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# REFUGEE RIGHTS: THE NEW FRONTIER OF HUMAN RIGHTS PROTECTION

*Bill Frelick\**

For four decades, a neat line divided the human rights field from the refugee field. That line was represented by international borders. The human rights field was concerned almost exclusively with abuses of the rights of citizens by their own governments or, occasionally, by nongovernmental entities operating within the borders of states. By contrast, the refugee field came into play only after persons fleeing persecution had crossed an international border. The cause of flight was considered relevant only insofar as it provided a basis for determining refugee status. Addressing the causes of refugee flows was considered beyond the competence of agencies operating on behalf of refugees.

The neat division had its origins in the two documents that, in the aftermath of World War II, defined the scope of human rights and the international refugee regime: the Universal Declaration of Human Rights<sup>1</sup> of 1948 and the UN Convention Relating to the Status of Refugees of 1951.<sup>2</sup> The UDHR laid down its marker on behalf of refugees by declaring that "[e]veryone has the right to seek and to enjoy *in other countries* asylum from persecution."<sup>3</sup> The Refugee Convention defined the term "refugee" as a person who, 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.<sup>4</sup>

The UDHR concerned basically itself with persecution within a person's own country. Such persecution, or more specifically, the fear of such persecution if returned, forms the basis of the refugee definition. The most fundamental rights protection in the Refugee Convention concerns safeguarding refugees from being returned to a place where their life or freedom would be

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<sup>1</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), at 71, U.N. Doc. A/810, (1948) [hereinafter UDHR].

<sup>2</sup> 189 U.N.T.S. 150 (*entered into force* April 22, 1954) [hereinafter Refugee Convention].

<sup>3</sup> UDHR, *supra* note 1, art. 14(1) (emphasis added).

<sup>4</sup> Refugee Convention, *supra* note 2, art. 1(A)(2) (emphasis added).

threatened.<sup>5</sup> This is known as the principle of *nonrefoulement*, enshrined in Article 33 of the Refugee Convention, and now considered by many to be a peremptory norm of customary international law.<sup>6</sup>

During those four decades, the UN system clearly divided responsibilities for human rights as distinct from responsibilities for refugee protection and assistance. The first UN human rights mechanism was the Commission on Human Rights, created in 1946, which reports to the General Assembly through the Economic and Social Council (ECOSOC).<sup>7</sup> The Commission generally meets only once a year. Its work is conducted largely through special rapporteurs or working groups, such as the Special Rapporteur on Torture or the Working Group on Arbitrary Detention.<sup>8</sup> In 1993 the UN also established a UN Commissioner for Human Rights (UNCHR).<sup>9</sup> The UNCHR is responsible for the UN Centre for Human Rights and for coordinating the UN's human rights work.<sup>10</sup>

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<sup>5</sup> See *id.* art. 33 (enumerating the principle of nonrefoulement).

<sup>6</sup> EXCOM, United Nations High Commission for Refugees, General Conclusion on International Protection, No. 25 (XXXIII) (1982), ¶ (b) (noting that "the principle of non-refoulement . . . was progressively acquiring the character of a peremptory rule of international law."); CARTEGENA DECLARATION ON REFUGEES, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 19-22 Nov. 1994, sec. III, para. 4, reprinted in II UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS 206, 208 (Jean-Pierre Colombey ed., 1995) (stating that the principle of non-refoulement should be acknowledged as a rule of *jus cogens*); GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 168, 201 (2d ed. 1996); PIRKKO KOURULA, BROADENING THE EDGES: REFUGEE DEFINITION AND INTERNATIONAL PROTECTION REVISITED 276 (1997).

<sup>7</sup> See generally HOWARD TOLLEY, JR., THE U.N. COMMISSION ON HUMAN RIGHTS (1987).

<sup>8</sup> See *id.* at 104-11; M. T. Kamminga, *The Thematic Procedures of the UN Commission on Human Rights*, 34 NETH. INT'L. L. REV. 299 (1987); David Weissbrodt, *The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights*, 80 A.J.I.L. 685 (1986).

