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**University of Kent
At Canterbury**

DEGREE OF DOCTOR OF PHILOSOPHY

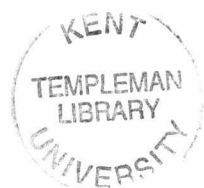
**“REFUGEES: FROM GAPS
IN PROTECTION
TO CASE LAW”**

BY

HANAN MALEK HAMDAN

APRIL 2003

F185445



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I would like first to thank my family members for their continuous support, and for going out of their way to help me do what I always wanted to do. I want to thank them for being so humane in an environment, which, for a very long time, was harsh and violent.

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GLOSSARY

DORS	Determination of Refugee Status Committee
EU	European Union
GA	General Assembly
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IDP	Internally Displaced People
IRO	International Refugee Organization
MOU	Memorandum of Understanding
NATO	North Alliance Transatlantic Organization
NGOs	Non-Governmental Organization
OAU	Organization of African Unity
RPF	Rwandan Patriotic Front
SCF-UK	Save the Children France-United Kingdom
UDHR	Universal Declaration of Human Rights
UNAMIR	United Nations Assistance Mission for Rwanda
UNDHA Affairs	United Nations Department of Humanitarian Affairs
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNHCR	United Nations High Commissioner for Refugees
UNHUCs	United Nations Sub-Offices and Humanitarian Centers
UNICEF	United Nations Children's Fund
UNOMUR Rwanda	United Nations Observer Mission Uganda-Rwanda
WFP	World Food Programme
WHO	World Health Organization

ABSTRACT

My choice to study refugee issues and related humanitarian problems stems first from a personal experience. Living most of my life in a country shattered by violence and war, and hosting a large number of refugees from other neighbouring countries drew my attention to this problem. Being myself exposed to internal displacement, where we had to leave from one place to another, to seek safety, also made me aware of the problems that these vulnerable groups face. My later work with the United Nations High Commissioner for Refugees, where we had to deal with caseloads of Iraqi, Sudanese, and Sahrawi refugees, made me more interested and dedicated to studying this topic.

This thesis is aimed at addressing refugee problems since the creation of the refugee system during the Cold War. It addresses some of the gaps in refugee protection since the end of the Cold War and later developments, particularly the increase in the number of refugees, the change in the nature of the refugee flows and their geographical locations, the asylum crises, and the increasingly restrictive interpretation of the Convention.

After studying the gap in international protection, the different approaches that emerged as a result of this development are addressed. Corridors of Tranquillity, Safety Zones or Safe Havens started emerging, which aimed at addressing relief and providing protection to people within their countries of origin. The thesis examines the concept of Safe Havens and its impact on refugee flows. The Safe Havens in north Iraq and the Safe Humanitarian Zone in Rwanda are the chosen case studies.

The main approach in this thesis has been to concentrate on the legal perspective. In studying the gaps in refugee protection, the gaps in the law or the interpretation of the law are analysed and when, addressing the concept of Safe

Havens, the legal background for creating these areas is also analysed. Political problems are also discussed, but more attention is given to the legal aspects. This is due to the fact that the legal aspect of the problem is often not sufficiently addressed when studying the topic of refugees in the field of International Relations.

As mentioned at a later point in this thesis, the concept of Safe Havens is not studied as a substitute for asylum, or a concept, which threatens asylum. Rather it is studied as a reaction, which gives an opportunity to people in conflict situations to seek refuge within the borders of their countries, until a more permanent solution is found.

Introduction

Humanitarianism in the Post Cold War period

A new era in international politics followed the end of the Cold War marked by an unclear vision with regards to the type of response needed to face the realities of the post Cold War era - an era associated with the eruption of many conflicts that had been dormant in the preceding period. The disintegration of the Former Soviet Union was also parallel to the unification of Germany and to territorial disputes in different parts of the world. The proliferation of new nation states was associated with a power vacuum and increased nationalistic feelings.

Amid these changes, two separate and divergent trends, that are in conflict with one another, were witnessed in the period that followed: the issue of state sovereignty and territoriality on the one hand and the wider involvement of the United Nations within countries on an humanitarian basis on the other hand.¹ The concept of state sovereignty was given prominence in the early stages of the Post Cold War period with the emergence of a significant number of successor states to the Soviet Union and Yugoslavia.

On the other hand, greater emphasis was placed by the international community on the growing role of the United Nations and the humanitarian action undertaken in countries of origin² of refugees witnessing severe humanitarian crises resulting from internal conflicts. Such involvement in support of human rights posed challenges to the concept of sovereignty. The United Nations action, for instance in Somalia, Bosnia and Rwanda, came as a response to the severe humanitarian crises that resulted from internal conflicts. The divergence is even more vivid when discussing concepts relating to human rights.

¹ For further reading on the subject see Mary Kalder, Old War New War.

Realist v. Idealist Approach

The role of the Post Cold World United Nations has been subject to considerable discussion and assessment. The increased activity of the international organization has been most noticeable since 1990, including a wide variety of peacekeeping operations and in some cases enforcement action. These developments have brought forth questions relating to the future role of the United Nations within the international system, whether the organization will continue to be subject to the will of the Permanent Members of the Security Council (a realist approach) or will assume a more independent role (idealist approach).³

The role of the United Nations is a rather limited role for the realists who believe that the state remains the main player in international politics. As for the concepts of humanitarian activity and humanitarian intervention, they remain for the realists a tool of statecraft used to meet the national interests of states.⁴ The veto powers of the five permanent members and the absence of an independent UN military component makes the United Nations, according to the realists, dependant on the wishes of the main states in the Security Council. Despite the fact that the Charter has provisions for a UN Military Staff Committee, the international organization has rather relied, during any military operation, on the military forces of member states, making the organization less of an independent actor in the international arena.

The idealist, on the other hand, believes that Post Cold War developments have provided the international organization with the chance to assume wider responsibilities and roles. In accordance with the United Nations Charter, the organization is entrusted with the responsibility to maintaining international peace and security. The increased involvement of the United Nations in humanitarian action and in dealing with internal conflicts in the Post Cold War era is a clear indication of the centrality of humanitarian issues and of the United Nations' role. It is also clearly noticed that a wider interpretation for the term "security" is adopted in comparison

² Otte, T. G., (1998), pp.196-198.

³ Otte, *op.cit.*, p. 162.

⁴ See Holsti, K.J., (1988), pp.118-139.

with the period when the Charter was initially drafted. Linking security issues to refugees, for instance, has been witnessed in several Security Council Resolutions in the aftermath of the Cold War.

Centrality of Humanitarian Action

A change in the nature and the role of humanitarian action has been witnessed from 1989, prompted mainly by the eruption of different wars and the humanitarian emergencies it entailed. The Western World saw in the evolving crisis in Iraq, Somalia, Yugoslavia, and Rwanda a challenge that it had not been used to for a very long time. Humanitarian action thus presented the best response for the evolving crisis and the easiest way out.

The end of the Cold War was not associated with a clear vision on how to respond to many of the evolving conflicts. Humanitarianism constituted a response for many of the conflicts of the era. Humanitarian action did not, however, provide an answer to where humanitarianism ultimately might lead⁵. In addition to the changes in the political beliefs that accompanied the end of the Cold War, other factors played an important role in putting further emphasis on humanitarian action. The increased role of the media, which extensively covered most of the humanitarian crises in the 1990s, had a large influence on public opinion in many of these countries. The humanitarian crisis in Northern Iraq was largely covered by the Western media, which influenced the public reaction of many states in the West.

Roberts cites two other factors contributing to the increased emphasis on humanitarian action. He states, "When governments around the world are confronted with demands to take action about situations of extreme horror, humanitarian approaches are often the easiest way out"⁶. In the case of massive refugee flows for instance, it is easier for governments to undertake humanitarian action close to the countries of origin to deal with these massive flows. He also believes that states and governments have more interest to act collectively nowadays through international

⁵ See Roberts, A., (1999), p. 24.

institutions. It is thus more possible to agree on humanitarian activities than political action in this domain. Humanitarian action resembles then a tendency among institutions to agree on the lowest common denominators⁷.

United Nations' Increased Involvement

Further developments in the international arena had an impact upon the centrality of humanitarian action. The increased involvement of UN bodies such as UNHCR and UNDHA in complex humanitarian emergencies was further witnessed in the early 1990s in Europe, Africa and the Middle East.

The number of Security Council Resolutions addressing humanitarian issues increased significantly from 1989 whether in peacekeeping operations or in other forms of enforcement activity. The UN resolutions have, to a certain degree, legitimized international activity undertaken following the Cold War, mainly in countries, which witnessed severe humanitarian crises. The Resolutions on Iraq, Former Yugoslavia, Rwanda, Haiti and Somalia gave clear indications on the increased UN involvement in situations that witnessed humanitarian crises. Despite the fact that the humanitarian factor was given a great deal of emphasis as the main reason for involvement, questions were raised relating to the consistency of the action that was undertaken by member states on account of these resolutions.

Security Council resolutions concerning Iraq paved the way for a response by the international community. These resolutions were, however, used by the United States for enforcement action. The humanitarian considerations behind the United States' action could be questioned. The United Nations resolutions also authorized involvement in Former Yugoslavia through the deployment of the UN protection force, in Somalia through resolution 794, in Rwanda in 1993 and in Haiti in 1994. The humanitarian factor was stressed in most of the resolutions as an important motive for action. The action undertaken in some of these operations was controversial mainly in relation to the timing and the nature of the involvement.

⁶ Ibid., p.25.

Humanitarian intervention as such goes against Article 2(7) of the United Nations Charter and the concept of state sovereignty. The United Nations Charter does not provide for action or intervention within countries of origin on account of humanitarian considerations or human rights violations as they are considered to be within the internal affairs of states. The Charter however allows for enforcement action under Chapter VII of the Charter when a threat to international peace and security is determined. Increasingly, humanitarian crises and refugee flows were linked to threats to international peace and security and have thus warranted international action. Some argue that whereas the term “threat to international peace and security” was used only once in these resolutions, the referral to the “humanitarian” factor was continuously repeated. The term “threat to peace and security” was used mainly as a pretext for the enforcement action.

The double standard or the selectivity of the United Nations involvement is also a source of doubt relating to the United Nations Resolutions. The United Nations intervened and authorized involvement in some crises and withheld activity in other conflicts witnessing severe humanitarian crises. In Cambodia, Myanmar and Beijing for instance, the international community did not undertake large-scale humanitarian activities. The absence of similar media coverage could have been among the reasons behind this modest activity.⁸ Furthermore, it is noted that no doctrine for the humanitarian activity of the United Nations was set. Rather the United Nations is defining its humanitarian response on a case-by-case basis according to the specific nature of every humanitarian crisis. The lack of enthusiasm to identify a doctrine for such action is among the weak points of the United Nations response to humanitarian crises.⁹

Concerns have been raised about the protection of civilians and humanitarian workers within countries that witness internal conflicts and civil strife. In this regard,

⁷ Ibid., p.26-27.

⁸ Roberts, A., (1996), p. 25.

⁹ Ibid., p. 26.

questions of whether humanitarian assistance could fall into the hands of belligerents and result in the prolongation of conflicts have also been brought up.¹⁰

Preventive Action

The centrality of humanitarian activity and the evolving role of the United Nations in the Post Cold War period gave rise to discussion on preventive action - an action undertaken by the international community at an earlier stage to avert humanitarian crises. Preventive action is sometimes impeded by the will of external powers to take action. Such inaction in the field of prevention is mostly justified by five considerations: policy makers' fear that such an activity in a foreign land will lack public support, economic considerations, fear of sending soldiers to be killed in foreign lands, fear of policy makers of engagements in open ended commitments and finally the fear of failure.¹¹ Counter arguments suggest that distant conflicts often have regional and international implications and that the economic costs for a belated action are frequently higher than the costs of preventive action. Furthermore, conflict prevention operations are often low risk operations. As for the fear of failure, some argue that preventive action is often more successful than later intervention.¹²

The humanitarian crises erupting in the aftermath of the Cold War period reveal clearly that many opportunities to limit and prevent conflicts were missed, "the errors were both of omission and commission, of failure to act and the failure of action taken".¹³ Rwanda presents a very good example of the missed opportunities in preventive action. The topic will be discussed in further details in the case study on Rwanda. Preventive action had on the other hand yielded good results in some areas threatened with severe conflicts. Macedonia in the Balkans and North Korea are some examples.

¹⁰ See Roberts, A., (1999), pp. 27-28.

¹¹ See Brown, M.E., and Rosecrance, R.E., (1999), pp. 227-229.

¹² Ibid. .

¹³ See Jentleson, B. W., (2000), p. 320.

Requisites for Preventive action

Jentleson cites several prerequisites for preventive action, namely an early warning system, diplomatic strategies, the presence of major international actors, and the presence of a credible preventive military force. When analyzing the early warning system, he highlights the need “for more systematic analytical capacity for developing policy responses”. In assessing the diplomatic strategies needed, he highlights the importance of mixed strategies, an effective negotiation strategy, the role played by special envoys, action at a very early stage, economic sanctions, attraction of membership in international and regional organizations.¹⁴

The presence of a major international actor is another prerequisite. The need for a serious commitment for preventive diplomacy is needed by Western powers. The important role played by the United Nations in providing legitimacy for actions undertaken by the international community is highlighted together with the growing role of regional organizations. The link drawn between regional security and peaceful resolutions to conflicts are considered as an asset for preventive action. Finally the presence of a credible military force is seen as essential as it provides backup to the diplomatic components of any preventive action or strategy.¹⁵

Military action is not often part of preventive action. Diplomatic, political, and economic activities could be part of preventive action involving both long-term efforts and focused efforts addressing more imminent crises. Longer-term efforts include diminishing security concerns, supporting political justice and human rights, encouraging economic growth and justice and changing patterns of discrimination both in the cultural and social fields. More focused preventive action includes dispatching fact finding and mediation missions, undertaking confidence building steps, traditional and multifunctional peace keeping operations, military and technical assistance, the threat to use military force, judicial enforcement measures, and arms embargos and economic sanctions.¹⁶

¹⁴ Ibid., pp.334-338.

¹⁵ Ibid., pp.339-341.

¹⁶ See Brown, M.E., and Rosecrance, R.E., (1999), p., 10.

Sanctions present a very controversial subject in any discussion on prevention. The subject is not however covered in this thesis. Yet few concerns are raised when discussing this topic mainly in relation to the ethical and moral dimension of sanction regimes. The sanctions regime imposed on Iraq from 1991, for instance, led to catastrophic results on the Iraqi population and especially on the most vulnerable among the population, namely on children, women and the elderly. Sanctions has further impoverished the economy and led in the 1990s to a massive population movement. A very high percentage of the Iraqis who left Iraq during this period, with the exception of those who left in the aftermath of the 1991 uprising, were motivated by economic considerations. The sanctions imposed on the country had dreadful results on the Iraqi population and less impact on the regime itself. The moral and ethical aspects of the sanctions regime imposed by the international community are highly questionable.

When discussing preventive action, the importance of international consensus on the fundamental norms in international politics is highlighted. The admission policy of regional and international bodies like NATO and the European Union presents a very important prevention mechanism.¹⁷ The link between prevention and international legitimacy is also crucial. Preventive action undertaken by powerful states without legitimate authorization from the international community represented by the UN represents very dangerous phenomena. Human rights concepts and regional and international peace and security concepts could be used as a pretext by powerful states to justify illegitimate action undertaken. The notion is extremely dangerous if it does not have the international legitimacy of the United Nations.

Preventive action has also been witnessed on behalf of refugee issues. In the Post Cold War period, the international community has focused more on the underlying causes of the refugee problem in countries of origin. The rationale behind this approach is that refugee movements can be prevented if action is undertaken to eradicate the threats that prompt people to leave. States are thus trying to work out a

¹⁷ Ibid., p. 230.

new approach or policy aiming at addressing the root causes of the refugee problems within countries of origin. Such a policy entails the application of early warning mechanisms, preventive diplomacy and also concerted effort to ensure respect for human rights.¹⁸ As part of the increased emphasis on preventive action, the international community is increasingly attempting to deal with the problem of mass movement and displacement in countries of origin. This being done through the provision of assistance and aid, by the UN and peace-keeping operations, to the victims of conflicts close to their homes, through the creation of safe and secure areas to protect endangered civilians.¹⁹ This approach accompanied the transformation that took place to the refugee regime and that will be discussed at length in this thesis.

The Transformation of the Refugee Regime

The changes in the international arena following the end of the Cold War and the drastic evolution of humanitarian activity that was associated with these changes had a great impact upon the refugee system initially put in place in the aftermath of the Second World War to match the realities of Cold War period. The asylum-oriented system was mainly designed by Western countries and oriented towards providing protection for refugees fleeing from the Eastern bloc and Communist regimes. It was possible for Western countries to provide the protection needed for the limited number of such refugees, as they were easily assimilated and integrated in the West.

Later developments in different parts of the world, like Africa, Latin America and Asia posed new challenges to the system that had been put in place, as it was associated with a drastic increase in the number of refugees, an asylum crisis and hardened attitudes vis-à-vis refugee issues. The number of refugees increased dramatically in the 1970s and 1980s. The nature and the scope of the refugee movements also changed. Massive refugee flows were generated by generalized violence and they were no longer confined to their geographic locations. Western countries were not only dealing with refugees fleeing from Eastern Europe. Large

¹⁸ See Loescher, G., in Dunne, T. and Wheeler, N.J. (eds.), (1999), pp. 239-240.

¹⁹ See Dunne, T. and Wheeler, N.J. (eds), *op.cit.*, p. 253.

numbers of refugees were now fleeing from African and Asian countries and arriving in the West.

This gave rise to an asylum crisis that took place in the West and resulted in hardened attitudes on refugee issues. The drastic increase in the number of refugees arriving to Western countries was thus associated with a collapse of the ideological factor shaping Western refugee policies and posed another challenge to the refugee regime set in place. The complex humanitarian emergencies that took place in the early 1990s added a further strain to the refugee regime and to the international community represented by the United Nations. Humanitarian emergencies in Iraq, the Former Yugoslavia and Rwanda left the international community of the Post Cold War era with some challenges to meet and new questions to answer.

An increased UN involvement was also witnessed in refugee situations. Refugee issues became gradually linked to threats to international peace and security in various countries like Haiti, Former Yugoslavia and other countries. And the international community increasingly took part in internal conflicts that had regional and international implications, particularly those that were deemed to pose a threat to international peace and security. It was equally noticed that refugee flows or potential refugee flows prompted such international action. The relation between refugee issues and the decision to intervene is worth studying. The international community's action in Northern Iraq, Rwanda, Haiti, Somalia, took place after the massive flow of refugees that exerted considerable strain on receiving countries. Refugee flows in some of these situations became linked to threats of international peace and security and called for such action. In all these instances of intervention, the international community undertook military action through the United Nations or following the United Nations authorization thus setting a precedent for future action. Yet the question to be raised next is how much influence did humanitarian considerations play in the decision to intervene?

In the case of Northern Iraq, the massive refugee flows at the borders was followed by a United Nations resolution requesting immediate access of humanitarian assistance to all those in need of assistance. Yet linking refugee flows to threats to

international peace and security in Security Council Resolution 688 created a precedent. The legitimacy of the resolution, which was issued in the shadows of Chapter VII, was questioned by many states that relied on article 2(7) of the Charter and stressed that the situation was an internal affair that did not call for or validate the need for international action. Other countries, on the other hand, stressed that conflicts with regional and international implications cannot be considered to be solely the internal affair of a given state.

The action that was undertaken by individual states in Iraq following the resolution was however criticized as being illegitimate and not authorized by the resolution and the real motive for this action was also questioned. Was the decision to intervene basically prompted by humanitarian motivations as stated or did political and security considerations play a major role. The role of the media and the "CNN" influence on public opinion in western states and the decision to intervene was assessed. The media coverage of the stranded refugees and IDPs put further strain on the international community and its decision to intervene. The above-mentioned resolution did not authorize the use of forceful action in the north but rather asked for unlimited access for humanitarian organizations to deal with the humanitarian crisis. This resolution was however used by the allied forces as the basis for the creation of the enclaves that were later on handed over to the United Nations. The legitimacy and the motives of the action were thus questioned. The United Nations involvement on the other hand was of a separate nature as it followed the Memorandum of Understanding (MOU) signed on April 18, 1991. Accordingly the United Nations took over the operation in the North to be able to deal with the humanitarian dimension of the crisis. Based on an Iraqi request, the United Nations provided humanitarian assistance to Iraqi civilians. The action, which gained more legitimacy than the action undertaken by individual states, came as an immediate effect of the refugee crisis that erupted in the aftermath of the war.

In the case of Somalia, the situation was different from that in Northern Iraq. The strategic interests of the major powers were not present in Somalia thus affecting the international response to the situation. The increased humanitarian crisis in Somalia gave rise to a UN resolution 733 of January 23rd, 1992, which also made

linked human suffering and peace, and stability of the region. The continuation of such a suffering, according to the resolution, was linked to a threat to international peace and security in the region. Humanitarian organizations were asked to increase humanitarian assistance and a military embargo on Somalia under Chapter VII of the Charter was also imposed. Subsequent Security Council resolutions on Somalia (746, 751 & 767) also used similar language linking human suffering to peace and security in the region. It is noted that the humanitarian considerations had greatly impacted the decision to intervene, although the resolution had no specific reference to refugees.

Rwanda posed another example of the international community's involvement in humanitarian crises with mass influx. The assassination of the Rwandan President Juvenal Habyarimana on April 6, 1994 was followed by a renewed war that resulted in a genocide of the minority Tutsi and some Hutu supporters and 1.7 million refugees in addition to 1.2 millions IDPs by the end of the same year. Several Security Council resolutions were passed on Rwanda in the course of the year affirming thus the international community's increased involvement in crises with a severe humanitarian dimension.

