would need to be corrected in order to correspond to the final text before distribution.

Regards,

---

cc:
MM/MS Blatter/Chetty, Mayne, Obl/Schaak, RBAO, Chron, Registry

0415FSVM

CRCC believes more people will now step forward for repatriation with UNHCR in the days to come. It appears that this is more desirable option than being booked on illegal immigration charges and being sent to police station jails.

I must emphasize that the above is an account from CRCC, one that was delivered to me in person by Generals Somchai and Kampol (Deputies of CRCC) a few minutes ago. At this stage, I have no reason to discount their information, especially as they went out of their way to deliver it. I will report further as more information becomes available.

cc: Working Group
MG/EH/BA/KB

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEE

Field Office ARANYAPRATHET, Thailand
Tel: (037) 231-679, Fax (037) 231-792

FACSIMILE TRANSMISSION	No. of page(s): 2	Date: 23 April 1993

Addressee:

[X] UNHCR: BKK.
ATTN: Mr. Daniel E. Conway
ARA/HCR/BKK/234

[X] UNHCR: PNP.
ATTN: Mr. Serge Ducasse/
Ms. Nici Dahrendorf (copied)
ARA/HCR/PNP/234

[X] UNHCR: BTB
ATTN: Mr. Udo Janz
ARA/HCR/BTB/234

[ ] UNHCR:
ATTN:
ARA/HCR/

Drafted by: JA/cp	Cleared with:	Authorized by: J. ASSADI

Text:

Subj: Update on Site 2/refuseniks

Further to my fax of 22 April, I met yesterday afternoon in a final repatriation coordination meeting with Gen. Sanan, Chief of CRCC, and Col. Thon, Chief of DPPU, who were accompanied by other CRCC/DPPU officials. The meeting was convened at UNHCR and chaired by the undersigned.

The focus of the meeting was of course the question of the refuseniks. The camp commander of Site 2 provided a briefing on DPPU efforts to counsel people to go home. The camp commander felt nevertheless that despite UNHCR/UNBRO/DPPU counselling some 400 individuals would still be adamant about returning home by the conclusion of the operation. The meeting agreed that while a number of people have come forward for repatriation, many others are "trapped" by the refusenik leaders/spokesmen. After extensive discussion on the various counselling approaches that have been utilized (or ought to be), the Thai authorities proceeded to discuss the various ways of dealing with refuseniks still in the camp at the end of repatriation, ie on 28 April. They eventually agreed as follows:

Current Thai policy and not law would apply to these individuals: the latter entails imprisonment and fines while the former means deportation. Deportation will in all likelihood be carried out by Burapha Field Forces as of 28 or 29 April. My impression is that they will use the nearest major border crossing, namely Tapraya/Thmor Pouk. Before that, however, in the afternoon of 26 April, military trucks will enter the camp in order to present the refuseniks with a sharp and vivid choice,

Fo

27 APR

URGEN

UNITED NATIONS
HIGH COMMISSIONER FOR REFUGEES
BANGKOK, THAILAND

1993 APR 27 AM 11:00

1.

Telecommunications Transmital Form

For Drafter:

Date: 27/04/93	Drafter: DEC/sl	Extension: 1858	Priority level:
Office/Unit: Representative's Office	File: 100.THA.CAM		Mode of transmission:
For Registry/Telecoms:			[ ] Telex [ ] Sitor
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UNHCR PHNOM PENH
THA/CAM/HCR/ 0179

UNHCR ARANYAPRATHET
BKK/ARA/HCR/ 0153

URGENT URGENT CONFIDENTIAL

FOR: SERGE DUCASSE, CHIEF OF MISSION, PHNOM PENH
INFO: JAHANSHAH ASSADI, ARANYAPRATHET
FROM: DANIEL E. CONWAY, REPRESENTATIVE, BANGKOK

RE: NON-VOLUNTARY REPATRIATION OF CAMBODIANS REFUSING UNHCR ASSISTANCE TO RETURN

1. JAHANSHAH ASSADI INFORMED ME LAST NIGHT OF YOUR TELEPHONE CONVERSATION WITH HIM YESTERDAY IN WHICH YOU SUGGESTED WE CONSIDER PROVIDING BUSES AND TRUCKS TO PICK UP IN CAMBODIA ANYONE REPATRIATED INVOLUNTARILY FROM SITE 2 BY THE THAI AUTHORITIES, TO TRANSPORT THEM TO A RECEPTION CENTER.