<sup>9</sup> *High Commissioner for the promotion and protection of all human rights*, G.A. Res. 141, I U.N. GAOR, 48th Sess., Supp. No. 49, at 261, U.N. Doc. A/48/49 (1993).

<sup>10</sup> See generally United Nations, *High Commissioner for Human Rights* <<http://www.unhchr.ch/>>.

A distinct agency, the UN High Commissioner for Refugees (UNHCR), was created on behalf of refugees in 1950.<sup>11</sup> Its mandate defined refugees in words identical to those that would appear a year later in the Refugee Convention, specifying that a refugee is a person "outside the country of his nationality" who is unwilling or unable to return owing to a well-founded fear of persecution.<sup>12</sup> The Statute also specified that "the Work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees."<sup>13</sup>

During the Cold War, the UN system was noteworthy for the ineffectiveness of its human rights work. Criticism of member states was frowned upon as interference in internal affairs. This principle is found in the UN Charter, which asserts that the UN and its members may not intervene "in matters which are essentially within the domestic jurisdiction of any state."<sup>14</sup> The heavy lifting in the human rights field was left largely in the hands of nongovernmental organizations.

In contrast, the UNHCR was generally noted for its effectiveness, but was careful to tread circumspectly outside the borders of refugee-producing states. High Commissioners steered clear of commenting on the causes of refugee flows, seeing such statements as inconsistent with the UNHCR's mandate to be "entirely non-political."

During that time, most of the world's refugees originated in communist or communist-dominated states. UNHCR was perceived, with some justification, as a creation and a tool of the West in the ideological struggle of the Cold War. The widely accepted view of the world, at that time, was that neither borders nor major ideologies would change. Despite rhetoric to the contrary, most assumed that refugees were not likely to return to their countries of origin. Hungarians, East Germans, Poles, Soviets, Cubans, Vietnamese, Cambodians, Ethiopians, Afghans, and millions of others would either languish for years in camps in neighboring countries or, if lucky, be resettled in third countries.

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<sup>11</sup> *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428 (V), Annex, 5 U.N. GAOR Supp. No. 20 at 46, U.N. Doc. A/1775 (1950) [hereinafter *Mandate of the UNHCR*].

<sup>12</sup> Compare *id.* at ¶ 6(A)(ii) (establishing competence of the High Commissioner to persons "owing to a well-founded fear of being persecuted . . . is outside the country of his nationality . . .") with Refugee Convention, *supra* note 2, art. 1 (defining a refugee).

<sup>13</sup> *Mandate of the UNHCR*, *supra* note 11, ¶ 2.

<sup>14</sup> U.N. CHARTER art. 2, para 7.

UNHCR listed three "durable solutions," repatriation, local integration, or resettlement to resolve the plight of refugees. Although UNHCR called repatriation the preferred solution, in most cases it was not considered a viable option because political changes would not occur sufficient to allow refugees to return safely. Exile was presumed. And UNHCR's emphasis was on securing asylum and on defending the rights of refugees in their host countries. Pressure was exerted on "first asylum states" to keep their borders open to allow refugees to enter. A system of international burden sharing developed, with mixed success, to provide incentives to those states to provide at least temporary asylum pending a durable solution.

#### I. NEW WORLD ORDER: THE PERSIAN GULF WAR AND THE CHALLENGE TO ASYLUM

All that has changed since the crumbling of the Berlin Wall and the collapse of the Soviet Union. Borders are no longer considered sacrosanct. New states have formed. The protective wall of the principle of noninterference in the internal affairs of other states, although still standing, has not been immune from the changes in the world scene.

The first major post-Cold War refugee flow occurred in the immediate aftermath of the Persian Gulf War. In pulling together the coalition to oppose Iraqi President Saddam Hussein's invasion of Kuwait, U.S. President George Bush announced a "New World Order."<sup>15</sup> Refugees did not fit the ideal of an orderly world. In principle, the causes of refugee flows would be stopped and refugees would be able to remain in their home countries in safety and dignity. This also comported nicely with the growing anti-immigrant mood in the affluent West, the distaste for asylum seekers in their own countries, and the fear that millions more could be on the way from the collapsed Soviet Union and the third world.