Resolution 912 of April 21 was the first on the crisis issued fifteen days following the start of the genocide. The resolution took note of the large displacement of Rwandan refugees and IDPs but on the other hand reduced UNAMIR's presence in Rwanda to merely 270 troops, affecting thus its ability to assume adequately its functions. The resolution was later on followed by resolution 918 of May 17th, which depicted the deep concern of the international community over the situation in Rwanda, and the death of thousands of civilians. The resolution further noted that massive population

Displacement and refugee flows constituted a humanitarian crisis, the continuation of which threatened regional peace and security. The resolution also expanded the mandate of UNAMIR to protect refugees and displaced people or civilians at risk in Rwanda. The resolution also allowed for the creation of safe

humanitarian areas. The role of UNAMIR was expanded to reach 5,500 troops but they were only deployed at a later point.

Resolution 925 of June 8 also took note of the massive displacement in Rwanda and resolution 929 of June 22 drew a link between the magnitude of the human suffering and the threat to peace and security of the region and authorized France to deploy troops under "Operation Turquoise" - an operation that had important humanitarian results that were clearer than the humanitarian motives for this action. Again, in the case of "Operation Turquoise", the Security Council reiterated on several occasions that refugee flows represent a threat to peace and security. Refugee flows to Burundi would have added to the tense situation in the region and the country.

It is noted that in the aftermath of the Cold War refugee issues and flows had implications at the regional and international levels and warranted international action. The international community represented by the United Nations drew attention to refugee flows and in many instances made a link between refugee flows and threats to peace and security. The involvement in situations of mass influxes usually followed a Security Council resolution or authorization. Yet the response towards the various humanitarian crises involving refugee flows varied and was not always coherent. Political concerns played a major role in shaping the response of the international community. The response of refugee flows in countries, which had strategic and political interests, differed from those countries with less strategic interests. The refugee flows in Northern Iraq at the borders with Turkey for instance implicated not only Turkey but also mobilized NATO to take action.

The massive refugee flows resulting from severe humanitarian crises and the increased number of refugees arriving to western countries in comparison to the limited number refugees fleeing the Communist regimes shifted the attention from reactive to preventive approaches in dealing with refugee issues. The wide coverage of the media for such humanitarian crisis exerted more pressure on the international community to take action. The ideological factor behind the establishment of the refugee polices of the Cold War was also eroding. A transformation in the refugee

regime marked by a shift from the asylum-oriented approach to preventive approaches. i.e., addressing the root causes of the refugee issues and dealing with such causes within countries of origin was taking place. The creation of Safety Zones and the expanded role of the United Nations in humanitarian crisis and refugee situations in the Post Cold War were two additional components of this transformation that became very clear in the 1990s.

Safety Zones

Creating Safety Zones for the protection of civilians in armed conflicts is a concept provided for in international law. The 1907 Hague Convention IV, provides that steps should be taken to spare places where sick and wounded are collected.²⁰ The 1949 Geneva Conventions had provisions for the setting up of “hospital zones and localities” to protect the sick and the wounded. These areas would normally follow agreements between the different combatants.²¹ The convention also has provisions for the creation of neutralized zones for protecting combatants who fell sick or who were injured.²² In addition, the 1977 Geneva Protocol I had provision for demilitarized zones between the combatants.²³ The creation of Safe Areas according to these instruments requires the prior agreement of belligerents and the complete demilitarization of these areas. They also do not have arrangements for protecting or defending these areas, thus having many limitations.

Safe Havens evolving after the Cold War varied significantly. Areas providing protection to victims of conflicts as well as refugees and internally displaced people started emerging. In many instances, the creation of these zones followed Security Council Resolutions. Different terminology was used to describe these areas such as

²⁰ “In the sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.” The 1907 Hague Convention IV, Article 27.

²¹ 1949 Geneva Convention I, Article 23; and 1949 Geneva Convention IV, Article 14.

²² 1949 Geneva Convention IV, Article 15.

²³ 1977 Geneva Protocol I, Article 60. See also Article 59, on “Non- defended localities’.

Corridors of Tranquility, Humanitarian Corridors, Neutral Zones, Open Relief Centres, Protected Area or Safe Havens. Several areas of this nature were created in the 1990s mainly in Northern Iraq, Former Yugoslavia and Operation Turquoise in Western Rwanda.

The Safe Areas proclaimed in Iraq, Rwanda and Former Yugoslavia have common features.²⁴ These areas were mainly created by outside states or international bodies and prompted mainly by the concern for the safety of the refugees and internally displaced persons. The Safe Areas were mostly protected by external military forces mainly in Bosnia and Rwanda and in some of the cases, the military activity from the belligerents continued within the proclaimed Safe Areas.

The Safe Area in Northern Iraq was the first zone created after the Cold War and promoted for the creation of these areas. A military operation was launched by US, British and French troops on 17 April 1991 following a failed uprising that was encouraged by the US. A Safe Haven was subsequently formed in the north of the 36th parallel. The area was handed over at a later point to the United Nations following an agreement with the Iraqi government. The claimed aim was to provide shelter and protection for 400,000 refugees of Kurdish origin stranded at the Turkish borders. The UN Secretary-General at the time, Javier Perez de Cuellar questioned the legal basis of the action. The coalition troops were replaced by a UN Contingent of 500 guards entrusted with the protection of refugees and humanitarian workers. IDPs started gradually to return to their original areas.²⁵ Not much effort was made to disarm the different Kurdish factions in the safe haven in northern Iraq.

A Safe Area was created in Rwanda by French troops. France chose to create its Protected Areas in the Southwestern part of the country - an area, which was empty of the Tutsi population that was earlier subjected to the genocide. Retreating government forces, previously participating in the genocide, took shelter in the protected areas of the French. Whereas the humanitarian considerations played a role in motivating the French action, political reasons also played an essential role. The

²⁴ See Roberts, A., (1999), pp., 31-34.

massive flows of refugees and IDPs presented a security threat to the neighboring countries in the region and the French action tried to secure the "northern region of Zaire that was at risk of being de-stabilized by the presence of the massive refugee flows". Although the humanitarian considerations were not the sole motive for intervention, yet again refugee issues were linked to threats to peace and security at the regional level and prompted international activity.²⁶ Other Western countries did not have the same strategic interests as France to be involved in Rwanda. When the international action took place, many considered that it came at a belated point. If earlier action had taken place many lives would have been saved. The action that was undertaken by France had however important humanitarian results as it provided protection to a large number of civilians. An estimated number of 13,000-14,000 people were protected from the risk of being killed by the operation.

The United Nations involvement in Safe Areas represented attempts by the international community to respond to humanitarian crises within countries of origin and to massive refugee flows. The presence of a large number of internally displaced people within their countries of origin was broadly covered by the Western media. Providing humanitarian solutions within the countries of origin came to serve as a preventive measure for massive refugee flows and as a protection measure against massive violations of human rights and a quick relief to the humanitarian crisis unfolding. The legitimacy of the action undertaken by individual states, namely the US the UK and France, was subject to questioning and criticism.

Conclusion

The centrality of humanitarianism was witnessed in the aftermath of the Cold War. Increasingly, humanitarian action was undertaken by the international community in countries of origin to address severe humanitarian crises with regional and international implications. Several factors contributed to the centrality of the

²⁵ See Roberts, A., (1996), p., 42.

²⁶ "The Security Council is alarmed by the continuation of fighting in Rwanda, which is causing massive exodus of the population. This situation may lead very quickly to a further humanitarian disaster and endanger the stability of the region, since the flow of these refugees is seriously affecting the neighbouring countries." S/PRST/1994/34, July 14, 1994.

humanitarian activity. The absence of the ideological factor of the Cold War together with the lack of clear vision on how to respond better to evolving crises played a crucial role in enhancing the central role of humanitarianism that came as the easiest response for many of the conflicts. Media coverage played an added role in drawing the international community's attention to the crisis erupting in different parts of the world and in putting further emphasis on western governments to act.

The changes in the international arena were also coupled by an evolving role for the United Nations mainly within countries of origin. The concept of state sovereignty, which was given prominence during the earlier period, faced more challenges with the involvement of the international community in internal conflicts. Developments in the current period gave way for further involvement in conflicts that were considered earlier to be within the internal affairs of states. These conflicts were considered now to have regional and international implications that posed threats to international peace and security. This action was in many instances authorized by the United Nations.

With this expansion and development in the scope of humanitarian action, issues of impartiality and neutrality of the humanitarian work also came under challenge in the 1990s. Many believed that humanitarian action and political activity needed to be separated. The ICRC President noted in his address to the UN General Assembly in 1992 that:

“Humanitarian endeavor and political action must go their separate ways if the neutrality and impartiality of humanitarian work is not to be jeopardized... it is dangerous to link humanitarian activities aimed at meeting the needs of victims of a conflict with political measures designed to bring about the settlement of the dispute between parties.”²⁷

²⁷ Cornelio Sommargura, President of ICRC, at the UN General Assembly, 20 November 1992, International review of the Red Cross, January -February 1993, No. 292, p. 52-53.

Providing humanitarian aid in situations of conflict sometimes entails physical protection for aid workers and civilians that they are intending to protect. The protection accorded in such situations might endanger the impartiality and neutrality of humanitarian work

Humanitarian work is also associated at certain times with a clash with human rights, especially in situations where humanitarian assistance needs to be provided to people involved in human rights violations. Rwandan refugee camps are but one example of this clash as they were harboring people who were allegedly perpetrators of the genocide. Divergent approaches exist regarding notions of impartiality in providing humanitarian assistance to people who are known to have committed human rights violations. UNHCR tried to combine humanitarian activity with human rights issues especially protection from violence, thus strengthening the idea that humanitarian and political activities are not entirely separated. Concerns were raised that humanitarian assistance might lead to the prolongation of conflicts as it might be used by the belligerents to elongate the conflict.²⁸

A trend-linking refugee flows to threats to international peace and security was also witnessed in the aftermath of the Cold War. Humanitarian action was increasingly seen as being properly exercised within countries of origin. The creation of enclaves within these countries to provide protection to threatened civilians was one form of the international community's involvement on behalf of refugees and internally displaced people. This involvement was based, in many instances, on Security Council Resolutions. Providing protection to endangered civilians necessitated the presence of armed groups. This trend has been increasingly witnessed in the 1990s. Enclaves created in Northern Iraq, Yugoslavia and Rwanda in the form of Safe Havens and Corridors of Tranquility were often protected with armed forces. In the case of Northern Iraq, the legality of the armed forces presence, i.e., the US, France and the UK was questioned. Resolution 688 was very controversial as it was drawn in the shadows of Chapter VII.

²⁸ See Roberts, A., (1996), pp., 56-57.

Several questions were raised on the legitimacy of such action within countries of origin particularly when it did not follow United Nations Resolutions. The first question is related to Article 2(1) of the Charter that stresses the principle of sovereignty and the challenge posed to this principle by the involvement within countries of origin. Other questions are related to the consistency of United Nations' action and the application of Chapter VII of the Charter.

This thesis aims at analyzing these questions in the light of the involvement of the international community in refugee situations. The refugee regime that was created during the Cold War period and designed to match the realities of that era is analyzed. The evolution and the developments that took place had a direct impact on this regime are studied: the asylum crisis, the change in the nature and scope of the refugee movements; the gap in the international protection regime as compared to regional evolution were all factors that are assessed in the coming chapters. Against this background new approaches for refugee protection emerged addressing root causes of the refugee problem and tackling these causes within countries of origin. The growing role of the United Nations and the centrality of humanitarian activities in the aftermath of the Cold War facilitated the application of these approaches. A study of international action on behalf of refugees within countries of origin and of the legal and political framework for this action is thus undertaken in the following chapters. Safe Havens in Iraq and Rwanda are used as the case studies and the legitimacy of such action is examined and conclusions are drawn. Despite the extensive research that was made on the safe havens in Former Yugoslavia, this subject was intentionally not tackled in this thesis in view of the rather different form and outcome in the Former Yugoslav experience.²⁹ The thesis concludes with some questions put forth to be a basis for future research.

²⁹ See below, p. 117.

CHAPTER II.

The Genesis of the Refugee Problem

A study of the humanitarian and political evolution of what has been termed the refugee problem from its simple origins following the Second World War is examined in this chapter. The aim is to analyse those aspects, which shaped refugee policies at the beginning of the Cold War era, and resulted in the institutionalisation of this problem, through the creation of the principal international refugee organisations.

A. The Humanitarian and Political Evolution

The present century has witnessed the emergence of enormous refugee flows, coupled with serious international efforts to find solutions for this problem, and the dedicated work of Nansen, in the beginning of the century, is an example of these efforts³⁰. The massive displacements started at the beginning of the century, following the disintegration of many empires and reshuffling that accompanied it. New nation states emerged from this era, which were designed to encompass groups of similar ethnic origins. Considerable tension occurred among groups that did not fit into the natural communities of the newly emerging states.³¹ Ethnic and religious minorities could not enjoy the protection of the legal institutions in their countries, and became targets of persecution and expulsion. Population transfers were sometimes legalised by certain treaties that were signed at the beginning of the century. The Convention of Lausanne for the compulsory exchange of populations between Turkey and Greece is

³⁰ In 1921, the League of Nations Council assigned Fridtjof Nansen to work on the refugee problem that emerged from the First World War. Among the difficulties that were encountered by him when dealing with the refugee problem at that time were the large number of refugees, the lack of funds, and their lack of identity papers and passports, a fact that further complicated their relations with the host countries. Nansen solved the problem of identity documents by creating a form of passports for the refugees. He further convinced a considerable number of governments to accept these passports. His efforts on behalf of the refugees continued for years afterwards and were not stopped despite the difficulties that he faced. See Christensen, C. A., (1961), pp. 19-20.

³¹ Zolberg, R.A., (1983), pp.36-37.

an example. This Convention was part of a peace settlement (20 November 1922 to 24 July 1923) aimed at solving the problem of Turkish and Greek minorities on both sides by uprooting and evacuating these populations from their land and social milieu, and transferring them to another homeland dominated by their ethnic kinsmen.³²

During the 1920's and 1930's the refugee problem was perceived to be a temporary problem. Whenever a refugee emergency erupted, the League of Nations offered assistance on an ad hoc basis. The League was providing assistance to various groups of refugees such as Russians, Armenians, and Turkish refugees. The refugee policy of the League of Nations, however, bore the stamp of a half-hearted commitment.³³ Looking after a certain group of refugees might imply conflict with a member state or a potential member state. In order to avoid this conflict, the League withheld its assistance from some groups, such as the Jews, in an attempt to avoid conflict with Germany.

The Second World War saw the European continent experiencing mass exodus. By the end of the war, about thirty million refugees were on the move. The scale of the exodus increased the awareness among the main European powers of the seriousness of this problem. The refugee problem after the Second World War was no longer a temporary problem. A continuous flow of refugees emerged, the majority of who were Eastern European refugees who did not want to be repatriated. Humanitarian considerations may be assumed to have increased the awareness in the West of the seriousness of the problem. The persecution that certain groups faced during the Second World War probably motivated western countries to play an active role in an attempt to relieve the victims. A serious attempt to deal with the refugee problem was considered.

³² Koufa, K., Svolopoulous, C., (1990), p. 283.

³³ Salmon, K.,(1991), p.37.

B. The Institutionalisation Of The Refugee Problem

The end of the Second World War marked the beginning of the institutionalisation of the refugee problem. Two main refugee organisations were formed after the war to address the refugee problems generated in Europe. These two organisations were UNRRA and IRO. Both organisations had a mandate for a short period. UNRRA was formed at the end of 1943 and designed to assist those who had to flee during the Second World War. Those who fled earlier were not eligible for its help. Its main duty was to provide relief to a large number of displaced people affected by the war, such as food, shelter, and medicine, in addition to helping some groups with repatriation.³⁴ The eligibility criteria of the organisation were chaotic. Those who were considered as ineligible in some centres were considered as eligible in others.

By 1947 the Americans and the British were supporting the idea of founding another organisation within the framework of the UN to succeed UNRRA, which did not deal with refugees who were becoming a growing number, but only with displaced persons. The IRO was created as a result in 1947 and UNRRA was dissolved. IRO's Constitution contained the definition of a refugee, as a person who is outside his country of origin, and who has a fear of persecution based on religion, nationality, race and political opinion. The concept of persecution was thus identified for the first time. A person can refuse repatriation, provided that he expresses valid reasons. The IRO's functions were limited to repatriation and resettlement. By then the majority of refugees who were still in camps, were Eastern European refugees. The Eastern Bloc wanted them to go back rather than be resettled. When the Western countries did not agree with this, the Eastern countries decided to withdraw.³⁵ Towards the late forties and early fifties, the continuous stream of new refugees forced consideration by the major powers to find a successor for the IRO, the Charter of which would expire by 1950.

³⁴ Sjoberg, P., (1990), pp. 132-176.

³⁵ Zolberg, Suhrke, and Aguayo (1989) p.23., Goodwin-Gill (1990), pp. 25-26.

1. Creation of UNHCR

Background - Divergence Among the Creating Powers

The creation of the Organisation was accompanied by divergence between Eastern and Western countries, in addition to differences within the Western countries themselves. The Eastern European countries remained opposed to all international co-operation on refugee issues, which was not based on the concept of repatriation.³⁶ The Soviet Union objected to the creation of the UNHCR as it had objected earlier to the creation of IRO.

The process of establishing the office of UNHCR was also accompanied by divergence among the Western countries themselves. France supported the establishment of an agency which would possess large funding. This was reasonable, given the presence of many refugees living in camps in Germany. France feared that the cessation of the IRO's work would lead to many refugees fleeing to France. Although it advocated an agency with ample funds, France did not advocate a universal definition of a refugee in a Convention. This would have implied that France would have to take care of a large number of refugees.³⁷ As for the United Kingdom, it favoured the broadest definition possible for refugees. The British delegate to the UN noted that the status of a refugee should be granted to any person fleeing persecution.³⁸ This could be explained on humanitarian grounds, but the fact that the United Kingdom was not very susceptible to refugee flows could play a part in explaining this attitude as well. When it came to material assistance the British position changed considerably. The Foreign Office considered that vast material assistance was not needed.³⁹

³⁶ Salmon, K., (1991), p.227.

³⁷ Ibid., pp. 228-229.

³⁸ "Travaux Préparatoires" p.278.

³⁹ FO, 371/78172, November 7, 1949, FO to the UK Delegation to UN.

The position of the USA seemed different. It was not very enthusiastic to enter into a long-term economic commitment with regard to refugees. It advocated an agency with limited functions and restricted definition. It also wanted an organisation with a limited life span.⁴⁰ While the United States supported the work of IRO generously in financial terms, it was much more in favour of strengthening the bilateral and regional ties with its allies instead of providing large-scale financial support for multilateral organisations.⁴¹

2. The Legal Framework

Amid all these divergence between Western and Eastern countries on one hand, and between the Western countries themselves on the other hand, the Office of the High Commissioner For Refugees was established. According to the Statute, adopted by the General Assembly Resolution in December 1950⁴², the Office has a humanitarian and non-political character. The Office is to provide international protection for those "refugees who fall within the scope of the present Statute, and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of Governments concerned, private organisations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities"⁴³ According to the Statute, the High Commissioner shall report annually to the General Assembly through the Economic and Social Council and their subsidiary bodies and shall follow their policy directives. The Executive Committee of the High Commissioner's Programme holds an annual session in Geneva every October to approve the programmes and to set the financial budget needed for these programmes. This Executive Committee has two subcommittees, one on International Protection, and the other on Administrative and Financial Matters.

⁴⁰ Salmon, K.,(1991), p.230.

⁴¹ Holborn, L.W., (1975) pp.58-60 and Loescher, G., (1988a) p.6.

⁴² General Assembly Resolution A/res/8(1), 12 February 1946.

⁴³ Statute of the Office of The United Nations High Commissioner For Refugees, Chapter I.

The Convention relating to the Status of Refugees adopted the following year stated that “the term “refugee” shall apply to any person who:

.... As a result of events occurring before 1 January 1951 and owing to 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”⁴⁴

The Convention establishes the principle of non-refoulement for these persons, i.e., a person who has a well founded fear of persecution shall not be returned against his will to the territory where he or she might face persecution. As new refugee groups emerged in the 1960's, whose circumstances were not related to the conditions prior to 1951, the time limitation, which had been set in the Convention, proved in the light of experience to be a serious handicap for the High Commissioner. This led to the signature of the 1967 Protocol, which was signed, by many states that had not ratified the 1951 Convention. Instead of amending the original Convention, the new Protocol was drafted in a way that allowed the signatory governments to abide by the principles embodied in the Convention. This protocol eliminated the temporal and the geographic limitations that were embodied in the Convention, and resulted in a more flexible legal instrument.

The efforts of the Organisation African Unity (OAU) to draft its own regional Convention, which included a broader definition of a refugee than that embodied in the HCR Convention, partly stimulated the High Commissioner to seek a rapid adoption of the Protocol.⁴⁵ The OAU's extended definition of a refugee included “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order...is compelled to leave his place of habitual

⁴⁴ See the 1951 Convention relating to the Status of Refugees, Art.1 (2).

⁴⁵ Loescher, G.,(1993), p.80.

residence in order to seek refuge in another place outside his country of origin or nationality.⁴⁶

The institutionalisation of the refugee problem thus came after the Second World War as a response to the tremendous increase in the number of refugees fleeing from their countries during the war. The creation of the major refugee organisations accompanied the beginning of the Cold War, and reflected the divergence among the major powers. These divergences are assumed to have shaped the refugee policies in the following decades.

⁴⁶ The Organization of African Unity Convention, Governing the Specific Aspects of Refugee Problems in Africa. OAU doc.CM/267/ Rev.1(10 September 1969).

CHAPTER III.