2. IN ORDER TO KEEP LINES OF COMMUNICATIONS CLEAR, I SUGGEST THAT IN FUTURE WE DISCUSS BETWEEN US DIRECTLY PROPOSALS WHICH HAVE POLICY IMPLICATIONS, OR WHICH MIGHT HAVE POLITICAL FALLOUT IN OUR RESPECTIVE COUNTRIES. OF COURSE, WITH THE COMPLETION OF THE REPATRIATION, THERE MAY BE FEW OF THESE, BUT WE SHOULD KEEP OUR DIRECT LINES OF COMMUNICATION OPEN.

3. ON THE SUBSTANCE, WE IN THAILAND ARE FIRMLY OPPOSED TO THE PARTICIPATION OF UNHCR, IN ANY CAPACITY, IN THE NON-VOLUNTARY REPATRIATION OF CAMBODIANS FROM SITE 2.

.../2-

Cleared By:	Authorized By:
Signature, Name and Title	DANIEL E. CONWAY, REPRESENTATI Signature, Name and Title

CC:

URGENT

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Field Office ARANYAPRATHET, Thailand
Tel: (037) 231-679, Fax (037) 231-792

FACSIMILE TRANSMISSION	No. of page(s): 2	Date: 28 April 1993

Addressee:

[X] UNHCR: BKK.
ATTN: Mr. Daniel E. Conway
ARA/HCR/BKK/244

[X] UNHCR: PNP.
ATTN: Mr. Serge Ducasse/
Ms. Nici Dahrendorf
ARA/HCR/PNP/244

[X] UNHCR: BTB
ATTN: Mr. Udo Janz
ARA/HCR/BTB/244

[ ] UNHCR:
ATTN:

ARA/HCR/

Drafted by: JA/cp	Cleared with:	Authorized by: J. ASSADI

Text:

Subj: Conclusion of Cambodian repatriation/refuseniks

I am pleased to inform you that the Cambodian repatriation operation from the Thai border camps was completed today. The final convoys today carried 1,949 persons to the Sisophon reception centre, bringing the total number of returnees for the entire operation to 361,462.

A brief ceremony was held at the Poipet/Klong Luk border crossing to mark the departure of the last convoy. The last returnee (and his family) to leave Thailand was also honored with gifts and garlands (he appreciated the gifts but wasn't crazy about being the last person to repatriate!)

As indicated in my earlier faxes, as of today our activities and presence in Site 2 have ceased. Burapha Field Forces entered the camp this morning to take charge of the area. DPPU will leave the camp tomorrow. Late last night I received Gen. Sanan's approval for four staff to remain in Site 2 for another 48 hours (along the lines indicated in my fax of 27 April).

Unfortunately, the refusenik dilemma remains intact. A large number of UNHCR repatriation buses/trucks were made available to the refuseniks (parked in fact at their doorsteps) late this afternoon, as a last-minute opportunity. However, only two families (6 individuals) volunteered to go home with us today. Therefore, the buses left the camp without passengers. As of late today Section 99, where the refuseniks live, was therefore sealed off by the authorities.

URGENT

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Field Office ARANYAPRATHET, Thailand
Tel: (037) 231-679, Fax (037) 231-792

FACSIMILE TRANSMISSION	No. of page(s): 2	Date: 29 April 1993

Addressee:

[X] UNHCR: BKK
ATTN: Mr. Daniel E. Conway
ARA/HCR/BKK/247

[X] UNHCR: BTB
ATTN: Mr. Udo Janz
ARA/HCR/BTB/247

[X] UNHCR: PNP
ATTN: Mr. Serge Ducasse/
Ms. [illegible]
[illegible]/HCR/[illegible]

[ ] UNHCR:
ATTN:
[illegible]/HCR/[illegible]

Drafted by: JA/cp	Cleared with:	Authorized by: J. ASSADI

Text:

Subj: Start of round-up of refuseniks

This morning Thai police began their crackdown on the refuseniks in (former) Site 2. As the previous authorization to allow for four UN staff to be stationed in the DPPU office in Site 2 was rescinded late last night (subject of a separate confidential note for the file), the following is a brief and preliminary account of events as relayed to us by CRCC:

At approximately 11:00 hrs. some 20 unarmed Thai policemen, accompanied by CRCC officials, entered Section 99 and attempted to arrest a number of refuseniks on charges of illegal immigration. Several of the refuseniks fled and others resisted arrest. Some refuseniks, upon seeing their fellow refuseniks being placed on police vehicles, laid themselves on the road to block the departure of the vehicles. Eventually, two individuals were arrested and taken to Tapraya police station.

Apparently the police and CRCC made a point of not engaging the refuseniks in any violent manner and did not pursue those who had eluded their grip. They also intentionally undertook this exercise unarmed. No injuries were reported. The two arrests were symbolic and were meant to send a message, according to the CRCC.