In the U.S. view, the experiences of Vietnam would not be repeated. The Gulf War would not be drawn out. Nor would the war's aftermath; neighboring allied countries would not be burdened by a continuing flow of refugees for years after the cessation of hostilities. No longer would a Vietnam or a Cuba, and now an Iraq, with impunity be permitted to force its citizens to become refugees. No longer would allies such as Thailand or Pakistan, and now

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<sup>15</sup> See George Bush, *Address Before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict*, 1 PUB. PAPERS OF THE PRESIDENT: GEORGE BUSH 218 (1991).

Turkey, be pressured to keep their doors open and bear the burden of caring for hundreds of thousands, perhaps millions, of refugees for year after year.

But could the United States, with or without the support of the world community, alter the refugee-producing conditions in such states? All its efforts to the contrary, Saddam Hussein remained crippled but in power, and still able to persecute his own citizens. And persecute them he did.<sup>16</sup> Hundreds of thousands of Kurds fled his depredations.<sup>17</sup> Turkey closed its borders.<sup>18</sup> They remained stranded on the mountainous frontier.

The U.S.-led coalition could have pressured Turkey to open its border. It did not. The coalition could have marched on Baghdad. It did not. The right to seek asylum, declared in the UDHR,<sup>19</sup> was denied. But would the world community sit back and watch mass *refoulement* being committed?

A new approach was devised. Its basis is found in UN Security Council Resolution 688, which marks a turning point in both the international refugee and human rights regimes, marking their intersection in the country of origin. Its result was the creation of a safe haven zone inside northern Iraq.

UN Resolution 688 is important both for what it does and does not say. It frames its condemnation of Saddam Hussein's repression not in terms of the human rights violations committed against Iraqi citizens inside Iraq, but in terms of the "massive flow of refugees towards and across international frontiers" caused by that repression.<sup>20</sup> The concern is not primarily about Saddam's threat to the Kurds of Iraq, it is a fear of the Kurds themselves--that their flight to other countries will "threaten international peace and security in the region."<sup>21</sup> This opens the door under Chapter VII of the UN Charter for interference in the internal affairs of Iraq.

Therefore, Resolution 688 should not be read as ushering in a new day for human rights against government abuse of its citizens committed under the umbrella of state sovereignty. On the contrary, the resolution affirms the "sovereignty, territorial integrity and political independence of Iraq and of all

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<sup>16</sup> See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 146-49 (1992); HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1992 651-92 (1992); see also HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ (1993); HUMAN RIGHTS WATCH & PHYSICIANS FOR HUMAN RIGHTS, THE ANFAL CAMPAIGN IN IRAQI KURDISTAN (1993).

<sup>17</sup> See U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 1992 98-99 (1992).

<sup>18</sup> See *id.* at 82.

<sup>19</sup> UDHR, *supra* note 1, at art. 14(1).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

States in the area."<sup>22</sup>

But Resolution 688 did make a significant advance. It insisted that Iraq "allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq."<sup>23</sup> In compliance with Resolution 688, Iraq did conclude a Memorandum of Understanding (MOU) with the UN Secretary General's Executive Delegate Prince Sadruddin Aga Khan on April 18 that allowed the UN to provide humanitarian assistance wherever it believed necessary. The language of the MOU, perhaps more than Res. 688, could provide a precedent for future involvement of the various arms of the United Nations into internal affairs of states at the point at which human rights and refugees intersect, the conditions that force people to flee their homes. The MOU welcomed "United Nations efforts to promote the voluntary return home of Iraqi displaced persons and to take humanitarian measures to avert new flows of refugees and displaced persons from Iraq."

Resolution 688 had made a genuine advance by expressing the consensus of the world community that international humanitarian organizations should be allowed free access to assist within Iraq.