The Legal Aspect of The Refugee Problem

The legal dimension of the refugee problem is examined in the following chapter. It analyses the concept of protection accorded to refugees in international law, and discusses the evolution of refugee law at the regional level. Such an evolution, which came as a response to the growing complexity of the refugee problem in different regions, was not matched by an equally needed evolution at the international level. It finally analyses the gap in refugee protection at the international level, which could be attributed to the restrictive refugee policies by many western countries.

A. Analysis of the Concept of a Refugee

The essence of the refugee concept is embodied in the 1951 Convention relating to the Status of a Refugee and the 1967 Protocol. The Convention draws a narrow concept of the refugee as a person fleeing from persecution. It confines this definition with geographical and temporal limitations. The Protocol, on the other hand, eliminates these limitations and widens the scope of application of the Convention.

The geographical limitation embodied in the Convention is Europe, and the time limitation is the year 1951. The Convention identified several variables that define a refugee. According to Article One of the Convention, a refugee is a person who is outside his country of origin. Secondly, he is supposed to be lacking the protection of his government. Thirdly, a refugee is supposed to have a well-founded fear of persecution. The Convention, however, does not require that persecution has actually occurred. The feeling might be due to conditions arising during an ordinary absence abroad, while the element of well-founded ness looks more to the future, than to the past. Fear involves both subjective and objective elements. It might thus be exaggerated or reasonable, but the idea of a well-founded fear of persecution requires

the presence of sufficient facts that a particular applicant might face persecution.⁴⁷ The assessment of the well-foundedness of fear is, thus, not easy. The knowledge of the surrounding conditions, and the coherence of the statement of the applicant are needed.

The fear of persecution, according to the Convention, should be based on one of five variables, the first of which is race. Many groups and individuals have been discriminated against due to their race. This discrimination has in many times amounted to persecution. Religion stands as the second variable. The religious factor has resulted in persecution that targeted certain religious groups or minorities in this century. Nationality was identified as the third variable, and the belonging to a certain social group is the fourth variable that stands as a ground for persecution in the Convention. In determining whether a certain group constitutes a social group, within the scope of the Convention, attention must be given to uniting factors such as ethnic, cultural, linguistic origins, as well as economic activity, shared values, outlooks and aspirations. It is also relevant to study the treatment of this group by state authorities.⁴⁸ The fifth variable that the Convention specifies as a ground for persecution is political opinion. A person who holds opinions opposed to that of the government and its institutions, and who has been faced with repressive measures by the government due to these opinions may be said to have a well founded fear of persecution based on his or her political opinions.

The limitations embodied in the 1951 Convention represented a handicap for UNHCR to respond adequately to situations prevailing at that time. In practice the role of UNHCR was expanded throughout the following years. This first materialised when the General Assembly authorised, in 1957, UNHCR to assist refugees who did not come fully within the statutory definition.⁴⁹ The notion of Good Offices was then used as an 'umbrella idea' under which to encompass refugees who did not come within the competence or immediate competence of the United Nations.⁵⁰ These

⁴⁷ Goodwin-Gill, G.,(1983), p.25.

⁴⁸ Ibid., p.30.

⁴⁹ GA Resolution 1167(XII), 26 November (1957).

⁵⁰ Goodwin-Gill, (1983), p.7.

developments did not constitute an amendment of the refugee definition. Rather it revealed an expansion in the scope of its application.

The 1967 Protocol widened the scope of the Convention by eliminating the time and geographic limitations embodied in the Convention. The Protocol, however, did not broaden the criterion for determining refugee status. The criterion remained the presence of a well-founded fear of persecution. This means that a large percentage of Third World refugees, those whose flight was motivated by wars, or broadly based on political and economic turmoil rather than persecution, remained *de facto* excluded.⁵¹ These individuals who indeed needed international protection were excluded from the scope of the Protocol since they were not thus victims of persecution.

The General Assembly extended the UNHCR activities in 1970's to include refugees and displaced persons of concern to the Office. UNHCR was requested at different times to assist refugees who had returned to their home countries. At other times it was asked to assist refugees who were uprooted and displaced in their own countries.⁵²

1. The Concept of Protection: Meaning and Scope of Application

Refugees are individuals denied the protection of their governments. In some cases they are fleeing from abuses perpetrated by the state. In other cases they are fleeing from oppression that the state is powerless to prevent because it has lost control of all or part of its territory or has otherwise ceased to function in an effective way. The international community recognises the need of these individuals or groups for protection from persecution. It provides them with the protection needed until they are able to re-enjoy national protection either through voluntary returns to the country of origin or through re-acquiring a new nationality.⁵³

⁵¹ Hathaway, J., (1991), p.10.

⁵² Independent Commission on International Humanitarian Issues, *Supra*, note 63, p.48, Cited by J. Hathaway, (1991), p.13.

Protection accorded to refugees by the international community involves both direct and indirect protection. Indirect protection involves promotion of the work of the Office of the UNHCR. Whereas direct protection involves the following functions: the determination of a refugee status, the prevention of the return of a refugee to places where he or she might face persecution, the grant of asylum, the issuing of identity and travel documents, the facilitation of voluntary repatriation, the facilitation of family reunion, the assurance of access to educational institutions, the assurance of the right to work and the benefit of other economic and social rights, and the facilitation of naturalisation.⁵⁴

Determination of refugee status is a prerequisite for providing protection to a refugee. Refugee status can be determined on an individual basis, or in case of large groups it is carried by using prima facie group determination procedures. In cases of individual determination, it remains to the individual to establish his case. The coherence and strength of his statement is an important element in determining his case. Moreover, the relevant facts and documents presented constitute an important variable. In many circumstances, however, the applicant lacks the necessary documentation. Information on the country of origin's situation, including information about the Human rights conditions could be important in assessing the individual's claim.⁵⁵ Being the main international organisation for providing assistance to refugees, the UNHCR contributes to national refugee status determination in various ways.⁵⁶

⁵³ UNHCR, "the State of The Worlds Refugees", (1993), p.5.

⁵⁴ Goodwin-Gill, G., (1983) p. 137.

⁵⁵ The Convention and the Protocol do not mandate the adoption of particular procedures for the determination of a refugee status.

"It is therefore left to the contracting states to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure". (UNHCR, Handbook on Procedures and Criteria for determining Refugee Status, (1979), p. 45.

⁵⁶ UNHCR contributes by

"assisting and training of government officers who are involved in the refugee status determination procedures, by providing advice to applicants, by analyzing draft legislation which have an impact on the determination process, and by participating in an advisory or voting role in the decision making or review process."

See Avery, C.L., (1984), p. 242.

The principle of non-refoulement, or the prohibition of returning a refugee to a country where he or she might face persecution, forms the core of international protection accorded to refugees. The Convention addresses this issue in Article 33, which states that:

"No Contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion."

Article 33 of the Convention puts serious restrictions on the expulsion of refugees. It considers that such a measure should not be carried out save on the grounds of security to the country in which the refugee is present. Moreover, refugees facing expulsion are supposed to be given a considerable time that allows them to be admitted into another country. A refugee, however, who faces expulsion on the grounds that he constitutes a threat to the national security of the country of his residence would find it very difficult to secure entrance into another country. Returning a refugee to his country of origin, which is the only country that is obliged to admit a refugee, is very difficult. The expelling country and the refugee who refuses to depart could end up in an awkward position. A refugee refusing to depart could end up in detention, and the expelling country may find itself frustrated in its attempts at removal.⁵⁷

The principle of non-refoulement in the Convention suggests that it applies to persons who have already acquired a refugee status, and who are within the territory of a certain country. It thus raises questions about its relation to rejecting people at frontiers. Some consider that this principle is strictly applied to people present within the territory of the Contracting States.⁵⁸ Over the years, however, the broader interpretation of non-refoulement has been established. States have allowed large numbers of asylum seekers to enter their territory, and stay there pending a solution to

⁵⁷ Goodwin-Gill, G., (1983), p.83.

⁵⁸ Grahl-Madsen, (1966), pp.94-9.

their problem.⁵⁹ Concerning refugees who enter illegally into the country of asylum, the Convention provides for their exemption from penalty. Article 31 provides that contracting states shall not impose penalties on refugees who are "coming directly from a territory where their life or freedom was threatened".

A distinction exists between non-refoulement and the granting of asylum. Non-refoulement is not always equivalent to the granting of asylum. A person might be able to stay in a given country, and still be unable to enjoy the benefits of asylum due to restrictions that might be imposed on this person by the immigration authorities in that given country.⁶⁰

Voluntary repatriation was considered as the last stage in the process of return to normality.⁶¹ Repatriation either takes place in accordance with a plan after peace and stability are established, or spontaneously and sometimes amidst situations of armed conflicts. This could place refugees, who decide to return during unstable conditions, under serious risks. When repatriation occurs in accordance to an organised plan, based on co-ordination between the home country, the host country, and UNHCR serious protection problems could be avoided. Repatriation plans occur when safety and security for the returning refugees are established, and when the situation in the country of origin is no longer dangerous. These plans include usually an amnesty for political offences, assurances of safe passage for returning refugees, material assistance to help refugees establish themselves, and provision for an international presence of some kind to monitor their safety.⁶² Spontaneous repatriation, on the other hand, occurs as a result of the refugees own initiative rather than being due to an agreed plan under the auspices of the international organisations that protect refugees.⁶³

⁵⁹ Goodwin-Gill, G., (1983), p.76.

⁶⁰ United Nations Document A/ CONF.78/C.1/SR.24, pp.8 (representative of the United Kingdom), Cited by Prof.J.N.Saxena, in the "Round Table of Asian Experts on Current Problems in International Protection of Refugees and Displaced Persons". Manila, Philippines, 1980.

⁶¹ UNHCR, The State of the Worlds Refugees, (1993), p.7.

⁶² Ibid., p. 106.

⁶³

Protection of repatriated refugees entails overseeing the guarantees or assurances that make their return feasible. Arrangements that permit the international monitoring of the safety of returnees are an essential part of most formal repatriation agreements. These arrangements are sometimes negotiated during or after spontaneous repatriation movements. Protection accorded to these returnees also entails providing them with identity papers and travel documents, in addition to assisting them in registration and recognition upon repatriation. Without these measures a returnee would be susceptible to discrimination and retaliation.⁶⁴

Refugees legally present in a given territory are entitled to have identity papers and travel documents. They are also accorded social rights, rights to self-employment and practice of liberal professions, education, and exemption from reciprocity, exemption from exceptional measures taken against nationals of the state of origin of a refugee. In addition, the Convention, in article 34, makes provisions for the assimilation and the naturalisation of refugees. States "shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings".

Concerning the indirect protection accorded to refugees, it involves the promotion, dissemination, and teaching of refugee law. It is achieved through promoting the accession and ratification of international instruments on the status of refugees and on asylum; the implementation of these instruments on the status of refugees and on asylum; the implementation of these instruments at the national level, mainly national legislation; the promotion of measures at national, regional, and international levels to reaffirm and develop fundamental principles on the protection

"These spontaneous repatriations create a dilemma for the international organizations protecting refugees, especially if the refugees return to places which are not considered as safe areas to return to. The duty of providing protection to the refugees does not allow these organizations to encourage repatriation; but they also have a responsibility to assist refugees who decide to exercise their right to return to their own country". Ibid., p.110.

⁶⁴ Ibid., p. 117.

of refugees; the promotion of adequate dissemination, research and teaching of refugee law; the promotion of public awareness of refugee problems.⁶⁵

According to its Statute and the UN Convention Relating to the Statute of Refugees, the UNHCR should co-operate with government authorities and competent national organisations for the promotion and dissemination of international refugee law.⁶⁶ The Office of the High Commissioner has increasingly given more attention to the concept of promotion, dissemination, and teaching of refugee law.⁶⁷

The refugee status will be lost, according to the Convention, through any of five conditions. The first condition is the voluntary act of the individual. The Statute and the Convention specifies that refugee status will be lost when the refugee declares that a well-founded fear of persecution no longer exists, or the need for protection no longer pertains.⁶⁸ This occurs when the individuals re-avail themselves of the protection of their country of origin; if the individual voluntarily acquires another nationality and enjoys the protection it provides; if the individual voluntarily re-establishes himself or herself in the country of origin. Under all these conditions the individual must act on voluntary basis. Being involuntary, the protection obtained should not bring a refugee status to an end.⁶⁹ The re-availability of protection of the country of origin is presumed when a refugee uses his national passport for travel, or for return to the country of origin.⁷⁰

The Statute and the Convention specify that the voluntary act is also required with regards to the re-acquisition of nationality.⁷¹ In case of acquisition of a new

⁶⁵ Patnogie, J.,(1988), p.5.

⁶⁶ Ibid., p.6.

⁶⁷ The Office of the High Commissioner has increasing given interest in the preparation of workshops and courses addressed to government officials who are concerned with legal aspects of the refugee problem. Such courses give the opportunity to participants who are high level government officials dealing with refugee issues to have a better understanding of refugee legal problems, and to have a better understanding of the sources of and the solutions to the refugee problem. Colombey, J.P., Warsaw, (1989).

⁶⁸ Statute, para. 6(a)-(d); Convention art. 1 C (1)-(4).

⁶⁹ Goodwin-Gill, G., (1983), p.48.

⁷⁰ Ibid., p.48.

⁷¹ Statute para. 6(b); Convention art, 1 C (2).

nationality, this nationality must be effective. At least the fundamental incidence of the nationality should be recognised, including the right of return and residence in the state.⁷²

The second element that will lead to the loss of refugee status is a change in circumstances. This involves fundamental changes in the country of origin that will erase the well-founded fear of persecution. A change of regime in a certain country might lead to major improvements in the domain of human rights. The third element that might lead to a loss of the refugee status is enjoying the protection or the assistance of other states or United Nations organisations. Regarding the refugees of the first category, many states tend to refrain from providing protection to refugees who are considered to have found asylum and protection in other countries. The same applies to refugees who are thought to have spent a long time in transit.⁷³ Normally a person, who has enjoyed the protection and asylum in a certain state, usually has no claim to transfer residence to another country. Protection here entails that the person has a right for residency, re-entry, work, and a guarantee against refoulement to his country of origin where he might face persecution.⁷⁴

A person applying for a refugee status might face serious problems if denied the protection of a certain state on the basis of being another state's responsibility, even though he or she might not enjoy the protection of that state. Individuals in such condition might be unable to return to the alleged country of asylum, nor regularise their status in the country of their presence.⁷⁵

Refugees, who receive the protection of other international United Nations bodies, are not entitled to UNHCR protection. Palestinian refugees come under this category. Palestinian refugees are the responsibility of the United Nations Relief and Work Agency (UNRWA). This organisation was established as a subsidiary organ by

⁷² Goodwin-Gill, G., (1983), pp.45-49.

⁷³ Ibid., p.53.

⁷⁴ Art.1 c (3), and 1 E of the Convention.

⁷⁵ Goodwin Gill, G., (1983), p.55.

the General Assembly in 1949.⁷⁶ It operates in Jordan, Syria, Lebanon, and the Gaza Strip. In areas where UNRWA operates, Palestinian refugees do not qualify for UNHCR assistance. When a Palestinian refugee is outside its area of operations, he or she may qualify individually for UNHCR assistance.

The fourth condition under which the individual might lose refugee status is under the condition of undeserving cases. Three kinds of crimes fall into this category: first, people committing crime against peace, war crimes, and crimes against humanity; second, people committing serious non-political crimes; third, people committing acts contrary to the purposes and the principles of the United Nations.

Regarding the first category, crimes against peace include "planning, preparation, initiation, or waging of a war of aggression or a war of violation of international treaties, agreements, or assurances or participation in a common plan or conspiracy for any of the foregoing"⁷⁷. War crimes include violations of the laws or the customs of war ⁷⁸. While crimes against humanity are defined as "Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial, or religious grounds..."⁷⁹

The second category of undeserving cases of protection is people committing serious non-political crimes. The Convention excludes people from refugee status if the person has committed such crimes "outside the country of refuge...prior to admission...as a refugee".⁸⁰ The determination whether a crime is a non-political crime is not always easy and considerable examination of the nature of the crime is required.

The third category relates to persons committing acts contrary to the purposes and the principles of the United Nations. The main principles of the UN are embodied in Articles one and two of the Charter. The main principles embodied are maintenance

⁷⁶ GA Res.302 (IV), 8 Dec. 1949.

⁷⁷ Charter of the International Military Tribunal, Art.6(a): 82 UNTS 279; Charter confirmed by GA. Res. 3(1), 13 Feb.1946, and 94(1) 11 Dec. 1946. Cited by Goodwin Gill, G., (1983), p.59.

⁷⁸ Ibid., Art. 6(b).

⁷⁹ Ibid., Art. 6(c).

⁸⁰ Goodwin-Gill, G., (1983), p.60.

of international peace and security, respect for equal rights and self-determination of peoples, international co-operation in economic, social, cultural, and humanitarian matters, and the promotion of human rights for all. These main principles offer little clarification of the type of acts, which would deprive a person of the benefits of the refugee status.⁸¹

2. Regional Evolution

The refugee definition embodied in the 1951 Convention and the 1967 Protocol proved with time inadequate to deal with large numbers of refugees in the Third World. A broader definition of a refugee has evolved at regional levels. Africa and Central America have witnessed, in the last decades, massive refugee flows resulting from wars, political turmoil, and severe violations of human rights. Those refugees, who constitute the majority of present day refugees, do not qualify for a refugee status under the 1951 Convention. A broader definition was needed thus at the regional level to meet the new evolving realities. The OAU Convention and the Cartagena Declaration broadened the refugee definition to include larger categories of people deserving protection. The OAU Convention, which is a binding legal instrument, widened the scope of the refugee definition to include victims of armed conflicts and wars. The Cartagena Declaration, which is a non-binding legal instrument, widened the scope of the refugee definition to include victims of human rights violations. Both instruments represent a pragmatic approach for the refugee problem.

⁸¹ Ibid., p.63.

a. The Organisation of African Unity Convention

The adoption of the OAU Convention came as a result of the rapid increase in the number of refugees in Africa in the sixties. These refugees were either the result of decolonisation wars, or civil wars in newly independent states. The wars of independence in Africa were accompanied by oppressive measures, which resulted in refugee flows. The wars in the newly independent states, on the other hand, resulted from ethnic conflicts and left massive refugee flows. A large category of these refugees did not qualify for a refugee status under the 1951 Convention.

The history of the OAU Convention traces back to 1964, when the preparation for an African refugee legal instrument started. The Council of Ministers of the OAU adopted a resolution in Lagos, which aimed at establishing a special commission to study the refugee problem and provide recommendations for the solution of refugee problems in the countries of asylum.⁸² The first two drafts of the OAU Convention came successively in December 1964 and March 1965. Whereas the first draft was considered as having shortcomings, the second draft was rejected by the Council of Ministers and Heads of States in 1965.⁸³ Two additional drafts were finished in 1966 and 1967, which addressed specifically the African situation. A fifth draft of the OAU Convention was completed by 1968. In February 1969, the final draft of the OAU Convention was approved, and on the 10th of September 1969 the OAU Convention was signed in Addis Ababa.⁸⁴

The aim of the OAU was, thus, to 'Africanise' the existing international definition of a refugee, as it appeared in the 1967 Protocol, by recognising the causes of the forced migration prevalent in Africa, which the larger international community saw as temporary.⁸⁵ The OAU Convention came as an international instrument that deals with a refugee problem in a comprehensive manner. It constitutes a complementary legal instrument to the 1951 Convention and the 1967 Protocol, and

⁸² OAU, Council of Ministers, Resolution 19(II).

⁸³ UNHCR comments on the Leo Draft: UN doc.A./AC.96/310(29 Oct.1965) pp.1, cited by Arboleda, E., (1991), p.193.

⁸⁴ Ibid., p.193.

considers these two instruments as the "basic and universal instruments relating to the status of refugees".⁸⁶The OAU Convention also calls on member states that have not yet acceded to the Convention and the Protocol, to do so and to apply their provisions in the African context.⁸⁷ In addition, it calls for a close and continuous collaboration between the OAU and the UNHCR to reach a solution for the refugee problem.⁸⁸

The OAU Convention could be considered to be the first legal instrument contributing to the development of refugee law, since it entails many progressive elements compared with the 1951 Convention. The first progressive element in the OAU Convention is related to the definition of a refugee, which is devised to apply to the African context. Whereas, Article 1(1) of the Convention retains the definition of the refugee embodied in the 1951 Convention, Article 1(2) expands the scope of the definition of a refugee. The term refugee according to the Convention, not only applies to persons fleeing persecution, but also to encompass people 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 leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

By widening the scope of the refugee definition ⁸⁹ to include people fleeing from colonial and civil wars, and not only persecution, the OAU Convention became relevant to many refugee problems arising afterwards. Moreover, instead of the subjective test of the individual determination of a refugee status, the OAU's definition is based on objective criteria, which allows for group determination of

⁸⁵ Gunning, I., R., (1990). p.47.

⁸⁶ OAU Convention, Preamble, para. 9.

⁸⁷ Ibid., para.10.

⁸⁸ Ibid., p.11.

⁸⁹ It is pertinent to note that not all displaced people in Africa are recognized as refugees. The OAU refugee definition does not apply to people who are externally or internally uprooted due to natural disasters, or to internally displaced people due to civil strife.

refugee status. In this sense the OAU Convention constitutes a pragmatic and progressive legal instrument that corresponds to the African reality.

The other important contribution that the OAU provides is related to the issue of asylum. The OAU Convention approaches the question of asylum from the humanitarian angle, and strengthens the basic institution of asylum.⁹⁰ Article II. 1 of the Convention urges the member states of the OAU to:

"Use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well founded reasons, are unable or unwilling to return to their country of origin or nationality".