Later this afternoon, CRCC informed us that some 34 cases (117 persons) have indicated that they wish to repatriate with UNHCR "as long as they can go to their final destination (?)". CRCC has requested that we dispatch two buses and four trucks in order to accommodate these cases. We have agreed to do so. We would also propose to send them to Sisophon reception centre late today.

.../2--

We still expect the Thai authorities - primarily police and immigration - to begin their action against the refuseniks during the next day or two. Should the refuseniks be sent to police or immigration stations, as opposed to being summararily deported, it stands to reason that the refuseniks' resistance to this action should be less than it would have been in the case of immediate deportation. The level of force by the Thai authorities should therefore be correspondingly lower.

While we are delighted to see the successful conclusion of this massive and complex operation, we cannot help but feel a degree of disappointment over the predicament of the refuseniks. We can nevertheless take solace in the fact that we tried every possible means to avert the situation in which these 700 individuals presently find themselves, and one that will unfortunately be dealt with by the Thai authorities - peacefully or otherwise - in a matter of days if not hours.

cc: Working Group
MG/EH/BA/KB

URGENT

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
Field Office ARANYAPRATHET, Thailand
Tel: (037) 231-679, Fax (037) 231-792

FACSIMILE TRANSMISSION	No. of page(s): 2	Date: 30 April 1993

Addressee:

[X] UNHCR: BKK.
ATTN: Mr. Daniel E. Conway
ARA/HCR/BKK/248

[X] UNHCR: BTB
ATTN: Mr. Udo Janz
ARA/HCR/BTB/248

[X] UNHCR: PNP.
ATTN: Mr. Serge Ducasse/
Ms. Nici Dahrendorf
ARA/HCR/PNP/248

[ ] _____
ATTN:

ARA/HCR/

Drafted by: JA/cp	Cleared with:	Authorized by: J. ASSADI

Text:

Subj: Refugeniks/close of operation

Late last night I received a call from Gen. Somchai, Deputy Chief of CRCC, informing me that more refuseniks had volunteered to return to Cambodia with UNHCR (since the police action earlier in the day). He requested that some 10 buses and 10 trucks be despatched to Site 2 tomorrow (today) to transport these additional persons to Cambodia. I replied that we would do so only if UNHCR could verify the voluntariness of these departures, i.e our staff would have to be present at the point of departure in Site 2. (In the case of yesterday's movement we were only able to talk to the returnees after the buses had left the camp). After consulting with Gen. Sanan in Bangkok he agreed that one staff member be allowed in for this purpose. Gen. Somchai said they preferred a Thai UN staff member, as the presence of a foreigner might agitate the people. I agreed to this, as I had in any event contemplated assigning Khun Pikul to this task. He is (was?) the Protection Officer for Site 2 and is a Khmer speaker as well.

This morning the buses and trucks arrived in the camp at 8:00 but Pikul's entrance was delayed until 11:30 a.m. Allegedly the message from CRCC Aran to let him enter the camp had not yet reached CRCC in Site 2. Fearing and hearing that people would be boarded without our presence - and thus presented with a fait accompli - I informed CRCC at 11:00 a.m. that unless we were accorded immediate entry as agreed, we would recall the buses and trucks. Finally a half hour later Pikul was allowed into the camp. Moreover at 1:00 p.m. Khun Boonshan our logistics officer and liaison officer with CRCC/DPPU was also permitted to enter the camp.

At 2:00 p.m. two buses and two trucks carrying 65 persons and their belongings left the camp for Sisophon reception centre. A final movement left at 4:00 p.m. with 55 passengers on 2 buses. The figures are subject to confirmation. Six buses therefore returned empty. In the case of both movements our staff had the opportunity to confirm - in the camp - the returnees' voluntariness and the fact that no physical force had been used. In fact Pikul's and Boonshan's assessment was that CRCC had used patient persuasion to convince these persons to repatriate. No arms/weapons were seen, only meetings and discussions. The police were not in the camp either. The fact that some 400 people remained adamant and are still in Site 2 by the end of today also clearly indicates that people had the opportunity to say no to repatriation with UNHCR.

I also understand that CRCC may terminate its work today and that as of tomorrow, 1 May, no formal Thai unit responsible for refugees and/or repatriation will be operational (DPPU, as you know, concluded its mission on 28 April). I believe CRCC tried very hard to solve the refusenik problem during the past two days before their phase-out. As they were only partially successful, the fate of the remaining 400 refuseniks remains unclear, but CRCC - like DPPU before them - believe they tried their best without having to resort to severe measures. The fate of the remaining 400 is thus unclear and certainly ominous.