Citing Resolution 688 as justification, although it made no reference to sending international troops into Iraq, Britain, France, and the United States carved out a security zone in northern Iraq that would serve the dual function of 1) "protecting" Turkey from Iraqi Kurdish refugees by preventing them from seeking asylum in Turkey, and 2) destabilizing the Iraqi regime by supporting the development of a hostile, autonomous political and military entity within its territory.

The rhetoric of Operation Provide Comfort was humanitarian, and it did indeed provide relative safety for the Kurds of northern Iraq from Iraq's central government for the next several years. But it was not a case of politically neutral humanitarianism. Safety was selective. Although Iraqi government forces were kept at bay, Operation Provide Comfort provided no safety from incursions from Turkey, which periodically launched attacks against its own Kurdish guerrillas operating out of Iraq, on occasion hitting Iraqi Kurds, as well.

In 1996, seeing the writing on the wall and realizing that the safe haven could not be maintained indefinitely, one of the two strongest Kurdish factions, the Kurdish Democratic Party (KDP), decided to strike a deal with Saddam Hussein by inviting Iraqi government forces to bolster its side in a struggle with

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at para. 3.

the other major faction, the Patriotic Union of Kurdistan (PUK). Although the KDP's action seemed to be a blunder of the first magnitude, it was based on the evidence of a diminishing commitment by the international community following Turkey's reluctance to maintain the protective umbrella and a realization that the international community, reiterated as early as Resolution 688, would never challenge the ultimate sovereignty of Iraq over the Kurdistan region.

The border with Turkey remained closed. Aside from a few thousand hand-picked persons with close ties to the United States, who were evacuated, the rest remained trapped with no place to escape. As in 1991, asylum outside the country was denied. This time there was no semblance of protection inside the country either.

The Gulf War also resulted in institutional changes within the UN system. The Baghdad regime flagrantly obstructed humanitarian arms of the United Nations attempt to fulfill Resolution 688. The most serious post-war repression by Baghdad against its own citizens occurred in southern Iraq directed against the "Marsh Arabs," a people living in the area where the Tigris and Euphrates rivers merge. When Special Rapporteur Max Van der Stoep tried to report to the Security Council on Iraqi human rights abuses in the marshlands, in July 1992, he was allowed to speak only in his personal capacity. The Security Council took no action on his report. The following year did Secretary General Boutros Boutros-Ghali did not accept Van der Stoep's recommendation that UN human rights monitors be sent to Iraq. Iraq prevented Van der Stoep's return by denying him a visa.<sup>24</sup>

Responding to the lackluster performance of the UN in Iraq, in December 1991 the General Assembly created a new mechanism, the Department of Humanitarian Affairs (DHA).<sup>25</sup> The addition of DHA made no discernable difference in the effectiveness of UN human rights monitoring or on the response of the international community. Following the removal of UNHCR and UN security personnel from southern Iraq, the remaining UN humanitarian agencies, UNICEF and WFP, did not even ask the Baghdad government for permission to visit the marshlands.<sup>26</sup>

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<sup>24</sup> HUMAN RIGHTS WATCH, *THE LOST AGENDA: HUMAN RIGHTS AND UN FIELD OPERATIONS* 144 (1993).

<sup>25</sup> G.A. Res. 46/182, U.N. GAOR, 46th Sess., Supp. No. 49, at 49, U.N. Doc. A/46/49 (1991).

<sup>26</sup> *Id.*, at 137.



## II. DANGEROUS "SAFE HAVEN": THE CASE OF BOSNIA

The refugee and human rights fields became completely interlocked in Bosnia, another refugee-producing hot spot where "safe havens" were declared to be part of the world's new response to potential refugee flows.