The Convention also states that when a member state finds a difficulty in granting asylum to refugees, it should appeal to other member states through the OAU. These member states should co-operate to lighten the burden of the member state-granting asylum.⁹¹ The OAU Convention entails a very important provision that provides for the possibility of temporary asylum. A refugee failing to obtain the right of residence in any country of asylum is allowed "temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph".⁹²

The third important contribution of the OAU Convention is related to the principle of non-refoulement. The OAU Convention provides for a liberal and humanitarian interpretation of this principle. Art.II. 3 in the Convention provides that:

"No person shall be subjected by a member state to measures such as rejection at the frontiers, return and expulsion, which would compel him to return or to remain in a territory where his life, physical

⁹⁰ Chhangani, R. C., (1992), p.10.

⁹¹ The OAU Convention Art.II, 4.

⁹² Ibid., Art. II, 5.

integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2".

The progressive aspect of the OAU Convention with regards to the principle of non-refoulement is reflected in many ways. First, according to the Convention the principle of non-refoulement applies not only to refugees in the states' territories, but also to refugees at the frontiers. Second, not only does it apply to victims of persecution, but also it involves people fleeing from civil wars and conflicts. Third, the principle relates to all refugees, whether they had a refugee status determination or not, pending determination of refugee status.⁹³ Fourth, unlike the 1951 Convention, which provides for the possibility of expulsion of refugees if they endanger the national security of a given state, the OAU Convention does not provide for such a possibility.

The OAU Convention has introduced a fourth progressive element to international refugee law, which is related to voluntary repatriation. Due to the massive refugee flows in Africa, and the importance of the principle of voluntary repatriation as a solution for many refugee problems, the OAU Convention addresses this principle with considerable emphasis. Article V. stresses the voluntary aspect of repatriation, and that no refugee should be repatriated against his or her will to the country of origin. The repatriation process should, to a great extent, depend on legal and administrative measures in the country of origin, such as cessation of hostilities, establishment of a new government, and other fundamental changes of circumstances.⁹⁴ The OAU Convention sets certain duties for the countries of origin and for the countries of asylum with regards to the repatriation process. The countries of origin should try to stop refugee flows through creating suitable conditions at home. It should also facilitate the return of refugees through introducing legal and administrative measures such as amnesties. The country of origin should also facilitate the resettlement of returning refugees, and grant them the full rights and privileges of other nationals. The Convention also specifies that refugees who are voluntarily repatriated to their country of origin shall in no way "be penalised for having left it for

⁹³ Chhangani, R. C., (1992), p. 13.

any of the reasons giving rise to refugee situations".⁹⁵ As for the country of asylum, the Convention has specified further duties regarding the repatriation of refugees.

The first duty of the country of asylum is to make arrangements with the country of origin to guarantee the safe return of refugees.⁹⁶ Second, the country of asylum is not supposed to return refugees back to places where they might face persecution. Third, the country of asylum is supposed to assist refugees who decide to return back to their countries of origin by giving them every possible assistance.⁹⁷

b. The Cartagena Declaration

The 1984 Cartagena Declaration constitutes a comprehensive document dealing with the refugee problem in Central America. It came as a result of the massive refugee flows that occurred in Central America in the 1980's. The outbreak of violence in the region at that time forced thousands of people to leave their countries seeking asylum elsewhere. The existing legal instruments on asylum⁹⁸ were inadequate to deal with the evolving situation in Central America. Most of these instruments focusing on relations between states, and not on the individual's need for protection.⁹⁹ Although many Latin American states were adhering rapidly to the 1951 Convention and the 1967 Protocol, the need for a broader and pragmatic approach to deal with the refugee problem was growing. The new refugees not only included such well known

⁹⁴ Ibid., p.13.

⁹⁵ The OAU Convention, Art.V.(4).

⁹⁶ The OAU Convention, Art.V(2). In this regard, country of asylum is to coordinate also with the secretariat of the OAU and with other international organizations like the UNHCR. Art.V(5). The role of UNHCR in this domain is to prevent the forcible return of refugees, and to coordinate with the countries of origin and asylum to organize and monitor voluntary repatriation, (Gorman *supra* note 40 pp. 436-443). Cited by Chhangani, R. C.,(1992), p.15.

⁹⁷ The OAU Convention, Art.V.(5).

⁹⁸ The first legal instrument on asylum in Latin America goes back to 1889, when the Montevideo Treaty on international Penal Law devoted a chapter on asylum. It affirmed the right of asylum for those people persecuted for their political beliefs. This treaty was followed by several Conventions on asylum in 1928 in Havana; 1933 and 1940 in Montevideo; 1954 in Caracas; 1969 in Costa Rica. These Conventions were dealing with territorial and diplomatic asylum. (See OAS Official Records, OEA/ser.K/XVI/1.1) cited by Arboleda,E., (1991).

⁹⁹ Most of the existing legal instruments were designed to respond to individual cases under very specific circumstances. Although the 1969 American Convention on Human Rights

individuals, as politicians, intellectuals, and labour leaders, as in the seventies, it also included a wider category of people from different ethnic groups who fled in very large numbers seeking refuge elsewhere.¹⁰⁰

In a response to the developing refugee problem, a Colloquium was held in Mexico in 1981 by the Mexican Secretariat of Foreign Affairs, in co-operation with the Institute for Legal Research of the National Security of Mexico, under the auspices of the Office of the United Nations High Commissioner for Refugees. The aim of the Colloquium was to discuss urgent problems presented by the evolving crises, and the inadequacies of the existing International Refugee Law.¹⁰¹ Among the major realisations of the Colloquium, were that the regional refugee reality had gone beyond the existing legal instruments. The Colloquium's Conclusions and recommendations indicated the need for a wider refugee definition to deal with the deteriorating situation¹⁰².

In 1984, another Colloquium was held in Cartagena, Colombia to deal with the severe refugee situation, which had deteriorated after the 1981 Colloquium. This new Colloquium was sponsored by the University of Cartagena, and the UNHCR, and under the auspices of the Colombian government.¹⁰³ The "Cartagena Declaration", which was the product of this Colloquium has entailed a very broad definition of a refugee. The refugee definition embodied in this Declaration recognises people facing a threat to life, security, or liberty. It attributes this threat to one of five factors: generalised violence, foreign aggression, international conflicts, massive violations of human rights, or circumstances seriously disturbing public order.¹⁰⁴ The Cartagena Declaration includes very progressive elements compared with the 1951 Convention and the 1967 Protocol. By broadening the scope of the refugee definition to

provided protection to individuals, the notion of protection accorded by the Latin American countries was very limited. See Arboleda, E., (1991), pp. 199-200.

¹⁰⁰ Ibid., p.200.

¹⁰¹ UNHCR, *Asilo y Protección*, above note 61, p.7., Cited by Arboleda, E., (1991), p. 201.

¹⁰² Conclusions and recommendations of the Colloquium on Asylum and the International Protection of Refugees in Latin America, Mexico, 1981, p. 206.

¹⁰³ "Coloquio Sobre la Protección de Los Refugiados en America Central, Mexico y Panama: Problemas Jurisdicos y Humanitarios".(above note 61).

¹⁰⁴ Cartagena Declaration, Section III.3.

encompass victims of human rights violations, internal conflicts, and generalised violence, the Declaration includes the most progressive elements of any refugee legal instrument so far. This Declaration proves to be a very pragmatic response to the refugee problems that emerged in Latin America in that era. The Declaration, which is a non-binding legal instrument, has confirmed the customary law related to refugees in Latin America.

Conclusion

The refugee definition found in the 1951 Convention and the 1967 Protocol proved with experience to be inadequate to deal with the refugee problems developing in different parts of the Third World. In Africa, the massive number of refugees resulting from the decolonisation process and internal disturbances exceeded the scope of the protection provided by these instruments. The same applies to the situation of Latin American refugees who were fleeing in large numbers. The urgent refugee problems necessitated a new approach to deal with this problem in an humanitarian way. The result was the 1969 OAU Convention, which is a complementary instrument to the 1951 Convention and the 1967 Protocol. It includes, however, many progressive elements compared with the other two instruments. It is more relevant to the African context since it includes refugees fleeing from situations of armed conflict, and not only persecution. Moreover, the Cartagena Declaration constitutes a very pragmatic legal instrument, which included victims of human rights violations as people entitled to refugee status. Both instruments proved to be a progressive response to refugee problems evolving in their respective areas.

B. Universality v. Regional Approaches

1. Gap in International Protection

Refugee movements in recent decades are caused by various reasons. Persecution constitutes one of these reasons, but not the sole one. The 1951 Convention which was adopted to meet the needs of victims of persecution excluded

other victims in need of international protection from its scope. Victims of armed conflicts and civil disturbances, as well as victims of foreign aggression are excluded from the scope of the Convention. These people, who do not have a well-founded fear of persecution in accordance with the Convention, constitute the majority of the current refugee flows. The flexible interpretation of the Convention¹⁰⁵ in earlier decades has enabled the international community to react adequately to the emerging refugee flows. The situation, however, is changing over the course of time. The tremendous increase in the number of refugees and the asylum crisis is resulting in an increasingly restrictive interpretation of the refugee Convention by Western countries. The result is a growing number of unprotected de facto refugees.

Many Third World countries, in contrast to Western countries, have tended to bridge this gap in international protection by developing progressive regional instruments on refugees. This gap became more evident in the Western countries that are responding with increasingly conservative approaches to the refugee problem. The over-legalised refugee determination systems, and the lack of uniformity in interpreting and applying the refugee Convention are assumed to widen this gap. The restrictive and divergent interpretation of the terminology of the definition by different states¹⁰⁶ is clear when dealing with certain concepts of refugee law, like the issues related to the agent of persecution, imputed political opinion, civil war refugees, and safe third country.

¹⁰⁵ The history of the Convention has revealed flexibility in responding to refugee crises. The individual determination procedures that were applied for the determination of refugee status proved with time impractical in responding to the large numbers of refugees fleeing from their countries. Moreover, the concept of persecution applied excluded other categories in need of protection. For these reasons the Office of the High Commissioner devised and applied new procedures to respond to refugees out side the competence of the United Nations, such as the "Good Offices" procedure in the 1960's. In this procedure, the High Commissioner used the prima facie determination procedure which was based on the objective situation in the country of origin. In the 1970's the High Commissioner, based on a General Assembly resolutions, involved himself with externally displaced people in refugee-like situations. These included a broad category of people in need of protection. See Jackson, I.,(1991), p.410.

¹⁰⁶ Arboleda, E., Hoy, I., (1993), p.83.

a. The Agent of Persecution

The issue of the agent of persecution is closely related to the concept of persecution itself. A universally accepted definition of persecution does not exist. Different attempts aiming at formulating a definition of persecution have met with little success. It may be concluded from Article 33 of the 1951 Convention ¹⁰⁷ that a clear link exists between persecution and a threat to life and freedom of the individual, or other forms of serious human rights violations¹⁰⁸. The Convention, however, does distinguish between persecution stemming from the state, and persecution done by private citizens¹⁰⁹. It also does not provide any specific provisions indicating that the agent of persecution must be the state for the individual to be eligible for a refugee

¹⁰⁷ *Supra*, note 32, at 14. See Brill, W. L., (1992), p.14.

¹⁰⁸ The use of human rights standards as criteria for determining the existence of persecution is very controversial. The conservative view is that only a very narrow subset of human rights violations amounts to persecution. These include deprivation of life and physical freedom. They argue that acts aiming at restricting and denying of such rights as the freedom of thought, conscience and religion, freedom of opinion or expression, and freedom of assembly and association do not constitute persecution. Others adhere to a more liberal approach in this regard. Hathaway, for instance, cites four different types within the International Bill of Human Rights, and considers that part of these rights does amount to persecution. The first category of these rights includes "freedom from arbitrary deprivation of life, protection against torture, inhuman or cruel punishment or treatment, freedom from slavery, and prohibition from criminal prosecution". These rights are considered core and basic rights, from which no derogation is acceptable, and any denial of which could be considered as persecution. The second category of rights includes freedom from "arbitrary arrest or detention; the right to equal protection for all, including children and minorities; the right in criminal proceedings to a fair and public hearing and to be presumed innocent unless guilt is proved; the protection of personal and family privacy and integrity; the right to internal movement and choice of residence; the freedom to leave and return to one's country; liberty of opinion, expression, assembly and association..". The third category of rights includes the right to work, including favorable conditions of employment, the right to food, clothing, housing, medical care, social security, education, protection of the family, particularly children and mothers. The fourth category of rights is the rights to own and be free from arbitrary deprivation of property, and the right to be protected against unemployment. Hathaway considers persecution as the failure to provide protection, from the state's side, against a breach on any right from the first category, a discriminatory or non-emergency violation of the rights of the second category, and the failure to implement a right within the third category. Regarding the fourth category, they are considered as outside the scope of state's protection.

¹⁰⁹ "This is because the risk of harm in the totalitarian refugee-producing states of the day was assumed to stem from the actions of official agents of the state (such as police, military, or secret service)". See Evans, G., (1991), p.1.

status. The main element is whether the individual is at risk of being threatened by his life and freedom, based on the five grounds.

The handbook, on the other hand, indicates that persecution is normally related to actions committed by the authorities of the country. It might also be originated by:

"Sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable to offer effective protection".¹¹⁰

Thus, a person who is at risk of harm initiated by non-state actors, and who is denied the protection of his state is eligible for refugee status according to the handbook. The critical point is thus the state's unwillingness, or inability to provide protection. This occurs when the state is not fully in control of the security situation in the country of origin, or where the persecution is originated by autonomous military groups. In such conditions, a well-founded fear of persecution might still exist even if the state is willing to provide protection to the individual.¹¹¹

¹¹⁰ Supra, note 32, at 17. Cited by Brill, W., (1992), p.15.

¹¹¹ Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in support of Respondent (Patrick Francis Ward), Final Draft, UNHCR Geneva, 17 December 1991, Para 15. According to Hydman, "the 1951 Convention Definition of Refugees: An Appraisal with particular reference to Sri Lanka Tamil Applicants", Human Rights Quarterly, 1987, Vol.9, No. 1, 67:

"If a group of citizens perpetrates acts of persecution against other groups, and if the country is either unable or unwilling to provide protection to the victimized, the victims nonetheless will be considered to be the objects of persecution. The fact that the government wishes to provide protection will not alter this situation".

Goodwin-Gill shares a similar view in "The Refugee in International Law", Oxford 1983:

This liberal approach regarding the issue of the agent of persecution that is presented in the handbook is not shared by many asylum countries. The problem arises from the restrictive interpretation by states of the issue of agent of persecution. Claimants who have a well-founded fear of being persecuted by non-state agents are in many receiving countries denied the protection of that country. With the changing nature of refugee flows from East-West to South-North refugees, the issue of agent of persecution becomes very important. The majority of refugees may be fleeing from persecution initiated by non-state actors. A serious gap in refugee protection might thus stem from such a restrictive approach.

In many countries, state authorities might not be directly involved in the act of persecution towards certain groups or individuals, but persecution might be state sponsored. It is difficult for the person fleeing from such circumstances to prove the state's complicity in such an act. Even if the state is not directly involved in persecutory activity, the state might be unwilling to provide protection to victims of persecution of non-state actors. This could be due to political problems, where a state is unwilling to interfere between different factions in a politically unstable country. This unwillingness might also be a consequence of a state's policy to deny protection to specific groups within the country.

The domestic jurisprudence of many states on the issue of the agent of persecution has been in many times incompatible with UNHCR's handbook. This might be referred to the fact that these states are applying the concepts of their municipal law, which requires the agent of persecution to be the state in order that an applicant may be eligible for a refugee status. In the case of Germany, for instance, the refugee status determination is based on article 16(2) of the German Constitution. The politically persecuted person enjoys the right to asylum in the German constitution. German domestic law refers to the 1951 Convention in matters related to grounds of

" Refugees, for example, have fled mob violence or activities of so called death squads. Governments may be unable to suppress such activities, they may be unwilling or reluctant to do so, or they may be even colluding with those responsible. In such cases, where protection is in fact unavailable, persecution within the Convention can result".

persecution, and non-refoulement.¹¹² The Federal Constitutional courts have considered, in a decision in 2 July 1980¹¹³, that persecutory acts done by non-state actors could be sufficient grounds for the granting of asylum. This approach considers both the state's unwillingness and inability to provide protection from a non-state persecution as a sufficient ground for the granting of asylum. Recently, this liberal approach has been replaced by a more restrictive one, which considers that only the state's unwillingness to provide protection to individuals facing non-state acts of persecution makes their claimants eligible for the granting of asylum.¹¹⁴

Thus, only the state complicity criteria, according to the new law, constitute a sufficient ground for the granting of asylum. If the state is unwilling to use the resources under its disposal to provide protection to a threatened individual, then he is eligible for asylum. If, on the other hand, the scope of protection exceeds the state's capacity, then the state cannot be held responsible for the acts of non-state actors.¹¹⁵ This is very relevant to refugees who are fleeing from civil war disturbances. In situations where the state is not able to provide protection to individuals or groups within its territory due to the state of anarchy or civil unrest, people are thus denied the right to asylum. Many Somali refugees, for instance, who claimed to be persecuted by non-state actors who belonged to rival groups, were rejected by the Courts in

¹¹² See Brill, W., L., (1992), p. 23.

¹¹³ The Court's decision stated that:

"if the state encourages persecutory measures by individuals or groups or supports, condones or tolerates such acts and therefore, denies the necessary protection to the individuals concerned, thereby being either not willing or able to provide protection, private acts can also be considered as 'political' persecution in the sense of Article 16(2) 2 of the basic law".

(An official translation). Federal Constitutional Court, Decision of 2 July 1980, in EZAR 200, No.1, at 11.

¹¹⁴ See Brill, W., L., (1992), pp. 23-24.

¹¹⁵

"In the context of the right of asylum, the basis for the immutability of persecutory measures by third parties to the State cannot be found in the state's claim to the legitimate monopoly of power, but only in its... realization. If the grant of asylum is intended to offer protection from a particular use of a state's persecutory power, it follows that protection from anarchy or dissolution of State's power is not promised by article 16(2)2 of the Basic Law."(unofficial translation). Supra, note 59, at 15. Ibid.

Germany. This was carried on even after the inclusion of the principle of non-refoulement in the German Aliens Law(5.1 Aliens Law). According to this Law:

"Persecution must emanate from the State or must be imputable to the State. 51.1 Aliens Law expressly prohibits only the deportation of the politically persecuted. Political persecution...(however) is always State persecution. This interpretation is in accordance with the legal relationship between 51 and 53 infra Aliens Law. In those provisions, protection from other, i.e. non-political, danger is not granted" (unofficial translation)¹¹⁶.

When the state's complicity is not clearly identified in situations where persecution is emanating from non-state actors, the claimants are being denied the right to asylum, even when their life is seriously in danger. An applicant from Bangladesh, whose father and brother were killed by an underground organisation, has been denied the right to asylum by the Higher Administrative Court in Bavaria. This decision was reached even after acknowledging that the applicant has a well-founded fear of being persecuted at the hands of the underground organisation Purbo Bangla Sharbohara Party.¹¹⁷

The same approach that is applied in Germany with regards to the issue of the agent of persecution is also applied in other asylum countries. Many asylum countries seem to be applying the concept of state complicity when the agent of persecution is a non-state actor. At the same time, much controversy is witnessed when no proof of a state complicity is available, but rather it is a case of a state's incapacity. Cases applied in some Canadian courts reveal that the state complicity standard was required as a

¹¹⁶ Administrative Court of Stuttgart, decision of 13 August 1991, Az 17 K 8056/91 at 7.Cited by Brill, W., (1992), p.28.

¹¹⁷

" Considering the ascertained willingness and ability of the state of Bangladesh to combat against the violent acts of the PBSP throughout the whole country and to protect its citizens from attacks on their life and limb by this terrorist group, the potentially well-founded fear of the applicant to face such a threat in case of his return cannot establish a basis for the grant of asylum, since the applicant's home country is not responsible for the violent acts of the PBSP". Higher Administrative Court of Bavaria, decision of 5 November 1991, Az 21 BZ 90, 31942, at 19.

prerequisite for granting refugee status in cases when the agent of persecution was a non-state actor. The decision of the Federal Court of Appeal in the matter *Zahirdeen Rajudeen v. Minister of Employment and Immigration* in 1984 revealed the requirement of state complicity. The case involves a Tamil Sri Lankan of Muslim belief who claimed to be persecuted by a Sinhalese group. In his judgement, J. Stone provided the following:

"...in order to satisfy the definition of persecution complained of must have been committed or been condoned by the state itself and consist either of conduct directed by the state itself or in it knowingly tolerating the behaviour of private citizens, or refusing or being unable to protect the individual from such behaviour".¹¹⁸

This reasoning provides for protection based on the state's inability to provide protection for the individual. However, the final decision was based on the state complicity standard¹¹⁹.

In other different cases the same approach was applied. In the decision of the Federal Court of Appeal regarding the decision *Surujpal v. M.E.I.*, the state complicity standard was applied. The two Guyanese applicants had been subjected to violence due to their membership in the People's Progressive Party. In stating the reasons for judgement, Judge MacGuigan considered that the decision was based on the issue of state complicity in the act, which was proved by the police's unwillingness to accord protection:

¹¹⁸ *Rajudeen v. M.E.I.*, supra, note 80, at 2.

¹¹⁹ "It is true that the acts complained of were not committed by the state or its agents. On the other hand, a consideration of the evidence as a whole convinces me that the police were either unable, or worse still, unwilling to effectively protect the applicant against attacks made upon him. Accordingly, because of his race and religion, the applicant could not reasonably expect to be protected by an important state agency against unlawful attacks. In my view, he had good reasons to be fearful and, objectively, such fear was well founded" Judge MacGuigan, *id.*, at 5.