Today also works the termination of contracts of some 130 UNHCR/UNBRO/FISRAPT staff (to whom I cannot do justice by merely praising them in this message). Our contract with the bus and trucks company expires today, as do a number of other services and facilities. For all intents and purposes our work at the border can be considered as having ended as of today.

Therefore, may I take this opportunity, on behalf of all staff at the border, to express our deepest appreciation to colleagues in Bangkok and Cambodia for the untiring support and cooperation they provided to us throughout this operation. There were moments of tension and stress, but in the final analysis it was teamwork at its best.

cc: Working Group
MG/EH/BA/KB

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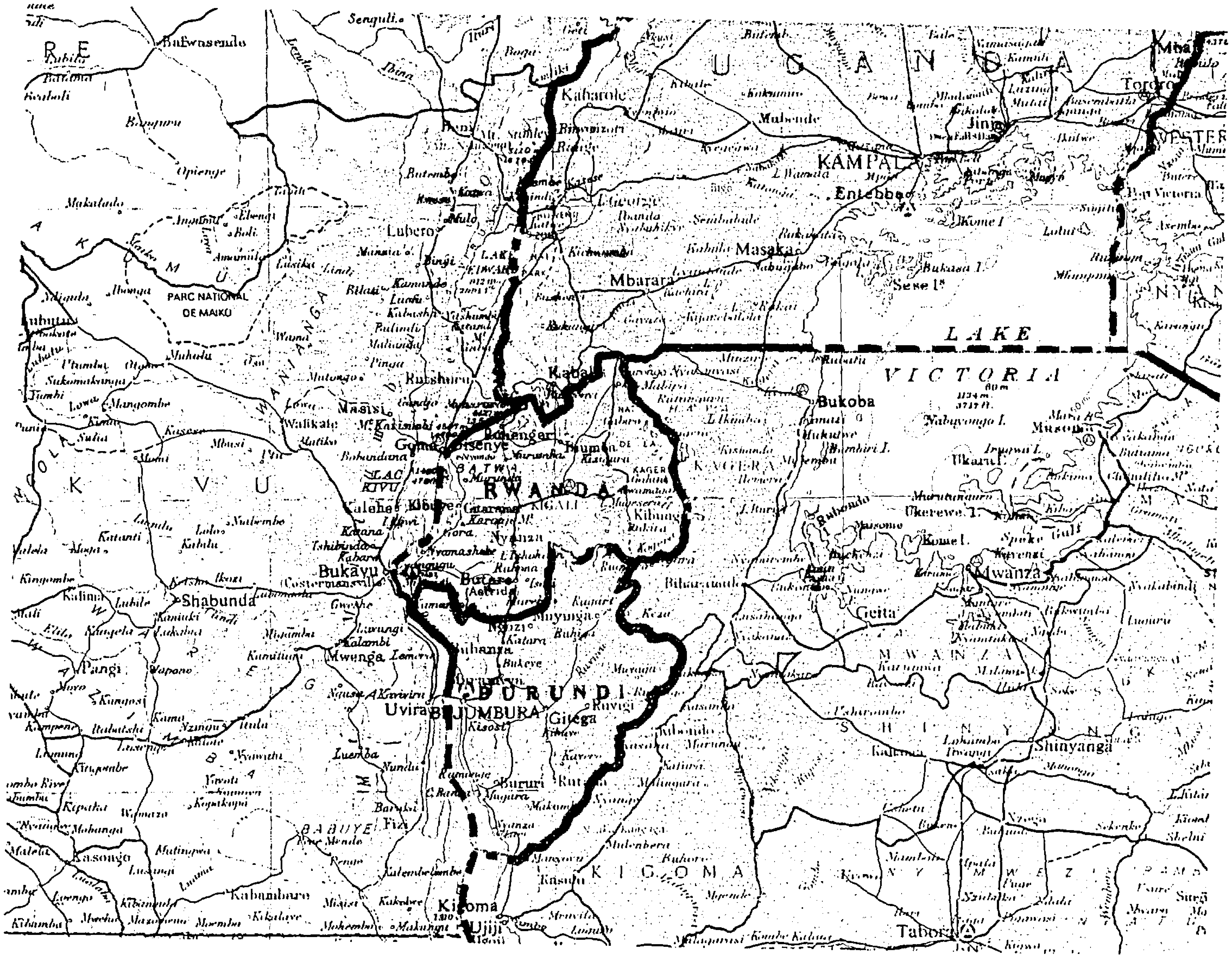
Map 1: Rwanda