Although the UNHCR statute mandates that agency to work on behalf of refugees outside their country of origin,<sup>27</sup> UNHCR was designated as the lead UN agency inside Bosnia to provide humanitarian assistance and protection to about 1.3 million internally displaced persons and an additional 1.4 million "war affected" civilians. It will never be known how many of those 2.7 million people would have left Bosnia and become "refugees" if they had been able to. The UN High Commissioner, Sadako Ogata, characterized her agency's role as providing "preventive protection," which she explained as an attempt to attenuate the causes of refugee flows. In her 1993 Note on International Protection, Ogata said:

UNHCR has always insisted that its activities in countries of origin are not incompatible with and must not in any way undermine the institution of asylum or the individual's access to safety. At the same time, the presence of UNHCR in a country of origin in connection with prevention, humanitarian assistance and/or solutions should not be taken to imply that conditions there are safe or that persons fleeing that country are not in need of international protection.<sup>28</sup>

There is no way of knowing for sure the extent to which the UNHCR presence in Bosnia prevented more horrific human rights abuses than actually occurred. It is arguable, however, that UNHCR's presence did serve to prevent persons from seeking asylum and so did, in fact, undermine the institution of asylum. Most civilians were not able to flee. One civilian, a Muslim from Serb-controlled Banja Luka, expressed the reality of being trapped:

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<sup>27</sup> UNHCR Mandate, *supra* note 11, at para. 6 (enumerating competence of the UNHCR).

<sup>28</sup> Executive Committee of the High Commissioner's Programme, Note on International Protection (Submitted by the High Commissioner), 44th Sess., at para. 37, A/AC.96/815 (1993).

[W]e are all in danger here. We are in the center of mass crimes, pogroms and genocide. . . . What's really sad is that we are alone, and we don't have any guns. The Western countries will not defend us and will not allow us to defend ourselves. . . .

There is really only one answer. We must leave. If we don't, we will die. You know, if the mayor announced that the road to Zagreb was open, but that we could only go on foot, everyone would go. Muslims, Croats, women, children, grandmothers. I don't think that I can escape by running over that hill. If I thought I could, I would do it at once. Everybody would.<sup>29</sup>

Soon after the conflict in Bosnia erupted, one European state after another began imposing visa restrictions on Bosnians. One commentator observed, "By sealing all escape routes and means of refuge, European governments are trapping refugees and displaced people in besieged cities and regions and placing them in the crossfire between warring forces."<sup>30</sup> With no observable political will from the international community to intervene to stop the killing or to allow escape, the UN was sent in to provide humanitarian assistance to the civilians trapped inside Bosnia.

As the chief operational aim of the UN on the ground evolved into a feeding operation, and without sufficient international military might even to deliver food wherever and whenever the need arose, UN officials had to sacrifice important protection principles in order to keep lines open for assistance. This meant making deals with the thugs who controlled checkpoints in and out of besieged areas. As 1992 drew to a close, UNPROFOR soldiers delivering humanitarian assistance were under orders to prevent would-be refugees from leaving besieged Sarajevo. "They cry, they plead with us for help to cross. They even offer us money," a French UNPROFOR soldier told the

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<sup>29</sup> PETER MAAS, *LOVE THY NEIGHBOR: A STORY OF WAR 75-76* (1996) (quoting Muharem Krzic).

<sup>30</sup> GIL LOESCHER, *BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS* 164 (1993).

*Washington Post*.<sup>31</sup> "But we're under orders to stop them."<sup>32</sup> The *Post* reported that 500 people a night were being caught trying to cross the airport tarmac that lay across a potential escape route from Sarajevo to Butmir, and relative safety.<sup>33</sup>

With access to asylum outside Bosnia unavailable for all but a narrowly limited number of new arrivals, the international community sought to provide either some modicum of protection inside Bosnia or, at least, the appearance of a modicum of protection. UNHCR protection officers struggled valiantly to prevent human rights abuses, radically transforming their traditional role in the process, but given UNHCR's limited tools, of which were devoted to providing humanitarian assistance, promoting human rights in Bosnia during the war was a losing proposition. Reluctantly, the international humanitarian agencies found themselves with so few options that they promoted the designation of "safe haven zones" inside Bosnia, even though many had grave doubts that the international community had the political will to guarantee their safety. In December 1992, the ICRC issued a rare and dramatic statement calling for the creation of safe zones inside Bosnia, saying: "As no third country seems to be ready, even on a provisional basis, to grant asylum to one hundred thousand Bosnian refugees, an original concept must be devised to create protected zones . . . which are equal to the particular requirements and the sheer scale of the problem."<sup>34</sup>

The ICRC's rationale for advocating a protected zone inside Bosnia was quite instructive. It was a last ditch attempt to wrest some form of protection on behalf of Bosnians after it had become clear that asylum outside the country of persecution would not be an option for most of them.