"In our view it is not material whether the police directly participated in the assaults or not. What is relevant is whether there was police complicity in a broader sense... It is not required that the state participation in persecution be direct; It is sufficient that it is indirect provided that there is proof of state complicity".

The reasoning behind the concept of state complicity is that only states are to be held responsible under international law, and not individuals. Whether an individual is denied the needed protection due to the unwillingness or the inability of his state, the result is the same. Such people are lacking the sufficient protection of their state and are facing a well-founded fear of being persecuted. Those individuals are thus in need of the international protection accorded to people under similar conditions by the 1951 Convention.

b. Civil War refugees

The majority of present day refugees come from armed conflict situations in Africa, Asia, and Central America. Severe human rights violations, and hardships resulting from civil war situations can lead large numbers of people to seek refuge outside their countries of origin. Those people, who are not refugees due to deliberate acts of persecution of their states, do not qualify for a refugee status under the provisions of the 1951 Convention and the 1967 Protocol. The international community has nevertheless responded in a liberal manner to situations where large-scale influxes have resulted from internal conflicts and wars. The problem arises, however, when individual determination procedures are required for people fleeing from civil war situations. Usually, this occurs when a minority of those refugees do apply for a refugee status in countries, which are geographically distant from their countries of origin. Civil war refugees are increasingly required to prove that they were singled out or personally targeted for persecution as a prerequisite for being granted refugee status.

According to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, persons who are compelled to leave their countries of origin due to international or national armed conflict situations are not refugees under the 1951 Convention and the 1967 Protocol. The Handbook points out, though, that the above-mentioned conditions could result in persecution resulting from one of the five criteria of the Convention. When a refugee claimant from civil war conditions is able to verify that he has a well-founded fear of persecution based on the Convention, then he is probably eligible for a refugee status.

Two important points are concluded from the handbook regarding refugee claims from civil war conditions. First, the handbook considered that victims of civil war conditions do not qualify them for a refugee status. This is because they are victims of generalised violence that is targeting the whole population without discrimination. Second, the Handbook recognises that certain individuals in countries experiencing civil war could be eligible for a refugee status, if they have additional elements, i.e., if they were also victims of persecution due to their political or civil status.¹²⁰

State practice, however, is not always consistent with this principle. Many restrictive interpretations and application of the Convention and the Handbook are increasingly witnessed. Many asylum seekers from civil war situations are being denied refugee status. Many of them were admitted on temporary basis and provided with a B Status. Those who were accorded refugee status were required to provide evidence of past persecution.

¹²⁰ See Egan, S.,(1991), p 2.The UNHCR has emphasized this principle in the Note on International Protection to the Executive Committee, August 27, 1990:

"One particular problem relating to the narrowing of the meaning of persecution is the often automatic denial of refugee status to persons who happen to come from a civil war situation, often on the grounds that excessively cruel treatment is merely the by-product of generalized violence. In reality, of course, persons become refugees when they flee or remain outside a country for reasons pertinent to refugee status, whether these reasons arise in a civil war situation, in an international conflict or in peace time".

This approach contradicts the forward looking assessment of the risk embodied in the definition.¹²¹ The fear of being persecuted, that an applicant has, could not only be attributed to previous acts of persecution, but also to a wish to avoid any future risk of being persecuted.

Advocates of the restrictive interpretation consider that in civil war situations, or in situations of general unrest and disturbance states have the right to take measures enabling them to safeguard their territory. These measures which might be directed against insurgents groups or groups fighting for independence are not considered to be politically motivated. Following this argument, German courts have considered that torture directed towards members of militant organisations in Turkey and Sri Lanka does not constitute political persecution. It is rather an attempt to preserve the state's integrity. In Switzerland, as well, a Tamil asylum seeker, who has supported various liberation movements and feared arrest by Indian groups, has faced rejection by the Swiss authorities. The Swiss authorities considered such an arrest not to be political persecution, but rather a security measure.¹²²

Thus, measures adopted by the authorities which are affecting the life and liberty of individuals in a civil war situations, and which may be occurring in violent political, racial, or ethnic contexts, are, in many cases, not considered, by the asylum countries, as politically motivated and do not amount thus to political persecution. The advocates of this restrictive approach consider that in a civil war, or in public disturbances, acts done by the state aiming at preserving the integrity of the state are prosecution and thus the targets of such acts do not qualify for a refugee status.

¹²¹ Ibid., p.3. New Refugee Status Advisory Committee, Guidelines on Refugee Definition and Assessment of Credibility, paras. 4, 9: Cited in Egan, S., (1991):

"Looking as it does to the future, the refugee definition is concerned with possibilities and probabilities rather than certainties. A well-founded fear of persecution may be based on what has happened to others in similar circumstances. Where a person has not been persecuted simply because he has not yet come to the attention of the authorities, he need not await until he has been detected and persecuted before he can claim refugee status...A person need not be singled out for persecution".

¹²² See Kalin, W., (1991), p.438.

Prosecution directed towards individuals who have violated the law, even if they were politically motivated, does not constitute persecution. Prosecution, however, could turn into political persecution if the measures indicate that the punishment inflicted upon the person concerned is due to his political opinions rather than to the act committed. This could be presumed when the punishment inflicted on the offender is harsher than those measures usually applied for similar offences.¹²³ State measures in civil war conditions against opponents do not thus constitute persecution provided that the aim is to protect the integrity of the state. If, however, such measures are inflicted on the individuals due to their political, racial, religious, or ethnic reasons, then the act committed does amount to persecution.

The advocates of the restrictive interpretation among governments and legal writers present another argument that aims at denying civil war asylum seekers refugee status. They consider that refugee law aims at protecting against political persecution, rather than hardships arising from wars, civil disturbances or unrest. They consider that victims of such disturbances cannot be granted refugee status. Even though they might actually be denied the protection of their governments, this lack of protection is not a result of discrimination directed towards them from the authorities, but it is rather a general condition.

Following this argument, victims of armed conflicts, who experience serious human rights violations and who face a very high risk of serious harm in case of continued residency, increasingly are denied refugee status unless they are able to show evidence that they have been individually targeted and singled out for persecution. This approach has been applied even more frequently by some Western countries in order to restrict the numbers of people acquiring asylum. In Australia, for instance, members of the Determination of Refugee Status Committee (the DORS Committee), and the Department of Immigration, Local Government and Ethnic Affairs have been having more regular recurs to this approach especially with applicants from Sri Lanka. In some cases, applicants are required to show that either they, an immediate family member, or both were assaulted, or arrested by the security

¹²³ Decision of 10 July.1989, 80 BVERFGE 315 at 337-8. Cited by Kalin, W., (1991), p.440.

forces in Sri Lanka. In these cases the applicants' houses were destroyed, in addition to many possessions that included some business equipment, which was essential to the pursuit of their livelihood. This destruction was either caused by deliberate acts by army personnel, or indirectly due to generalised violence. The recommendations from the DORS Committee did not consider the applicants to be refugees. The UNHCR considered that one of these applicants was eligible for a refugee status.¹²⁴

One applicant from Sri Lanka has claimed that her sister has been raped by a soldier when the army visited their area. She herself was assaulted by members of the armed forces when they took her from her house for questioning about the whereabouts of her brother. In 1986, her father, who was himself a police officer, was killed in a battle between the militants and the army. In the judgement of the case the DORS Committee concluded that even though Ms Gunaranji and her family had suffered in the 1983 communal conflict, she was not individualised, nor had she demonstrated that the Sri Lankan authorities would be interested in her on her return. This result, which contradicts the UNHCR view, considered that:

“...the army had concentrated attention on her family ...Her family has received specific attention from the army and she risks being persecuted for the imputed political opinion of her brother...We believe she has a well founded fear of being persecuted if returned to Sri Lanka..., but may be able to return to India”¹²⁵

In the final decision in the case, the Court concluded that the individual was not singled out for persecution. Consequently, without this singling out, a refugee status could never be accorded. In a number of similar cases¹²⁶, the Australian

¹²⁴ See Crawford, J., and Hyndman, P., (1989), pp.160-161.

¹²⁵ Ibid., p.161.

¹²⁶ In *Mohankumar v Ministry of Immigration and Ethnic Affairs*, the claimant, who is a Sri Lankan Tamil, faced a very strict test with the Australian Authorities. In addition to the fact that his two brothers were detained and presumably killed by the police, his father had been being "accidentally" killed, and he himself had been detained and tortured. In spite of that the Minister's delegate concluded that the applicant was not able to establish that he was personally

authorities required evidence from the applicants showing that they were singled out for persecution, or that they will suffer discrimination and denial of their basic freedoms or human rights, greater than the hardships experienced by the majority of the Tamils in Sri Lanka.¹²⁷

Measures taken by the authorities of certain states in a situation of disturbances or unrest could amount to persecution, at certain stages. The fact that the people subjected to that act of persecution are not individually targeted does not change the nature of the act itself.

People who belong to a group opposing a government, and who are subjected to severe measures because they belong to that group, are all singled out for persecution, even if large numbers of them were subjected to the same treatment. Denying those individuals international protection on the basis that they were not personally targeted for persecution is a serious gap in refugee protection by the signatory states of the Convention.

targeted for persecution. The statement of reasons for refusal of the application for refugee status read:

" 9. The... delegate considered the destruction of the applicant's family property, as well as the detention and the assault he received at the hands of the army, to have been random incidents and part of the army's general harassment in the area, and not directed specifically towards the applicant or his family. The... delegate did not consider these actions to be persecutory within the meaning of the Convention.

10. The ...delegate considered that the applicant had not established that he had been singled out for treatment amounting to individual persecution. While the applicant had been detained on one occasion, it was in a general round up in his village and not because the authorities had singled him out for special attention.

11. The ...delegate considered the Applicant's fear of return to Sri Lanka was based on the general situation in Sri Lanka and did not amount to well founded fear of persecution". See Crawford, J., and Hyndman, P., pp. 163-167.

¹²⁷ *Sinnathamby v Ministry of Immigration and Ethnic Affairs* (1986) 66 ALR 502, 505. Cited by Crawford and Hyndman, (1989), p. 165.

c. Safe Third Country

Among the restrictive measures that are being applied by some of the signatory states of the 1951 Convention, is the refusal to accept a claim to a refugee status, which is expected to be the responsibility of another state. Many states tend not to consider applications for a refugee status, when the applicant is expected to be another state's responsibility. Such a restrictive approach is creating serious problems for asylum seekers who have no protection or asylum from any country, but who are considered by the country where their application is made to be the responsibility of another country. Such individuals can "end up in limbo, unable to return to the alleged country of asylum or to pursue an application or regularise status in the country they now find themselves. The absence of agreement between states on responsibility in such cases, the variety of procedural limitations governing applications for refugee status and asylum, as well as tendency of states to interpret their own and other states' duties in the light of sovereign self-interest, all contribute to a negative situation potentially capable of leading to breach of the fundamental principle of non-refoulement.¹²⁸

Many Western asylum countries are adhering to such measures¹²⁹, which are leading to refoulement. Direct as well as indirect forms of refoulement are prohibited

¹²⁸ Goodwin-Gill, G., (1983), p. 55.

¹²⁹ Among the countries that are applying this approach is Australia. An example of such an approach is the Azemoudeh case. The Iranian claimant arrived at an Australian port where he claimed a refugee status. He was returned to Hong Kong, after being denied access to a lawyer who was waiting for him at the other end of the port. Later on, he was also deported from Hong Kong to Bombay, and from Bombay to Iran, where it was presumed that he was persecuted. The refoulement from Australia took place despite an order from the Federal Court, asking the Minister to bring him back to Australia from Hong Kong. This request was based on the argument that the refugee status of the claimant was not considered properly, and if the claimant were not returned, his position might be harmed seriously, without any chance of testing the legality of the Australian decision.

At the hearing on October the 4th 1985, Wilcox J asked the Minister to undertake all the necessary requirements to insure that the claimant entered Hong Kong and stayed there pending a further decision on his case. The Hong Kong authorities accepted to admit the claimant until

by the 1951 Convention under Article 33. When states refuse to accept refugee claims from individuals that are considered other states' responsibility, refoulement to places where the claimant faces persecution is very likely to occur. In such conditions more than one state could be held responsible for the act of refoulement.

The obligation of non-refoulement embodied in Article 33 is thus not fully satisfied if a signatory state of the 1951 Convention removes a person to a third country, which is believed to have more responsibility towards the claimant. This is mainly true if there is evidence showing that the applicant will face the risk of refoulement to his country of origin.¹³⁰

the 6th of October and later until the 9th of October. The Judge considered that the removal of the Claimant from Hong Kong to Bombay allowed for the possibility that the Indian authorities would return him to Iran. The Judge considered that:

"If Mr Azemoudeh is allowed to be returned from Hong Kong to Bombay, there is at least the possibility that the Indian authorities will return him to Iran. It is true that there is no evidence as to their attitude but it would be not unreasonable to react in the same manner as their counterparts in both Australia and Hong Kong and to wish to rid themselves of an alien who had no travel documents. Certainly one could not be confident that the situation would be otherwise....Although the ideal situation would have been for Mr Azemoudeh to be in Australia while his case was being considered, in order that he might better communicate with his advisers and the departmental officers, it probably would have sufficed for him to be held in Hong Kong pending a final decision. But by Tuesday afternoon it had become clear that this possibility was not available...The choice... was to have Mr Azemoudeh returned to Australia or to accept the likelihood that he would be returned to India, and possibly to Iran."

Consequently the Minister was ordered to arrange the return of Azemoudeh to Australia while his case was being considered. However, before the order was carried out, Azemoudeh was already deported to Bombay and subsequently to Iran. See *Azemoudeh v Minister of Immigration and Ethnic Affairs* (1985) 8 ALD 281. Cited by Crawford and Hyndman, (1989), p.168.

¹³⁰ A similar view was adopted by the House of Lords in *Musisi*, a case of a Ugandan applicant for a refugee status. The applicant had a well-founded fear of being persecuted in Uganda, should he be returned there. Despite a statement from a Kenyan official that the Kenyan government would return him to Uganda if he was returned to Kenya, the Secretary of State proposed to return him to Kenya. The House of Lords considered that the Secretary of State failed to recognize the risks that this refoulement entailed. This was expressed in the words of Lord Bridge who considered that:

"...if a person arrives in the United Kingdom from country A claiming to be a refugee from country B, where country A is itself a party to the Convention, there can in the ordinary case be no obligation on the immigration authorities here to investigate the matter. If the person is refused leave to enter the United Kingdom, he will be returned to country A, whose responsibility it will be to investigate his claim to refugee status and, if it is established, to respect it. This is, I take it, in accordance with the

This restrictive interpretation of the language of the Convention by some Western countries, coupled with incoherent application of the different provisions of the Convention, have excluded a major group of the asylum seekers, from the protection that the Convention was set out to provide. Restrictive interpretations regarding the issue of persecution, agent of persecution, civil war refugees, and safe third country are all leading to this gap in the protection of de facto refugees and asylum seekers.

2. Tentative Solutions: How to Bridge the Gap

This gap is mostly accentuated in Western countries, which have not responded to the evolving refugee situation in the same progressive manner as that of African and Latin American countries. The possibility of Western countries adopting a new progressive legal instrument, similar to the OAU Convention or the Cartagena

'International practice'.... which must rest upon the assumption that all countries which adhere to the Convention may be trusted to respect the obligations under it. Upon that hypothesis, it is obviously sensible practice...It is not, however, difficult to imagine where reliance on the international practice would produce the very consequence which the Convention is designed to avoid...Suppose it is well known that country A, although a signatory to the Convention, regularly sends back to its totalitarian and oppressive neighbor, country B, those opponents to the regime in country B who are apprehended in country A following their escape across the border....[I]f a person arriving in the United Kingdom sought asylum as a refugee from country B, assuming he could establish a well-founded fear of persecution there, it would, it seems to me, be as much a breach of article 33 of the Convention to return him to country A as to Country B. The one course would affect indirectly, the other directly, the prohibited result...In the ordinary case of a person arriving here, from a third country, and claiming asylum as a refugee from the country of his nationality, there will be no ground to apprehend that his removal to the third country whence he comes would put him at risk. But at the other end of the spectrum, the risk may be obvious. Between these two extremes there may be varying degrees of danger that removal to a third country of a person claiming refugee status will result in his return to the country where he fears persecution. If there is some evidence of such a danger, it must be for the Secretary of State to decide as a matter of degree the question whether the danger is sufficiently substantial to involve a potential breach of article 33 of the Convention. If the Secretary of State has asked himself that question and answered it negatively in the light of all relevant evidence, the Court cannot interfere". See *R v. Secretary of State for Home Department, ex parte Bugdaycay*. Cited by Crawford and Hyndman,(1989), pp.172-173.

Declaration, seems to be ruled out currently in view of the asylum crises and the restrictive measures applied by several countries. The developments, however, in the refugee problem following the Cold War period revealed the need to adopt new approaches to bridge this gap in refugee protection.

In attempting to find remedies for the present refugee problems, which aim at providing protection for a larger number of refugees, the international community and the UNHCR realised the growing need for new approaches to be applied regarding the refugee problem. In order to bridge this gap, measures like temporary protection were introduced. Temporary protection came as an intermediate measure between non-refoulement, which is an obligation under the 1951 Convention, and the granting of asylum, which opens the way for local durable solutions. In view of the asylum crises in the West, local durable solutions for large-scale influxes prove to be a heavy burden on the receiving countries. Temporary protection came, thus, as one of the remedies.

In 1980 and 1981 the Executive Committee of UNHCR adopted two conclusions on temporary protection in which it reaffirmed the application of the non-refoulement principle on large scale influxes and not only for individual cases.¹³¹ This initiative started gaining ground, mainly in Europe, in the mid 1980's. The twelve EC countries then, have taken over this initiative as regarding the co-ordination and harmonisation of their refugee policies.¹³² Temporary protection was mainly applied in Europe in the 1990's, as an attempt at burden sharing, in response to refugees fleeing from Former Yugoslavia. There were, however, no commitments regarding the numbers to be received in each country. Nor were there any attempts to apply equal distribution standards among the different countries. Refugees who benefit from temporary protection status are given a residence permit for a limited period, and are not subjected to individual determination procedures.

Temporary protection seems to be serving more than one purpose. First, it seems to save administrative and economic resources through applying *prima facie*

¹³¹ Conclusions on the International Protection of Refugees adopted by the Executive Committee of UNHCR no 19 (XXXI) and no 22 (XXXII).

¹³² Kjaerum, M., (1994) p.447.

group determination, rather than the individual determination process. Second, it seems to serve a political purpose, since it is easier to return an individual holding a temporary protection status to his country of origin when the situation in that country improves. Third, it constitutes a signal sent to the public in the receiving countries that the refugee situation is purely a matter of protection, and not of migration.¹³³

Individuals with a temporary protection status do not enjoy the same rights that refugees under the 1951 Convention enjoy. Although in some countries such as Switzerland, Spain, and Hungary persons with the temporary protection status enjoy many rights such as the right to work, and social benefits, this could not be considered the rule in most asylum countries. In many countries individuals under the temporary protected status have very restricted rights, mainly rights related to work and family reunion.

The right to work is restricted in many countries to people who hold temporary protection status. In Denmark and France, for instance, people with this status do not have the right to work, and the conditions for access to the labour market are very restricted. In the Netherlands and Germany, as well, people with temporary protected status do not have access to the labour market and they have a status similar to the asylum seekers. Refugees in this category are thus denied the working permit that allows them to be employed. This contradicts Article 23 of the Universal Declaration of Human Rights, which provides that everyone has the right to work. It also contradicts Article 17(2) of the 1971 Geneva Convention which considers that "restrictive measures imposed on aliens or the employment of aliens for the purpose of the protection of the national labour market should not be applied to a refugee" who "has completed three years residence in the country". Denying these individuals the right to have access to employment constitutes thus a breach of a basic human right. This situation becomes very difficult when their status is extended over a long period of time.

¹³³ Ibid., pp.449-450.

In addition to the restrictive application of the right to work, refugees with a temporary protection status also face restrictions related to family reunification matters. In the United Kingdom, for instance, people granted exceptional leave to remain are eligible to apply for family reunification after a period of four years. While in Denmark, refugees with a temporary protection status are only allowed to apply for family unification with a spouse or a child under exceptional conditions.¹³⁴ These policies are also contradicting the rights embodied in the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and The European Convention, which stress the importance of family re-unification outside the country of origin, if it could not be achieved inside. People with temporary protection status, in contrast to those with a refugee status, are thus not enjoying these fundamental rights. These practices by the asylum countries reveal some of the human rights' problems that are associated with the application of temporary protection.

Conclusion

Refugee protection in international law was based on the persecution criteria. The international community considered only the people who had a well-founded fear of being persecuted on five identified grounds to merit its protection. By relying solely on these criteria, the international community excluded a major group of de facto refugees from its protection. The situation was different at the regional level, where the complexity of the evolving refugee situations necessitated the adoption of a wider definition of a refugee. Africa and Latin America adopted progressive refugee instruments that accorded protection not only to victims of persecution, but also to victims of wars and human rights violations.

The response at the international level was different, since many Western countries seemed reluctant to adopt new legal instruments to provide protection to a wider category of refugees. They responded, instead, with flexible approaches that allowed them to assist groups not within the competence of the United Nations High Commissioner for Refugees. Over the years, however, Western countries have

¹³⁴ Ibid., p.452.

replaced their open door policies towards refugees with very restrictive policies. These policies have denied a large number of de facto refugees from the protection needed. The restrictive and the incoherent application of the refugee Convention and Protocol have led to this gap in refugee protection in many Western countries.