RWANDA
BURUNDI
UGANDA
KAMPALA
Entebbe
Jinja
Tororo
Mbarara
Masaka
Kabale
Kabarole
LAKE VICTORIA
Bukoba
Mwanza
Geita
Shinyanga
Tabora
Kigoma
Ujiji
BUJUMBURA
Uvira
Gitega
Butare
Nyanza
Gisenyi
Goma
Ruhengeri
Kibuye
Bukavu
Shabunda
Kibungo
KIGALI
Rutshuru
Masisi
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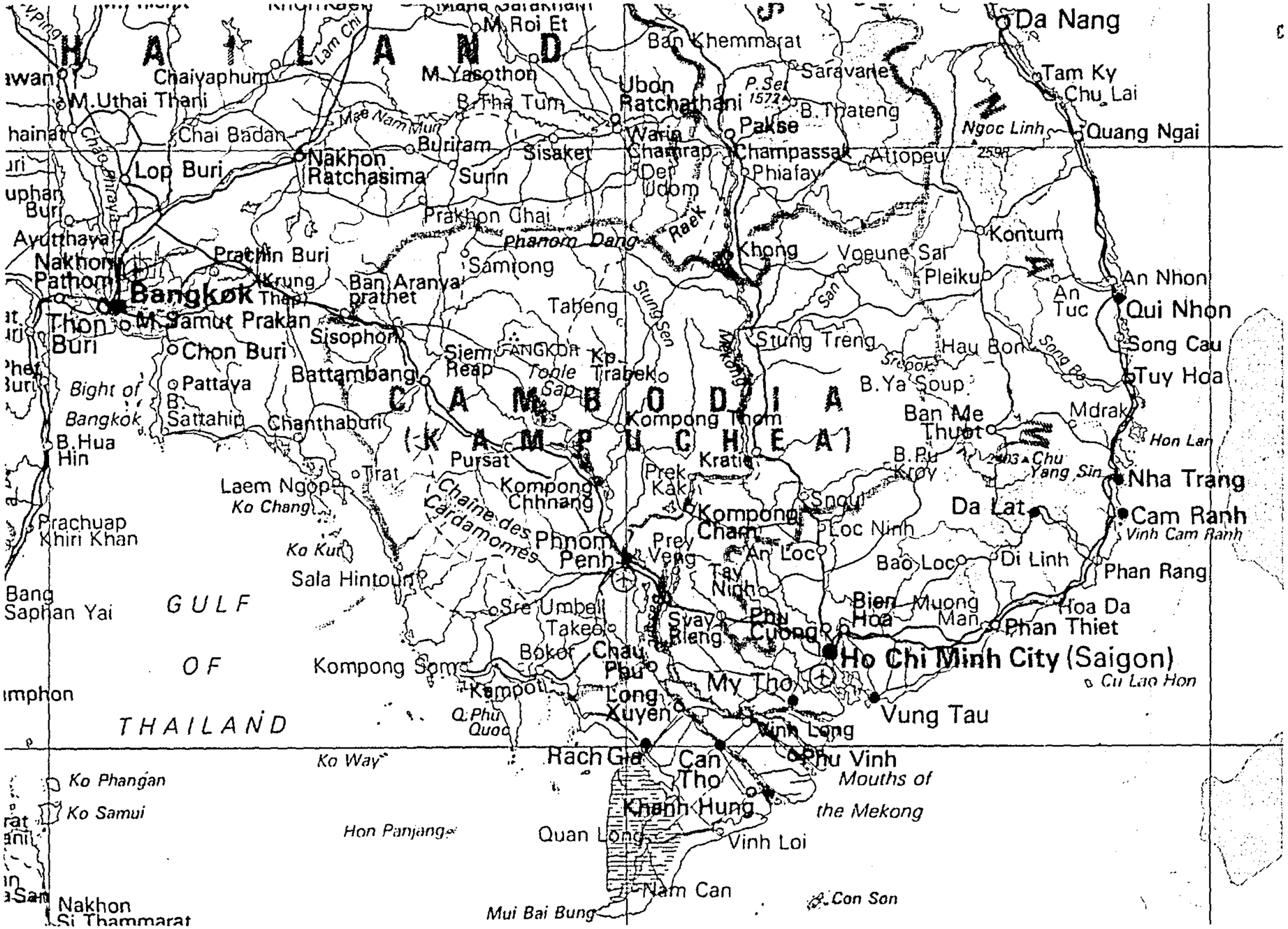
KAGERA
MWANZA
KIGOMA
LAKE EDWARD



Map 2: Cambodia