The will to protect them was lacking, despite repeated warnings by the United Nations' Special Rapporteur of the Commission on Human Rights that UNPROFOR and UNHCR were "unable adequately to protect the affected population and in many circumstances are helpless to prevent violations of

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<sup>31</sup> Peter Maas, *U.N. Keepers of the Siege: Relief Troops Bar Escape from Sarajevo*, WASH. POST, Dec. 30, 1992, at A1.

<sup>32</sup> *Id.*

<sup>33</sup> *See id.*

<sup>34</sup> Bill Frelick, *Preventing Refugee Flows: Protection or Peril?*, in WORLD REFUGEE SURVEY, 1993 5, 11 (U.S. Comm. for Refugees ed. 1993) (quoting ICRC statement); *see also* INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 93 (1992) (noting that ICRC President Sommaruga, in an address to the International Conference on the Former Yugoslavia, "pleaded for better protection of the civilian population *in situ*, if necessary by creating specially protected areas.").

human rights.<sup>35</sup> The Special Rapporteur, Tadeusz Mazowiecki, followed that warning, in 1992, with many more.<sup>36</sup> They went unheeded. By 1993 Mazowiecki was threatening to resign rather than be placed in the role of "disguising the helplessness of international organizations."<sup>37</sup> Finally, in July 1995, in the aftermath of the fall of the first designated safe area, Srebrenica, and the massacre of thousands from that area, Mazowiecki resigned.<sup>38</sup>

### III. INTO THE FUTURE

UNHCR has crossed the line that once separated the human rights and refugee fields. UNHCR and the nongovernmental agencies working on behalf of refugees are firmly inside countries of origin. In complex emergencies UNHCR, for all its limitations, has proven itself to be among the most robust and capable of the UN agencies in the defense of human rights.

The challenge, as UNHCR looks beyond Bosnia, is to strike the balance that Sadako Ogata spoke of in 1993. UNHCR and the rest of the refugee field must remain more vigilant than ever in defending the right to asylum and in confronting states that show a willingness to compromise that right. Not all signs in this regard are positive. As the safe haven in northern Iraq was going sour, UNHCR gave little indication that it was gearing up in any serious way either to extend protection inside northern Iraq in order to attenuate the causes of refugee flight or to bolster its presence at the Turkish border to monitor the treatment of asylum seekers at the border. As Turkish officials refused to admit would-be Kurdish asylum seekers, nary a word was heard in protest from UNHCR.

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<sup>35</sup> *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission resolution 1992/S-1/1 of 14 August 1992*, U.N. Commission on Human Rights, 1st Spec. Sess., Agenda Item 3, ¶ 56, U.N. Doc. E/CN.4/1992/S-1/9 (1992).

<sup>36</sup> See generally, Jeane Kirkpatrick, Op-Editorial, *A Matter of Principle at the U.N.*, WASH. POST, Aug. 18, 1995, at A25.

<sup>37</sup> "Mazowiecki Threatens to Resign Commission," PAP Warsaw, February 10, 1993, Foreign Broadcast Information Service, FBIS-EEU-93-027, Feb. 11, 1993, at 30.

<sup>38</sup> See Philippe Naughton, *U.N. Prober Finds Serbs May Have Massacred Bosnian Muslims*, WASH. POST, Aug. 24, 1995, at A21; Kirkpatrick, *supra* note 36.