In an attempt to bridge this gap, the international community is adhering to different measures. One of these measures is temporary protection, which aims at according protection on a temporary basis to refugees from war situations pending the end of the wars from which they are fleeing. The application of this approach has been coupled with some human rights problems. This is due to the fact that people with temporary protection status in many Western countries are denied some of the fundamental rights that are accorded to other refugees. Moreover, many countries are attempting to hinder the access of civil war refugees to their territories, through imposing various restrictions on those refugees ¹³⁵

Such measures are not, however, decreasing the number of refugees. They are rather decreasing the numbers of de facto refugees who are actually enjoying international protection. Consequently, the gap in refugee protection has been growing continuously with the evolving refugee realities, and so has the need to find a progressive approach to deal with this problem as well.

¹³⁵ Article 100c, par.2 of the Maastricht Treaty states that visa requirements may be introduced "in the events of any emergency situation in a third country posing a threat of a sudden inflow from that country into the community". Ibid, p.449.

CHAPTER IV

The Political Aspects of the Refugee Problem

The refugee problem can be studied more comprehensively if placed within its political framework. The institutionalisation of this problem accompanied the beginning of the Cold War. It is very reasonable thus to assume that Cold War policies have shaped the development of this problem. It is equally reasonable to assume that the end of the Cold War has left its impact on the refugee problem. The refugee problem is examined in the context of the Cold War, and this is followed by an analysis of how the end of the Cold War has brought with it developments that challenge the system established at the end of the Second World War.

A. Bipolarity as the Basis of the 1951 Refugee System

In his book Refugees and International Relations, Loescher pointed out that the Western powers created the refugee system, and accepted it only as long as it served their interests.¹³⁶ A study of the 1951 Refugee Convention, and of the refugee policies of the main powers suggests that bipolarity was the basis of the 1951 refugee system. The creation of UNHCR on December 14, 1950 came after the adoption by the UN in 1948, of the Universal Declaration of Human Rights which gave the individual the right to leave his own country, and seek and enjoy asylum elsewhere (article 14). It also came at a time when East-West relations were deteriorating rapidly, and the

international political climate was dominated by the superpowers' struggle. The drafting of the Convention came to reflect the tensions between the Western and the Eastern countries with regard to refugee issues. According to the Convention, a refugee is a person who has a well-founded fear of persecution that makes this person unwilling or unable to avail himself or herself of the protection of his or her government. Since the agent of persecution is supposed to be the state, granting refugee status to a person entails a stigmatisation of the government as a persecutor. The majority of the refugees that were still present in Europe in 1951 were Eastern European refugees, who refused to be repatriated. The Communist countries were opposed to any international co-operation on the issue of the refugees not based on the concept of repatriation. The Soviet delegation to the UN stated that "the adversaries of the new democratic regimes that were set up in Europe after the liquidation of the fascist and anti-democratic regimes", should not be considered as refugees and thus benefit from the assistance of the UN since they did not participate in the building of the democratic systems in their countries.¹³⁷ The only possible way for solving the refugee problem for the Soviet Union was the repatriation of the refugees to their respective countries. Therefore, the establishment of this organisation and its Statute were not necessary.¹³⁸ The Soviet Union participated in the debate in the General Assembly, but not in the final drafting of the Convention.

The study of the refugee policies of states in the decades following the establishment of the 1951 refugee system suggests that these policies did not escape the political coloration of the Cold War. Refugees, who constitute an indicator of the political situation in their countries of origin, demonstrate the political and moral bankruptcy of their governments. Refugee policy could thus be used as a tool to embarrass the opposing governments.¹³⁹ This could explain why people fleeing from Communist countries earlier were automatically granted refugee status in Western countries. Accepting those refugees, and encouraging others to flee, suggests that the refugees were used as a tool to embarrass other regimes. The problem of the

¹³⁶ Loescher, G., Monahan, L.,(1989), p. 9.

¹³⁷ "Travaux Préparatoires" p. 234.

¹³⁸ United Nations, Official Record, Fourth Year, Ninth Session, July 5 to August 15,1949.

¹³⁹ Loescher, G., Monahan, L., (1989), pp. 12-13.

Vietnamese boat people, for instance, created a lot of anti-Communist publicity. Using refugee policies as foreign policy tools was open to Communist regimes. Fidel Castro's expulsion of a number of criminals to Florida in 1980 (the Mariel Boatlift) was an attempt to embarrass the United States.¹⁴⁰ Moreover, the support of the Soviet Union during the Cold War for different refugee groups was a way to pursue its regional and strategic objectives. The refugee admission policy of states also suggests that refugees were used as foreign policy tools. Admitting refugees from certain countries entails a stigmatisation of the sending countries as persecutors. Generous admission policies to certain groups thus might encourage them to flee, and could show that people are taking sides in a particular conflict. Conversely, decisions not to give refugee status would entail support for the sending states.¹⁴¹

In the 1960's and 1970's the bulk of the refugee movements shifted from Europe to the Third World. The decolonisation movements and liberation wars occurring in Africa, Algeria (1959), Zaire (1960), Rwanda (1963), and Portuguese Africa (1961), resulted in massive numbers of refugees. By the end of the 1960's, the number of refugees was estimated to be between five and nine million.¹⁴² In addition to refugees fleeing from these anti-colonial wars, many refugees were also fleeing from political repression and civil strife in newly independent states.¹⁴³ The refugee movements resulting from decolonisation were supported by the Soviet Union to attack its western adversaries.

The refugee problem in the 1980's was very politicised. Many civil wars in the Third World were internationalised by the Superpowers by extending their support to one group or the other. Refugees were used as tools in these conflicts whenever they suited the strategic and political interests of these powers. Loescher considers that in areas of strategic interests refugee issues have been drawn into the broader superpower struggle for global influence.¹⁴⁴ In regions like Afghanistan, Indochina, Central Africa, the Horn of Africa and Southern Africa refugees were armed and

¹⁴⁰ Ibid., p.13.

¹⁴¹ Ibid., p.15.

¹⁴² Suhrke, A.,(1992),p.1.

¹⁴³ Loescher, G.,(1993), p.78.

supported materially and ideologically.¹⁴⁵ Eugene Douglas, a former US Co-ordinator for Refugee Affairs noted that US refugee policy helped to counter Soviet expansion and influence by "weaning away client states from Soviet domination".¹⁴⁶ Third World conflicts in the 1980's were hard to resolve quickly due in part to this external interference. This further complicated the refugee problem in that decade.

The 1951 system: An Assessment

The 1951 system established by the international community to help refugees had functioned efficiently until the late seventies. Subsequently, the system showed "alarming signs of disfunctioning, and even symptoms of paralysis"¹⁴⁷. This system was set to provide two functions for the refugees. One was protection and the other was finding a permanent solution to their problems. The solutions envisaged were either integration in the countries to which they had fled, or repatriation. Whereas, the first function was provided in spite of the difficulties concerned, the second function was becoming increasingly difficult. This was attributed to the increasing numbers of refugees, and the long duration of certain conflicts due to the Cold War. The ever-growing numbers of refugees in the Third World put the capacity of UNHCR under strain, since it was increasingly difficult to find the necessary resources to bring relief and assistance to those people.

The numbers of refugees fleeing from Communist regimes and seeking asylum in western countries was relatively modest. They were granted asylum in these countries and were easily integrated. As for the Third World refugees, their numbers in the 1960's and 1970's were also relatively low compared to the numbers in the 1980's and 1990's. The majority of those refugees were resettled in neighbouring countries. They did not pose serious pressures on the asylum countries. As for the numbers that managed to arrive to Europe, they were used as a labour resource that the Continent needed after the Second World War. UNHCR's role during the 1960's focused on emergency assistance. It provided emergency relief and established

¹⁴⁴ Ibid., p.11.

¹⁴⁵ Ibid., p.88.

¹⁴⁶ Douglas, E.,(1982), pp. 11-20.

¹⁴⁷ Moussalli, M., (1990), p.4.

programmes to support rural local settlement.¹⁴⁸ The majority of those refugees did not fit into the 1951 definition of a refugee. The High Commissioner sought greater authority from the General Assembly in 1961 to allow UNHCR to deal properly with the new emerging groups of refugees. In 1961 the General Assembly adopted a resolution authorising UNHCR to assist "refugees within its mandate and those for whom he extends his good offices".¹⁴⁹ This resolution allowed for the assistance of newly emergent groups of refugees as eligible for UNHCR assistance, without subjecting these people to individual determination of eligibility. In 1965 the High Commissioner was asked to provide protection and permanent solutions to all groups within his competence.¹⁵⁰ Humanitarian assistance for these groups became thus the primary role of UNHCR. By the end of the 1960's and the 1970's the work of UNHCR focused on rural resettlement schemes, where refugees were encouraged to establish themselves in the countries of their presence, and thus contribute to their host countries' economy. The aim was to make refugees self-sufficient at a living standard comparable to the surrounding local population¹⁵¹.

In the 1970's UNHCR's role focused on repatriation, which was considered the most preferred solution for the refugee problem then. In Sudan, in 1972 the General Assembly asked the High Commissioner to co-ordinate a major UN relief and rehabilitation operation¹⁵². This operation involved assistance of internally displaced people as well as the returning refugees inside Sudan.

The growing numbers of refugees in the eighties, and the long duration of the conflicts that were generating those refugees have put UNHCR capacity under strain. The financial crisis that UNHCR faced in the 1980's came to reflect the crises that the organisation was undergoing.¹⁵³ These crises reflected the deteriorating relationship

¹⁴⁸ Ibid., p.78.

¹⁴⁹ United Nations General Assembly Resolution 1673(XVI), December 18 1961.

¹⁵⁰ United Nations General Assembly Resolution 2039(XX),1965.

¹⁵¹ Loescher, G., (1993), p.82.

¹⁵² United Nations, D Resolution 1655 (LII), June 1972.

¹⁵³ In the beginning of the eighties UNHCR funding came under pressure as well as did its relation to the donor countries. The 1951 structure imposed restrictions on UNHCR's ability to raise and spend funds. According to this structure governments would approve the UNHCR general administration budget at the Executive Committee each October. Governments,

between UNHCR and the donor countries. The demand of the UNHCR to some asylum countries to provide protection to a wider category of people in refugee-like situations, and the policy of confrontation which the High Commissioner, Mr. Hartling, was using against the Western countries which he considered were becoming intolerant towards refugees, complicated this crisis.¹⁵⁴ These countries, on the other hand, criticised the UNHCR for what they considered as interference in their domestic affairs.

The tension between UNHCR and its donor countries reached its peak in 1985. Much of the criticism was directed at the way the UNHCR was handling various refugee crises.¹⁵⁵ These countries have criticised the UNHCR for playing a passive role in refugee crises. Consequently the UNHCR was alienated from its Western donors who believed in the importance of a new UNHCR leadership.

however, would not make any commitment to fund its programmes. The money would come the following year with no relation to HCR's needs. This became an obstacle for its activities in the 1980's. As the number of refugees increased, it became increasingly difficult for UNHCR to raise the money. See Lawyers Committee For Human Rights, "UNHCR at 40: Refugee Protection at a Cross Road", (1991), p.43.

¹⁵⁴ The crises started with UNHCR criticism of US policy towards the asylum seekers from El Salvador. The people were considered as illegal migrants, and were sent back to Salvador where they faced persecution. UNHCR protested to the US Mission in Geneva, asking the United States to treat those people as displaced persons in a refugee-like situation. This protest irritated the US Refugee Bureau. Ibid, p.49.

¹⁵⁵ The crisis in the Sudan added more criticism for UNHCR and the way it was handling the refugee crisis. In 1984, refugees started arriving in Sudan from Ethiopia. The refugees were arriving at a rate of 3,000 a day. The UNHCR could not respond adequately to the crisis. The UNHCR evaluation unit considered that "UNHCR was handicapped by its historic manner of reacting, rather than attempting to anticipate refugee influxes". Officials from the US Refugee Bureau criticized the UNHCR for its handling of the refugee crisis in Sudan, and considered that "UNHCR could not afford to wait passively until the next blow fell. It simply had to anticipate and take the initiative even at the risk of playing a political role". Hocke, J.P., (1986).

B. The End of the Cold War and the Proliferation of Conflict

Impact on the Refugee Phenomenon and the Treatment of Refugees

The end of the Cold War was accompanied by the hope of bringing an end to many refugee crises that were occurring at that time. The intensity of many long-standing conflicts, that produced large numbers of refugees, decreased. This facilitated the repatriation of certain groups of refugees. However, the new era brought new fears with regards to the refugee problem, and posed serious challenges to the protection of refugees. The main challenges to refugee protection resulted from the increased numbers of ethnic conflicts, the asylum crisis, and the traditional forms of protection of refugees.

1. Changing Nature Of Refugee Flows

a. Change in the Scope, Magnitude, Geographic Concentration, and the Nature of Refugee flows

The end of the Cold War was accompanied by many conflicts that had deep historic roots. These conflicts were mainly of an ethnic nature, and resulted in huge mass displacements. The scope and the magnitude of these displacements have reached unprecedented proportions. Whereas the number of refugees was 2.5 millions in 1970, and 8.2 millions in 1980, it amounted to 17.2 millions in 1990.¹⁵⁶ These numbers do not include internally displaced people. Around 24 million people were displaced within the borders of their countries in 1993. These people flee from internal conflicts, severe human rights violations and persecution. Thus they are in a refugee like situation, but within their own countries.¹⁵⁷

In addition to the change in the magnitude and the scope of refugee flows, the geographic concentration of the refugee movements was changing as well. Whereas refugees in earlier decades found asylum in neighbouring countries, many refugees

¹⁵⁶ UNHCR, The State of the World's Refugees, 1993, p.2.

¹⁵⁷ *Ibid.*, p.25.

now cross-regions and continents seeking asylum. Technological developments and new means of communication have facilitated the transfer of those refugees in Western countries. The growing number of refugees arriving to Western countries increases the pressures on these countries.

A large percentage of the refugees were Convention refugees who benefited from the protection provided by the international community. However, the number of people to whom the refugee definition does not apply is gradually increasing. This posed a serious challenge to the protection of these groups. The High Commissioner, J.P. Hocké, who was appointed in January 1, 1986, indicated this clearly. He considered that the vast majority of the current refugees did not correspond to the formal definition of a refugee provided in the 1951 Convention. They were "victims of violence", and not targets for persecution based on race, nationality, religion, or political opinion. They were rather "victims of armed conflict or other forms of violence or danger".¹⁵⁸ Such people do need protection even though they do not qualify for a refugee status.

Eastern Europe and the Former USSR

The end of the Cold War, followed by the collapse of the communist regimes and the disintegration of the Former Soviet Union threatened Europe with a mass exodus to the like of which it had not been exposed since the Second World War. Two categories of population movements evolved from Eastern Europe and other parts in the Former USSR. The first was mass exodus resulting from conflicts or ethnic persecution, and the second was East-West migration flows. The first category had resulted from the explosive situation in Former Yugoslavia, and from other areas in the Balkans, and parts of the Former Soviet Union that witnessed increased major ethnic and civil conflicts. Regarding the Former Soviet Union, the diversity of ethnic groups present there makes the area potentially explosive. 128 different ethnic groups are present in the former USSR with 22 of these groups consisting of more than one million people.¹⁵⁹ Moreover, more than 25 million Russians live outside the Russian

¹⁵⁸ Hocke, J.P., (1986).

¹⁵⁹ UNHCR, The State of The Worlds Refugees, 1993, p.123.

Federation in the independent republics. In addition to this, 72 million people live beyond the boundaries of the republic of their ethnic origin.¹⁶⁰ With the growing trend for autonomy, self-determination, and separatism among different republics, the potential for conflict situations and mass exodus is high. Conflicts in Georgia, Armenia, and Chechnya in the Caucasus, as well as in Tajikistan in Central Asia, resulted in massive displacement reaching 2.6 million refugees since 1988. Smaller violent displacement from Uzbekistan, Kyrgyzstan, the TransDniestr region of Moldova, and North Ossetia brought the total number of internally displaced people to 3 million.¹⁶¹ Nationalistic feelings had accompanied the emergence of the newly independent states, and resulted in discrimination against minority groups in the region. In the Baltic States, for instance, new laws discriminated among minority groups, and threatened more than one million ethnic Russians with statelessness,¹⁶² a phenomenon that occurred previously as a result of the disintegration of many empires and the emergence of new nation states earlier in this century.

Other factors in eastern parts of Europe lead to the second category of population movements, i.e., large scale East-West migration flows. The economic situation in these countries can be an important motive for leaving. The economic hardships that the Eastern European countries are undergoing and the growing numbers of unemployed or under employed workers can be highly influential for those people to seek better living conditions in the western parts of the continent. A large percentage of the industrial production in Eastern Europe was directed towards military production during the Cold War. As this sector is reduced, many of the people who used to work in this domain are also threatened with unemployment, or motivated to seek better working conditions in the West.¹⁶³ The democratisation process in Eastern Europe can have another effect on migration. Travelling outside their country is an aspect of their freedom for the people who have been denied this for decades. Some of those might decide to travel for more than a temporary period. A large number of the emigrants have been members of ethnic minority or religious

¹⁶⁰ Council of Europe, Report of population movements between the republics of former USSR, (1993).

¹⁶¹ UNHCR, Refugees, no 99, 1-1995, p. 28.

¹⁶² UNHCR, The State of The World's Refugees, (1993), p.123.

¹⁶³ Loescher, G., (1993), p.6.

groups such as Germans, Jews, and Greeks who had close links in the receiving countries like Germany, Israel, Greece, and the USA. ¹⁶⁴

Refugee flows in earlier decades had thus a different magnitude, scope, geographic concentration, and nature. Refugees were mainly concentrated in Third World countries, where they were resettled and integrated. Those who managed to arrive to Western countries, and especially those fleeing from Communist regimes, had no great difficulty in acquiring refugee status. However, numbers have increased dramatically since the end of the Cold War. These numbers are no longer concentrated in the Third World. The collapse of the Soviet Union and the Communist regimes have exposed Europe to refugee flows unseen since the Second World War. Moreover, very large percentages are not fleeing from persecution, but rather ethnic and civil conflicts. They constitute a group that urgently needs protection, these groups, however, are denied refugee status. The large numbers of migrant groups that are using the asylum route to get access to the West are also adding more complexity to the refugee problems, and posing challenges for protection.

Asylum Crisis

According to the Universal Declaration of Human Rights, individuals have the right to seek asylum. However, states have no obligation of granting asylum. This created a gap between the right of the individuals and the right of the states. States signing the 1951 Convention and the 1967 Protocol are under the obligation to provide asylum to individuals who have a well founded fear of being persecuted due to reasons of race, religion, nationality, or membership of a social or political group. However, a large number of refugees today do not fall into this category. As the number of asylum seekers is increasing, and the number of people abusing the asylum system is also increasing, some states are tending to apply a strict definition of the Convention regarding refugees, and adhering to strict measures with asylum seekers.

¹⁶⁴ Ibid., p.6.

These measures might limit the numbers of the abusers of the asylum system, but also might affect people who are in genuine need of protection.

The end of the Cold War was accompanied by the collapse of the ideological factor of the European refugee policy, which was highly directed towards offering asylum to people leaving Communist regimes.¹⁶⁵ This is mostly relevant to the new refugee and asylum seekers who are fleeing from Eastern Europe after the end of the Cold War. Citizens from the Former Soviet Union, for instance, have fewer opportunities to gain refugee status than they did during the Cold War, and in most cases they are subject to the same determination procedures that other asylum seekers face.¹⁶⁶

Moreover, the period following the end of the Cold War is accompanied by increased pressures of asylum seekers, from and in different regions, causing an asylum crisis, mainly in the West. Developments in the Gulf region have resulted in the outflow of 1.8 million Iraqi Kurds to Iran and Turkey. In addition, 400,000 refugees from Sudan, Somalia, and Ethiopia took refuge in Kenya. In 1993, 280,000 Togolese took refuge in Benin and Ghana.¹⁶⁷ In Europe the number of asylum seekers is increasing dramatically. Between the year 1987 and 1994 the number of asylum seekers increased in Europe from 179,000 to 313,000. The highest number was in the year 1992, when it reached 680,000 asylum seekers. Germany received the largest number of asylum seekers in Europe among these years. In 1992 it received 64 per cent of all the European countries, 438,000 out of a total of 684,000. In 1993 Germany's share was 59 per cent and in 1994 it was 41 per cent. The United Kingdom, France and Sweden, large countries, and with large receiving capacity, received only between 11 and 7 per cent of all asylum seekers during 1994. While the Netherlands, a much smaller country and with less absorbing capacity, received 17 per cent of the asylum seekers in Europe in 1994, compared to six per cent in 1993.¹⁶⁸

¹⁶⁵ UNHCR, *The State of The World's Refugees*, p.36.

¹⁶⁶ Loescher, G., (1993), p.6.

¹⁶⁷ UNHCR, *The State of the Worlds Refugees*, 1993, p.31.

¹⁶⁸ UNHCR, *Statistical Review*, 1995.

Among these asylum seekers, 171,000 were recognised, between 1989 and 1993, as refugees under the 1951 United Nations Convention relating to the Status of Refugees and the 1967 Protocol. France granted refugee status to the largest number of asylum seekers(59,000 or 35 per cent of the of all refugees recognised in Europe), Germany was the second(50,000 or 29 percent) and the Netherlands(18,000 or 10 per cent), a contribution that is significant compared to its absorbing capacity. During the same period, however, more than 1.4 million asylum applicants were rejected in Europe. The numbers of rejected applicants increased from 158,540 in 1989 to 454,070 in 1993. Among these 1.4 million applications, 59 per cent were rejected by Germany, 15 per cent by France, seven per cent by Switzerland and five per cent by Austria and the Netherlands. Moreover, around 183,000 persons were allowed to stay on a humanitarian basis in Europe during 1989-1993. The highest number was in Sweden (82,000 persons or 45 per cent of all these allowed to stay in Europe), then the United Kingdom (35,000 or 19 per cent), Switzerland (25,000 or 14 per cent), the Netherlands (15,000 or eight per cent) and Norway (six per cent) and Denmark (five per cent).¹⁶⁹ The increase in the number of asylum seekers, as indicated by the figures above, poses tremendous pressures on the host countries.

The increased number of the asylum seekers and in many cases the abuses of the asylum procedures provoked concerns among the authorities of the receiving countries, which adhered to strict procedures to limit the numbers of people coming to their territories. Unfortunately, these procedures affect refugees who are in genuine need of protection.

In addition to the measures by Western European governments and the United States to prevent the abuse of asylum procedures, Central European countries are adhering to restrictive measures as well. These countries are being threatened with major mass influxes from the former Soviet Union. Poland, for instance, faces the threat of mass influxes from the Former USSR, with about 2 to 3 million ethnic Poles residing in Lithuania, Belarus, and Ukraine at the beginning of this decade. Any kind of discrimination against these minorities in the countries in which they are living

¹⁶⁹ Ibid. .

might threaten Poland with mass influxes. These countries are undergoing structural changes that leave them with little capacity to "admit, house, and feed large numbers of immigrants without undermining their own attempts at political and economic reform".¹⁷⁰ They are thus responding by reinforcing their borders and developing emergency plans to deal with potential refugee flows on their Eastern borders.¹⁷¹ These countries are not only receiving people from the East, but also from the South. Many Third World asylum seekers are using Central and Eastern Europe as a way to get access to the Western countries.

The collapse, thus, of the Communist regimes, which could be assumed to have lifted the ideological basis of asylum, in addition to the tremendous increase of asylum seekers, has influenced the Western countries' attitude towards asylum seekers. The open door policies that have been used earlier are thus replaced by strict policies, which are affecting those who might be in need of protection.

Conclusion

The refugee problem has evolved over the last decades from being a European problem with a limited scope to a global problem. A refugee regime was established by the beginning of the Cold War to deal with the problem. This regime, which had two functions, protection of refugees fleeing from persecution and finding durable solutions, reflected the realities of that era. Whereas the first aim, protection, was functioning well during the Cold War, the second aim was becoming increasingly difficult. The increase in the numbers of refugees, and the long duration of some Cold War conflicts could explain the difficulties then.

The situation has changed in the Post Cold War era, which is accompanied by several developments that complicate further the refugee problem and pose challenges to the protection system of refugees. Among these developments is the tremendous increase in the number and the nature of the refugee flow, and the change of their geographic concentration. The number of refugees is increasing dramatically, and the

¹⁷⁰ Loescher, G., 1993, p.119.

majority of those refugees are fleeing from ethnic and civil conflicts, rather than persecution. Consequently, they do not qualify for a refugee status under the present international refugee instruments. These instruments, which have been created to provide protection only for victims of persecution, exclude the majority of the present day refugees from their scope.

This has resulted in a growing gap in refugee protection at the international level. This gap has been mostly evident in Western countries. The open door policy which was adopted by Western countries during the Cold war has been replaced by restrictive policies towards refugees and asylum seekers. The asylum crises that these countries are experiencing and the lifting of the ideological basis of asylum can be assumed to be reasons behind these restrictive policies. The result is thus an increased number of de facto refugees who are denied international protection.

These developments that have been brought by the Post Cold War era pose various challenges for the refugee regime that has been established to meet the realities of that era. It also motivates the international community and the UNHCR to adhere to new approaches to tackle the evolving refugee problem.

¹⁷¹ Ibid., p.6.

CHAPTER V.

THE REFUGEE PHENOMENON IN THE 1990'S

A. Conflict as the Source of Displacements

1. External

The number of the externally displaced people has increased considerably in the 1990's. The causes of their displacement could be attributed to the different ethnic and national conflicts that accompanied the end of the Cold War. A large percentage of the externally displaced are in Africa, as well as in Eastern Europe following the disintegration of the Former Soviet Union. Those who are externally displaced do not fall under the scope of the refugee Convention and Protocol since they are victims of conflicts and wars rather than persecution. This means that they do not benefit from the international protection given to refugees who flee as a result of persecution from their home countries.

2. Internal

a. Internally displaced people

The end of the Cold War, which was accompanied by many ethnic and religious conflicts, which were suppressed during the war, resulted in a dramatic increase in the number of internally displaced people. The unprecedented number, amounting to 30 million by 1994, revealed the complexity of the problem of the internally displaced. This problem, which under many circumstances is caused by

armed conflicts, communal violence, and severe violations of human rights,¹⁷² was lacking the international efforts that it required. This is partially due to the fact that the internally displaced were considered as the responsibility of their countries of origin. Following the Cold War period, the drastic evolution of this problem increased the degree of international concern and gave rise to calls for different approaches to address it.

Definition

Internally displaced persons have been defined by the Economic and Social Council of the United Nations as "persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, and systematic violations of human rights or natural or man made disasters; and who are within the territory of their own country".¹⁷³ This definition has been considered as either too narrow or too wide to address the problem of internal displacement¹⁷⁴. However, since there is no consensus on any other definition, it has been used as the working definition for the purpose of the work of the mandate of the

¹⁷² According to an analytical report of the Secretary-General, displacement is attributed to six causes: "armed conflict and internal strife, forced relocation, communal violence, natural disasters, ecological disasters, and the systemic violation of human rights." Armed conflict is considered to be the major cause of the displacement of the estimated 15 million refugees in Africa. Forced relocations occurring during civil wars "as a way of pacifying areas that may otherwise side with one another party to the conflict" or "when a government tries to control a minority group or political opposition by removing its members from their traditional habitat" are considered to be a major cause of displacement. Moreover, serious human rights violations, like "deliberate starvation of the civilian population, forced labor, forcible conscription into governmental or rebel armies, and killings by high intensity weapons and land mines" are also considered among the major causes of internal displacement. See Deng, F. M, (1993), p.9.

¹⁷³ Economic and Social Council Resolution 78/1990, (para.17).

¹⁷⁴ The World Health Organization (WHO) considered this definition to be not broad enough to recognize those who have fled their homes due to acute poverty, environmental degradation, or for social problems like ethnic and racial tensions. According to WHO the main causes of displacement are socio-economic, and the definition of the Economic and Social Council fails to address this issue. The International Committee of the Red Cross Societies (ICRC) considered this definition to be "too general to serve as a basis for a specific instrument". ICRC's position suggests that it is undesirable to distinguish between civilian population displaced in by armed conflict, and those who have similar needs, but who have not been displaced. UNESCO, on the other hand, accepted this definition, but considered that "recent developments in the Balkans and Eastern Europe... and newly independent states with conflicting territorial claims between ethnic groups, may necessitate some slight modifications". See Deng, F.M.,(1993), pp. 10-13.

Secretary- General.¹⁷⁵ The definition suggests, thus, two important elements for identifying internally displaced persons. The first is that these persons are forcibly displaced due to severe human rights violations, internal conflict, or man-made disasters, and the second is that those people remain within the boundaries of their countries. The United Nations High Commissioner of Refugees, on the other hand, defines internally displaced people as people in refugee-like situation who have remained within the boundaries of their own countries. The definition of the analytical report entails, thus, less subjective elements than those embodied in the refugee definition.

International Efforts on Behalf of the Internally Displaced

The Post Cold War era saw the international community more willing to provide assistance and relief to displaced people within the borders of their countries. Whereas this attention was directed towards the protection of refugees, minimal efforts for assisting and protecting the internally displaced were provided. The present attention on behalf of the internally displaced could be partially attributed to the growing interest in preventing refugee flows by addressing their root causes. Providing assistance to people within their own countries could be of great help in averting the refugee flows. This interest in the problem of the internally displaced was expressed in the statement of the United Nations High Commissioner of Refugees on October 4, 1993:

"UNHCR is prepared... to intervene on behalf of the internally displaced when our involvement could have a preventive impact on refugee problems. For example, we could provide protection or assistance to displaced people who might otherwise feel compelled to cross the border to become refugees."

¹⁷⁵ See Deng, F. M., (1995), p.77.

The UNHCR, like other UN agencies¹⁷⁶, has no special mandate to tackle the problem of internally displaced people. UNHCR has however, based on requests from the Secretary-General and the General Assembly, assumed the responsibilities of assisting the internally displaced by providing them with assistance and protection. UNHCR's engagement with the internally displaced is prompted, as mentioned earlier, by its wish to contain refugee flows. Protection of refugees, for UNHCR, has entailed traditionally their protection from refoulement and protecting their rights to asylum. Protecting the internally displaced entails on the other hand a different criterion. Ensuring the rights of the internally displaced to stay shall not conflict with their right to seek asylum¹⁷⁷.

In addition to UNHCR involvement with regards to the internally displaced, increased involvement for other UN human rights bodies has been witnessed regarding the internally displaced. The appointment of the representative of the Secretary-General on internally displaced people in July 1992 came to reflect this growing involvement. The designated representative, Francis M. Deng a former Sudanese diplomat, was asked to prepare a comprehensive study on the protection of internally displaced people within their national borders. The representative recommended two major principles, in his first report to the Commission in 1993. The first was the strengthening of the legal protection for the internally displaced, and the second was the creation of a Human Rights machinery to act on behalf of the internally displaced.

¹⁷⁶ The absence of a specific UN agency for the internally displaced has been a handicap for tackling the problem of internal displacement in a comprehensive manner. Many of the UN agencies have provided assistance to internally displaced persons in emergency situations. The assistance provided, whether in Somalia, Sudan, or Former Yugoslavia, included relief assistance rather than protection. Protection in such circumstances was often inadequate attention. Organizations like the United Nations Development Programme (UNDP) have been designated to provide relief in situations of emergencies. However, the UNDP has no protection responsibilities and it is in no position to raise the issue of the protection of internally displaced people. The Department of Humanitarian Affairs (DHA) has also no responsibilities. Although DHA is not an operational agency, it has been urged to perform expanded responsibilities with regards to assistance and protection of the internally displaced. See Cohen, R., (1994), pp.2-3.

¹⁷⁷ In countries producing internally displaced people, and housing refugees at the same time, a tension exists between the UNHCR role of protecting refugees and its expanded role towards internally displaced people. *Ibid.*, p.4.

The extension of the mandate of the representative by the Commission of Human Rights at its forty ninth session emphasised the growing commitment on the issue. The Commission called for continued efforts on the part of the representative to strengthen his dialogue with governments on behalf of internally displaced people. The Commission further requested the representative to present reports of his activities to the General Assembly and the Human Rights Commission¹⁷⁸. The mandate of the Commission of Human Rights enhanced the protection role of the representative regarding internally displaced people.¹⁷⁹ The mandate did not, however, give the representative emergency powers, nor did it give the representative the powers to initiate international responses through bringing the cases to the attention of the Security Council. The mandate, as well, does not sufficiently emphasise the process of monitoring the protection problems of the internally displaced.¹⁸⁰

Legal basis for assisting Internally Displaced People

Internally displaced people are under many circumstances in need of international protection in addition to humanitarian assistance. The fact, though, that the internally displaced do not cross international borders deprives them of the protection accorded to refugees under international law. Moreover, the absence of a body of law, specifically designed to address the need of the internally displaced puts them in a vulnerable position. Internally displaced persons are, in principle, entitled to the protection of their own governments. However, under many circumstances,

¹⁷⁸ Deng, F. M., (1994), p. 291.

¹⁷⁹ The mandate authorized the representative to:

- "- Intensify his dialogue with governments to seek remedies and solutions for serious protection problems;
- Coordinate with humanitarian agencies to ensure that protection problems are addressed;
- Undertake fact-finding missions to collect information on serious situations of internal displacement;
- Cooperate with regional organizations, U.N. human rights bodies, and NGOs; and
- Publish reports with recommendations for action by the Commission on Human Rights and General Assembly." See Cohen, R., (1994), pp.7

¹⁸⁰ See Cohen, R.,(1995), p.15.

national governments are either unwilling or unable to provide the required protection for the internally displaced.

In view of the absence of a body of law for protecting the internally displaced people, provisions from Human Rights Law, Humanitarian Law, and Refugee law constitute a general body of laws capable of being applied to certain problems related to internally displaced people. Among the sources of Human Rights laws that would be applicable for the protection of the internally displaced are the Universal Declaration of Human Rights (UDHR), the International Covenant of Civil and Political Rights, The International Covenant on Economic, Social, and Cultural Rights(ICESCR), the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, and the Convention on the Rights of a Child. These legal instruments guarantee a set of rights, which is applicable to situations of internally displaced people. Such rights include the rights not to be subjected to torture, arbitrary interference with family, home, or the arbitrary deprivation of property, in addition to the protection of the liberty and security of individuals. The ICESCR put the stress on a set of obligations to guarantee the economic and the social well being of individuals. Among the rights that are of relevant impact on the internally displaced are the rights of food, medical treatment, and housing.¹⁸¹

Among the regional Human Rights Instruments that could be applicable for the protection of the internally displaced are the American Convention on Human Rights, The American Declaration of the Rights and Duties of Man, The European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African (Banjul) Charter on Human and Peoples' Rights.¹⁸²

Human Rights law fails, though, in providing complete protection to the internally displaced, since many states refrain from ratifying or applying some of the human rights treaties. Some states would argue, for instance, that the UDHR, which is

¹⁸¹ See Deng, F.M., (1993).

a non-binding treaty, was adopted by the General Assembly as a common understanding rather than a bond.¹⁸³ Even though some human rights instruments do not constitute binding instruments, they do fall under customary law. The violation of such instruments is considered as violation of international law. The fact that customary law does not include many of the human rights instruments widens the gap in the protection of internally displaced people.

Humanitarian law provides a second body of law that would be applicable on situations of internal displacement. The four Geneva Conventions of 1949 and the additional Protocols of 1977 provide that civilians in armed conflicts should be treated in a humane way. Article three, which is common to the four Geneva Conventions, provides that civilians in non-international armed conflicts should be protected from being taken as hostages, and from being subjected to violence. It further affirms the need to provide the sick and the wounded with the medical care required.

Protocol II to the Geneva Convention (1977) is applicable to situations of civil conflicts resulting in the presence of internally displaced people. Article 17 (1) states that " the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand" in which case, " all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, safety, and nutrition". In accordance with article 17 (2) "Civilians shall not be compelled to leave their own territory for reasons connected with the conflict"¹⁸⁴

Protection accorded to internally displaced persons under humanitarian law, is however, of a limited nature. Article 17 of Protocol II of the Geneva Convention applies only to victims of armed conflicts, excluding consequently displacement

¹⁸² Deng, F. M., (1994), p.45.

¹⁸³ See Lewis, C., "Dealing with the Problem of The Internally Displaced Persons", in Georgetown Immigration law Journal, Volume 6, Dec. 1992, Number 4.

¹⁸⁴ The Geneva Conventions give special authority to the International Committee of the Red Cross to protect and assist victims of armed conflict under the provisions of Humanitarian Law. *Ibid.*, p.18.

caused by reasons other than armed conflicts.¹⁸⁵ Moreover, humanitarian law provides incomplete protection to the internally displaced because many states have not ratified Protocol II of the Geneva Convention, which provides more elaborate protection to victims of non-armed conflicts.

Refugee law, on the other hand, provides protection only to individuals who have crossed international borders. This excludes as a result internally displaced persons who are very much in a refugee like situation, but who have stayed within their national borders. Given the similarity of the situation of the internally displaced and the refugees, many important rights from refugee law could be applicable to internally displaced situations, such as the right to seek asylum. In countries like Iraq and Former Yugoslavia, "Safe Havens" and "Security Zones" have been created in an attempt to provide protection to internally displaced persons, without jeopardising the right of those individuals to seek asylum.

Despite all the provisions of international humanitarian law, human rights law, and refugee law, which could be applicable to situations of internal displacement, a gap in the protection for internally displaced people is recognised. The absence of a clear body of law to provide protection to the internally displaced forms an obstacle for providing adequate protection to this group. Another factor that lead to this gap in the protection of internally displaced persons is the absence of a specifically designated organisation to address this problem.

¹⁸⁵ Providing protection solely to victims of armed conflict under international law deprives people who were internally displaced due to a variety of other reasons. Under many circumstances, citizens are forcibly displaced by the government in an attempt to weaken the opposition in certain areas. The Iraqi government's policies towards the Kurds between 1974 and 1990 is an example of the above mentioned policy. Twenty-eight Kurdish cities were reported to be destroyed together with 4,000 villages in order to disperse the power of the Kurds in the area. See Michael Kelly, "Back to Hill", *New Republic*, June 3, 1991, at 24. Cited by Lewis, C., (1992),

Internal displacement could be also caused by persecution from the government. In El Salvador, for instance, internal displacement was partially stemming from the wish to avoid the persecution which led to targeting of 1800 people by the death squads in 1983. See Americas

UNHCR's criteria of involvement

As mentioned previously, the Office of the High Commissioner has a limited mandate regarding internally displaced persons. Its involvement is on an ad hoc basis and conditional on requests presented by General Assembly resolutions. These resolutions constitute the formal legal basis of UNHCR's involvement with regard to internally displaced people. General Assembly Resolution 48/116 concerning internally displaced persons sets out a number of requirements to be taken into account before taking action on behalf of the internally displaced, the most important two include a specific request from the Secretary-General or another principal organ of the United Nations, and the consent of the concerned state.¹⁸⁶

In addition to the General Assembly resolution, other requirements are needed for any action to be undertaken by the High Commissioner's office. These conditions which were called for by the Executive Committee include the availability of sufficient resources, such as funding, institutional capacity, and the possibility of deploying sufficient staff members.¹⁸⁷

Watch Lawyers Committee for Human Rights. "El Salvador's Other Victims: The War on the Displaced 36 (1984). Cited by Lewis, C., (1992), p.698.

¹⁸⁶ The General Assembly, at its forty-eight session, encouraged the High Commissioner:

" on the basis of her broad humanitarian experience and expertise, to continue to explore and to undertake protection and assistance activities aimed at preventing conditions that give rise to refugee outflows, bearing in mind fundamental protection principles, in close coordination with the Governments concerned, and within an inter-agency, intergovernmental and non-governmental framework, as appropriate;

Reaffirmed its support of the High Commissioner's efforts, on the basis of specific requests from the Secretary-General or the competent principal organs from the United Nations and the consent of the concerned state, and taking into account the complementarities, the mandates and the expertise of other relevant organizations, to provide humanitarian assistance and protection to persons displaced within their own country in situations calling for the Office's particular expertise, especially where such efforts could contribute to the prevention or solution of refugee problems". General Assembly Resolution 48/116. See Refugee Survey Quarterly, Vol.14, No.1 and 2, 1995. p.180.

¹⁸⁷ Executive Committee (A/AC.96/821, para.19). See Refugee Survey Quarterly, Vol. 14, No. 1 and 2, 1995. p.181.

Further to the above mentioned requirements governing UNHCR's involvement with the internally displaced, further preconditions are also needed. These include the following:

"(a) UNHCR's involvement must not in any way detract from the possibility to seek and obtain asylum;

(b) UNHCR must have full and unhindered access to the affected population;

(c) adequate provision must be made for the security of the staff of UNHCR and its operating partners and for acceptable operating conditions; and

(d) UNHCR's involvement should have the consent of all concerned parties and enjoy the support of the international community"¹⁸⁸

UNHCR gives priority to its involvement with the internally displaced in situations where there is a direct link with the office's work on behalf of refugees. This includes situations where the internally displaced are present or are expected to be present in the same areas as repatriated refugees. UNHCR's activities also involve situations where the internally displaced and the refugees are in the same conditions, both in terms of the causes of displacement and in terms of the needs. Another condition where the Office of the High Commissioner gives priority for involvement is in situations where there is a risk for cross-border movements for the internally displaced people. Humanitarian assistance or protection provided to the internally displaced in these situations could be helpful in keeping them safely in their countries. The involvement of UNHCR in the above mentioned situations could be related thus to attempts to find solutions to a refugee problem or the prevention of refugee flows.

¹⁸⁸ Ibid., p. 182.

Nature of UNHCR's activities on behalf of the internally displaced

The nature of UNHCR involvement on behalf of internally displaced persons depends on the nature of the displacement, and the protection needs of the internally displaced themselves. The growing involvement of UNHCR in conflict situations has been accompanied by an increased involvement on behalf of the internally displaced as well. UNHCR has identified areas of involvement with the internally displaced only when this involvement could result in preventive action for refugee flows.

Since internal displacement is often caused by systematic violations of human rights as well as of armed conflicts, UNHCR's involvement is increasingly occurring in areas affected by civil wars and internal tensions or violence. UNHCR's role in such areas involved both humanitarian assistance and protection. Humanitarian assistance included rehabilitation projects which helped the internally displaced to return to the areas they left. Protection functions, on the other hand, involved monitoring, upon the request of the concerned governments as well as the reporting of the violations of fundamental human rights.¹⁸⁹

In certain areas which involved armed conflicts and severe human rights violations, UNHCR's work involved assisting the safe passage of civilians, and organising the evacuation of civilians, mainly in life threatening situations. This occurred sometimes in co-ordination with the International Committee of the Red Cross (ICRC). UNHCR's involvement on behalf of the internally displaced also involved the intervention with local authorities in order to prevent the return of the internally displaced, against their will, to areas endangered by violence; guaranteeing the freedom of movement, and the right of people who are in danger to seek asylum in

¹⁸⁹ UNHCR involvement with the internally displaced also involved

"intervening with the relevant authorities to request protective action, as well as investigation and prosecution of specific cases of abuse; assistance and de facto protection to displaced persons in temporary relief centers; promoting tracing and family reunion of unaccompanied children; and assisting Governments to provide personal documentation".

See Inter-Agency standing Committee, (1994), p.16.

safe areas, in addition to promoting the right of the internally displaced to return voluntarily to their areas.¹⁹⁰ In countries such as El Salvador and Cambodia, UNHCR's work on behalf of the internally displaced included involvement in a comprehensive peace settlement which included the monitoring of Human Rights conditions in areas to which the internally displaced were returning. This involvement was in co-ordination with other United Nations human rights bodies.