UNHCR for the foreseeable future appears as though it will be operating on *both* sides of borders during refugee emergencies. As it develops its capacity as a human rights monitoring, and intervening, agency inside countries where gross human rights abuses are occurring, while balancing that role with one of providing humanitarian assistance, it must seek to remain attentive to the human rights of refugees after they have crossed borders. Security in refugee camps, protection for women and children, procuring identity and travel documents, seeking rights of free expression, association, religion, culture, and education will be as challenging as ever.

The solutions for refugees remain essentially the restoration of rights. In traditional terms, as mentioned above, the three solutions were voluntary repatriation, local integration, or resettlement. The first solution restores the rights in the country of origin that were lost through being forced into alienage. The second two solutions, local integration and resettlement, extend rights formerly enjoyed in the country of origin to a new state. If one of the principal New World Order solutions is prevention, it must be clear that this too must involve the restoration or preservation of these same rights. There can be no compromise. And if these rights cannot be enjoyed in the country of origin, the victim has the right to flee to seek those rights elsewhere.

The High Commissioner has coined the term "right to remain" as a shorthand for what she is hoping to accomplish. It seems a lofty right to defend, although interestingly the UDHR is silent on this right.<sup>39</sup> This new "right" has become a slogan, but its implications are not fully understood. When governments are almost universally resistant to providing asylum to refugees, when doors are closing at every border, the "right to remain" can be seen as a rationale for the denial of asylum. Guidance is needed on this as well as on UNHCR's evolving view of repatriation.

As mentioned above, during the Cold War, repatriation was usually not viewed as a viable option. Now, it often appears to be the only option. During the Cold War, when speaking of durable solutions, the terms "voluntary" and "repatriation" were inextricably joined. Now, they have been delinked. UNHCR speaks openly of "imposed return." In a recent paper entitled *UNHCR Strategy towards 2000*, UNHCR anticipates future involvement in such repatriations and outlines its role as a protector of human rights in the context of involuntary repatriation: *inter alia*, ensuring that the returnees are treated in accordance with

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<sup>39</sup> The UDHR speaks only of the right to leave and the right to return. See UDHR, *supra* note 1, art. 13(2).

human rights standards, and not subjected to any kind of persecution or discrimination. But the loss of voluntariness is conceded. Ultimately, refugees are fundamentally situated to determine when they feel it is safe, or not safe, to return. It appears that the element of refugee choice is being compromised both with respect to the right to leave and the right to return. The only right being upheld is the "right to remain." That right becomes suspect.

In a series of consultations with NGOs, UNHCR has committed itself to forging a closer working relationship with the NGO community. With respect to human rights these consultations, called PARinAC (Partnership in Action), included a specific recommendation:

There is a need to document and expose cases of human rights violations against displaced women, children, elderly people, persons forcibly recruited by armed forces, as well as members of ethnic, religious and linguistic minorities and indigenous people. UNHCR and NGOs should take action to monitor, report and to counter human rights violations, and should adopt measures to provide adequate protection to victims of violence. The involvement of organizations in the above-mentioned groups should be sought. UNHCR and NGOs should cooperate with the relevant human rights mechanisms in this respect.<sup>40</sup>

So far so good. But more is needed. NGOs need to be watchdogs not only of governments, but of UNHCR as well. UNHCR is not just another human rights organization with a human rights mandate. It has a refugee-specific mandate. Thus far, its entry into the human rights field, welcome in many respects, not least because of the weakness of the UN's human rights mechanisms, also has presented cause for concern. NGOs fear that UNHCR has made compromises with its protection mandate through involvement in delivering humanitarian assistance in countries of origin, through involvement with prevention efforts, and in a number of recent repatriation exercises. Fundamentally, the organization's commitment to the right of persecuted people to seek asylum is now coming into question. NGOs want to welcome UNHCR as a new and strong ally in the human rights field. However, NGOs worry that they may be losing their strongest and most important ally in the refugee field.

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<sup>40</sup> PARinAC, OSLO PLAN OF ACTION, 20 (1994) (Recommendation No. 50).

Balancing its work on both sides of the border, and at the border as well, is UNHCR's greatest challenge as it approaches the year 2000. Our job, as NGOs, is to help it to maintain that balance.