Protection of the internally displaced involves, as well, ensuring their access to food, medical supplies, and shelter. Even though humanitarian assistance alone, to victims of conflict, is not a sufficient form of protection, it is still an essential act to draw the attention of the international community to the plight of the internally displaced.

In providing protection to internally displaced persons, UNHCR works in close co-ordination with other United Nations bodies, with intergovernmental organisations, and with non-governmental organisations. Within the United Nations bodies, UNHCR co-ordinates with specialised organisations to meet the needs of the internally displaced. Among these bodies are the World Food Programme for food supplies, World Health Organisation for medical supplies, and UNICEF for assisting women and children. UNHCR also co-ordinates with Human Rights bodies, such as the Centre for Human Rights, and with the special rapporteur.¹⁹¹

International protection provided to internally displaced people is sometimes inadequate. This could be attributed partially to the lack of a single international organisation, which is designated to protect the internally displaced. Even in situations when one specialised agency is designated to act on behalf of the internally displaced, other impediments arise. Among the very important concepts that hinder intervention on behalf of the internally displaced is the concept of sovereignty. The concepts of sovereignty and non-intervention were two concepts that were confirmed in the United Nations Charter. Article 2(1) of the Charter affirms that the UN "is based on

¹⁹⁰In this regard UNHCR has participated in reconciliation efforts between returning displaced people and residence population. *Ibid.* p.16.

the principle of sovereign equality of all its members". The concept of non-intervention which is closely related to the concept of sovereignty is also affirmed in the United Nations Charter, article 2(7), which affirms that "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 or which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter". These two concepts have so far stood as the main impediments for the international community to get involved with the issue of the internally displaced. Since the problem of the internally displaced has been considered by many states to be the domestic concern of each state, intervention on behalf of the internally displaced has been viewed as intervention in the domestic affairs of another state.

b. Stateless People

Overview

The problem of statelessness evolved this century following the disintegration of multi-national empires after the First World War, and in the aftermath of the Second World War. This period resulted in a considerable number of stateless people in different regions that have witnessed territorial changes. This problem gained considerable attention from the international community, and the problem of many stateless people was resolved, mainly those who were living in Europe. Many, however, remained stateless over decades without resolving their problem ¹⁹².

The problem of statelessness has been accentuated following the Cold War period, particularly in the Former Soviet Union. The disintegration of the Former Soviet Union, and the emergence of many independent states threaten many

¹⁹¹ Ibid. p.18.

¹⁹² A considerable number of stateless persons are present in the Middle East for instance. The origin of their statelessness dates back to the beginning of this century. The disintegration of the Ottoman Empire, and the territorial changes that followed, resulted in a considerable number of stateless persons. The problem of statelessness in the Middle East remained unresolved over the following decades. In the meantime two large stateless communities are estimated to be present in Kuwait and Lebanon.

inhabitants within these states with the problem of statelessness. The nationality laws in many of the new states would render a substantial number of the inhabitants as stateless¹⁹³.

Definition of Concepts

the term stateless defines a person who does not possess a nationality of any state, an anomaly "who does not fit into the established legal order where nationality provides the normal link between the individual and international law".¹⁹⁴ A stateless person is, thus, denied the protection that is accorded by states to their citizens.¹⁹⁵

Stateless people are divided into two categories: 'de jure' and 'de facto' stateless persons. De jure stateless persons are persons who are not nationals of any state either because at birth they did not obtain the nationality of any state, or because they have lost their nationality during the course of time, and had not obtained a new one. De facto stateless persons are persons no longer enjoying the protection of the country of which they are nationals. This occurs when the authorities of the country refuse to accord them protection, or because they themselves refuse the protection of that given country.¹⁹⁶

Origins of Statelessness

Failure to obtain a nationality at birth, and the loss of the nationality at a later stage in life are two conditions that render a person stateless. Acquisition of the

¹⁹³ The nationality laws in some of the new republics could render some people who do not fall under its provisions as stateless. In the case of Estonia, it was estimated that on 30 March 1993, around 400,000 to 500,000 residents were stateless.

¹⁹⁴ Weis, P., (1961), p.30.

¹⁹⁵ A stateless person is denied any political rights that other citizens enjoy, . Moreover, a stateless person is denied the rights that are provided by states to their citizens under international law, i.e., " diplomatic protection" of individuals abroad, and the right of "sojourn and return", not to expel the individual from and to receive him back on its territory. See Weis, P., (1944), p.4.

nationality at birth occurs in accordance with two principles. The first of which is *jus soli*, i.e., the individual acquiring the nationality of the state of his birth, while the second is *jus sanguinis*, where the individual obtains the nationality of his or her parents.

This failure to obtain a nationality at birth occurs under several conditions. One of these conditions occurs in case of a child born abroad. This is particularly relevant to children whose parents are nationals of a *jus soli* country and who are born abroad in a *jus sanguinis* country. Another condition is when a child is born in a *jus sanguinis* country for a father or mother who are themselves stateless. The child in this case will be born stateless. Moreover, a child who is born of unknown parents in a *jus sanguinis* country would not receive the nationality of that country.¹⁹⁷

The loss of nationality at a later stage of time without acquiring another nationality will also render a person stateless. Loss of nationality occurs under several conditions. These might include conflict of laws¹⁹⁸; deprivation of the nationality as a penalty¹⁹⁹; deprivation of the nationality as a result of racial religious, and political persecution²⁰⁰; deprivation of nationality due to changes in political or social

¹⁹⁶ United Nations, A study of Statelessness, p.9.

¹⁹⁷ See *Ibid.*, p.9.

¹⁹⁸ Conflict of laws could render a person stateless. This is relevant in situations where, for instance, the marriage of a woman could have an effect on her nationality. Some legislation deprive a woman of her nationality if she is married to an alien, regardless of whether she has obtained another nationality or not. Conflict of laws could also render a person stateless in situations where a person has undergone a prolonged sojourn abroad. Under certain legislation, a person who is absent for a period longer than that which is stated will be deprived of his nationality. If a person did not obtain any other nationality, he would end up stateless.

¹⁹⁹ Deprivation of a nationality as a penalty occurs under the laws of some states in case a person enters into the foreign, public, or military service of another state without authorization, or when accepting a foreign title without authorization, or upon departure abroad without authorization, or upon performing any act considered as hostile.

²⁰⁰ Massive deprivation of a nationality of certain groups, as a result of racial, religious, or political persecution, renders the members of these groups stateless. These measures have been applied during the Iraqi-Iranian war by the Iraqi regime towards certain groups among the Iraqis who were suspected of having Iranian roots. Some members of this group were deprived from their Iraqi nationality, even those who had Iraqi spouses. These persons became stateless and as a result were forced to leave Iraq.

regimes²⁰¹; deprivation of nationality caused by changes of sovereignty in respect to territory²⁰².

Difficulties arising from Statelessness

Statelessness is accompanied by various difficulties both for the stateless people themselves, and for the host countries. A stateless person is usually deprived of the basic rights that other citizens enjoy. This is due to the fact that the legal position of a stateless person is undefined. Stateless persons thus face enormous difficulties in regulating their personal status, in exercising normal trades or professions, and in obtaining education, or in acquiring any kind of relief or social assistance that other nationals enjoy.

Other kinds of difficulties arise when a stateless person tries to leave the country of his normal habitual residence for another country. Since a stateless person does not possess the passport of the country of his habitual residence, this deprives him of the diplomatic rights that every state provides for its citizens while they are abroad to facilitate their travel and movement. A stateless person is also deprived of one of the most essential rights that other nationals enjoy, i.e., the right to return. Among the most important aspects of protection that states provide for their citizens, is the right to receive them on its territory in case they were expelled from another state. This right is thus not enjoyed by stateless people, when they are outside the country of their habitual residence.

The entrance of a stateless person to any other country is also associated with many difficulties. Since the legal status of such individuals is not established, and their departure, or repatriation, at a later stage, would create several difficulties to the receiving countries, many countries would be very reluctant to receive such

²⁰¹ Such as in the case of revolutions or civil war which result in the exodus of a large number of people who become either de facto or de jure stateless.

²⁰² This might be caused by cession, annexation, incorporation, or constitution of new states. This process is sometimes accompanied by new treaties that lead sometimes to the loss of

individuals. Moreover, the residence and the settlement of stateless people in other countries is also very difficult since they are always at the mercy of the administrative authorities of their country of residence.²⁰³

Stateless persons and refugees

Stateless persons and refugees constitute groups that are vulnerable and in need of protection. Statelessness and refugee status do not imply the same phenomenon. Unlike a stateless person, a refugee is a person who does possess a nationality, and who is related one way or the other with his or her country of origin. A refugee might become stateless in cases where he or she was deprived from the nationality upon leaving the country of origin. Most refugees, however, do keep their nationality after leaving. A stateless person might become a refugee in the case where he or she was expelled from the country of habitual residence²⁰⁴.

Legal Basis for Protecting Stateless people

Two international legal instruments were adopted following the end of the Second World War to provide protection for stateless people. These instruments aimed at guaranteeing, for stateless people present on the territories of the contracting states, fundamental rights and freedoms. The first Convention was the 1954 "Convention Relating to the Status of Stateless Persons", and the 1961 "Convention on the Reduction of Statelessness".

The 1954 Convention defines a stateless person as a person who is not considered a national by any state. It excludes from its provisions persons who are

nationality to some groups of inhabitants. See the Intergovernmental Committee on Refugees,(1946), p.5.

²⁰³ Rights granted by states to foreigners on its territory are in many cases based on reciprocity. Since stateless people are not considered as nationals of any other state, they are usually in an inferior position to other foreigners. See United Nations, "Study of Statelessness", p.17-23.



receiving protection from other UN agencies, those who are receiving protection from their authorities, or those who are considered to have committed war crimes, crimes against peace, and serious non-political crimes outside their country of residence.²⁰⁵ The provisions of this Convention stress the need for the contracting states to accord to stateless persons who are lawfully present on the territories of these states a favourable treatment, and not to be treated less favourably than other foreigners present on their territories.²⁰⁶

The Convention highlights two important issues pertinent to stateless persons, i.e., the issues of travel documents, and that of naturalisation. The Convention urges the contracting states to issue the stateless persons present on their territories travel documents to facilitate their travel outside their territories.²⁰⁷ The other critical point that the Convention stresses is related to naturalisation. The Convention stresses that the Contracting states should facilitate the assimilation and the naturalisation of the stateless persons present on their territories. They shall "make every effort to expedite naturalisation proceedings in order to reduce as far as possible the charges and costs of such proceedings".²⁰⁸ The Convention also calls on the contracting states to facilitate the application of labour legislation, and social security matters for stateless persons.

The other international legal instrument relating to stateless persons, the 1961 "Convention on the Reduction of Statelessness", which was adopted in August 1961, also highlights important points regarding the protection of stateless persons and the abolition of future statelessness. Among the very important points raised by the Convention are those that urged the contracting states to try to diminish statelessness by conferring their nationality upon those who would be stateless otherwise, in accordance with these countries' national laws.²⁰⁹

²⁰⁴ Whereas the fear of persecution is main reason that might render a person a refugee, fear of persecution is not the main criteria for rendering a stateless person what he is. Fear of persecution is one of the factors, but not the sole one.

²⁰⁵ See the 1954 "Convention Relating to the Status of Stateless Persons", article 1.

²⁰⁶ Ibid., Article. eighteen.

²⁰⁷ Ibid., Article. twenty eight.

²⁰⁸ Ibid., Article. thirty two.

²⁰⁹ Article one sets two conditions upon which the nationality may be granted "a) at birth, by operation of law, or b) upon an application being lodged with the appropriate authority, by or on

The Convention also stresses that the contracting states shall not render a person stateless by depriving him of his nationality due to ethnic, religious, religious, or political grounds.²¹⁰ It also refers to statelessness caused by territorial changes, and obliged the contracting states to take measures leading to the reduction of this phenomenon in any treaty reached.²¹¹ Finally the Convention calls for the establishment of a body within the United Nations to provide assistance for the stateless person.

The nature of UNHCR activities on behalf of stateless people

The Convention on the reduction of statelessness envisaged, in Article eleven, the setting up of a body to look over the claims of the people who are of concern to the Convention, and submitting these claims to the concerned authorities. This question was brought to the attention of the General Assembly in 1974, which then requested the UNHCR to carry out the functions provided under Article eleven of the Convention. This means that the UNHCR has become the agency which is designated legally to address the needs of stateless persons who are not refugees.

Despite the growing involvement of the UNHCR with regard to stateless people, this activity does face several impediments. The same concepts that form obstacles against the protection of the internally displaced also impede some action on behalf of stateless persons. The concepts of sovereignty and non-intervention stand as the main obstacles in this regard. Since nationality laws are considered as the domestic domain of every state, each state thus determines to whom it should or

behalf of the person concerned, in the manner prescribed by the national law". Moreover, paragraph two of the same article states that states could set preconditions for the acquisition of this nationality. Article one also tackles situations where statelessness is caused at birth.

²¹⁰ Article nine.

²¹¹ The contracting states, in case of territorial transfers' treaties, "shall include provisions designed to secure that no person shall become stateless", and in the absence of such provisions the contracting state to which the territory is transferred "shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition". See Article ten.

should not grant its nationality. Despite the fact that the international community has addressed the problem of statelessness at an early stage, the problem is still far from receiving sufficient attention or action. The fact that only a limited number of states have ratified the Conventions²¹² on statelessness makes the solution of such a problem more complicated, and keeps the stateless people in a very vulnerable position.

Conclusion

The problems of internally displaced and stateless people are evolving problems that are gaining further complexity in the course of time. The complexity of the two problems arises since the two issues fall within the domestic domain of states. International action on behalf of the internally displaced was always hindered by the fact that the internally displaced were within the territories of their given state, which is supposed to be responsible for their interests. Similarly, nationality issues were always considered as the domestic rights of a state to confer its citizenship on whomever it considers eligible. Stateless persons, on the other hand, were in a more privileged position than the internally displaced since they had international legal instruments to accord protection for them.

The international community has thus addressed the two problems earlier by either adhering to ad hoc approaches or by establishing some legal norms to address some of the problems. However, the concepts of sovereignty and non-intervention remained serious obstacles for finding drastic solutions to these recurring problems.

Whereas these earlier approaches were suitable in addressing the problems of the internally displaced, and in diminishing the problem of statelessness, the present situations do demand different approaches for tackling these problems. The international community's approach towards these problems seems to witness several changes. The causes of these changes could be partially attributed to the growing

²¹² The number of states party to the Convention Relating to the Status of Stateless Persons is 42. The last state ratifying as of May 1994 was Armenia. Regarding the Convention on the

complexity of the above mentioned problems, and the unsuitability of the previous approaches in dealing with the present dimensions of the two problems. Furthermore, severe human rights violations by any state on its citizens could not be entirely a domestic problem. Since severe human rights violations do lead in many times to massive displacement that might have an effect on the stability of many of the surrounding countries, these violations could not be entirely considered an internal problem. The growing concern of the international community towards the refugee problem and other mass influxes seems to manifest itself by the application of new forms of protection, such as temporary protection and in the humanitarian intervention in countries of origin on behalf of certain groups that are threatened with displacement.

Reduction of Statelessness, the total number of states party to the Convention is 17, out of which only Latvia from the former Soviet Union is a member state. See Appendix.

CHAPTER VI.

NEW APPROACHES TO THE REFUGEE PROBLEM

The humanitarian, and the "non-political" nature of UNHCR's work, as envisaged in its Statute dictated the nature of the activities and the role of the organisation over recent decades. a role which was described as "reactive" and "exile oriented". The organisation's role entailed providing protection to refugees after crossing international borders, rather than playing any preventive role in any expected refugee problem. Since any role in countries of origin was considered to be of a political nature. the organisation kept a reactive profile by limiting its role to countries of asylum.

The exile oriented approach manifested itself in the emphasis that was placed in the right to leave one's country in search of asylum in another country, and stressed equally the receiving state's responsibility for proving protection from refoulement. Options of integrating refugees in countries of asylum and the resettlement option were considered among the most viable solutions to the 'problem of the refugee' rather than the 'refugee problem'. The applicability of this solution to the present day refugee problem, in view of the developments that had accompanied the evolution of this problem is seriously questioned.²¹³

²¹³ The integration of refugees in countries of their first asylum, mainly in Third World countries, is also a difficult possibility to achieve especially in situations of mass influxes, assuming the limited resources and the stringent security considerations in some of the receiving countries. The African context provides very vivid examples in this regard, where the presence of massive refugee flows from Rwanda to neighbouring countries has exacerbated the security problems in these countries.

Such developments include the emergence of a new international world order, the asylum crises, the increased role of the United Nations in countries of origin, and the increased emphasis on human rights issues in these countries. All these emerging elements have necessitated the adoption of new approaches to respond to the refugee problem. A discourse about the adaptation of comprehensive responses to deal with the refugee problem started emerging in the international arena as a result.

The new approach envisaged and applied in the new emerging refugee situations could be described as "proactive, homeland oriented, and holistic"²¹⁴. The homeland character of the approach implies that emphasis is put on the right to return to countries of origin rather than stressing only on the right to seek asylum. The approach also means emphasising the responsibility of the state of origin with regard to refugee flows, rather than only concentrating on the responsibility of the receiving states. A third element of the homeland oriented approach implies assuming responsibility for categories of displaced person within the countries of origin, rather than only displaced persons who have crossed international borders.

The holistic character of the new approach implies that the UNHCR becomes involved in many different areas beyond its competence to address the different aspects of the refugee problem. Some of these areas, as mentioned earlier, include involvement in the "protection of human rights, maintenance of peace and security within and between states, the promotion of sustained development and the management of mass migratory movements".²¹⁵ This element of the approach also implies the expanded range of people who are of concern to the office. This includes

The same problem arises with regard to the question of resettlement in third countries, mainly in the industrial countries. As the number of the refugees grows bigger the question of resettlement as a durable solution to the refugee problem becomes more difficult to achieve. Voluntary repatriation, as another solution to the refugee problem is also accompanied with difficulties, especially when the reasons that led to the refugee exodus still remain. Following the end of the Cold War, the expectation was that many of the refugee problems will be solved due to the cessation of hostilities that accompanied the Cold War era. Whereas this was true for some of the refugee problems in some parts of the world, many other flows emerged.

²¹⁴ UNHCR, The State of the World's Refugees, in Search for Solutions, (1993), p.43.

²¹⁵ Ibid.,p.49.

people within their own countries, people returning to these countries, and people at risk of displacement and uprootedness.

Concepts such as the temporary protection status and the safe havens concept are manifestations of the new approach to mass influxes resulting from internal conflicts. These concepts reveal mainly the increased involvement of the Office on behalf of internally displaced persons within the borders of their own countries. They also reveal the increased involvement with a category of persons.

The following section seeks to analyse the concept of temporary protection, as one aspect of the comprehensive approach.

A. Temporary Protection

The number of civilians fleeing from conditions of violence and unrest far exceeds, in the last decades, those fleeing from individualised persecution. They are lacking the protection of their governments, either because these governments are unwilling or unable to provide protection to them. Mass influxes, as such, have increasingly occurred over the recent decades. Africa, Asia, and even Europe, lately, have been exposed to such influxes. States have responded to such influxes by providing temporary refuge to persons fleeing generalised violence pending the solution of problems in the countries of origin.²¹⁶

In the case of Asia the impact of the mass exodus was stronger for the Western countries than the exodus in the African continent. This impact may be due to the fact that the Southeast Asians sought refuge in Western countries. Many of these countries

²¹⁶ Since the 1980's more than 475,000 persons from Ethiopia had escaped the internal armed conflicts in Ethiopia to the Camps in Somalia, in addition to around 700,000 living outside the Camps. Similarly, Sudan had provided a place for refuge to persons fleeing generalized from violence in Chad and Ethiopia. Similarly, persons fleeing from violence in Uganda, and Angola in the eighties were provided temporary refuge in neighbouring African countries. See Perluss, D., Hartman, J., (1986), pp. 560-561.

responded, in return, by providing temporary refuge to fleeing persons in south east Asia as well as in the West.²¹⁷

Temporary refuge was also applied in countries in Latin America.²¹⁸ In response to massive flows from Latin American countries as well as other countries, the USA and Canada adhered to the practice of temporary refuge.²¹⁹

At the institutional level, the UNHCR played an essential role in the development and the evolution of the temporary protection norm. Since persons fleeing from internal armed conflict may necessarily fulfil the criteria for receiving the protection to which the Convention refugee is entitled, the norm of temporary protection was thus developed to provide protection to this category as an extended category of concern to the Office. The protection accorded to persons in this extended

²¹⁷ Within Southeast Asia internationalized internal wars have resulted in massive displacement in previous decades and the practice of temporary refuge was used by receiving states as a response to these outflows. Many Cambodians and Vietnamese sought refuge in Thailand. The same applies to Malaysia which provided refuge to some of Cambodian's minority Moslem population in the last decades. Also in South Asia the concept of temporary refuge was practiced by states. The most vivid example is the case of Pakistan which provided temporary refuge for three million Afghan civilians. *Ibid.*, pp, 562-565.

²¹⁸ Persons fleeing from civil unrest in Nicaragua, El Salvador, and Guatemala in the last decade had reached very high proportions. (according to the World Refugee Survey 1984, *supra* note 38, at 53, which cites estimates 300,000 to one million displaced in Guatemala, and indicates the presence of 40,000 Guatemalans in camps in Mexico). Persons fleeing generalized violence were provided with temporary refuge in neighbouring countries pending the cessation of conflicts in the home countries. *Ibid.*, p, 567.

²¹⁹ The United States adhered to the temporary refuge status as a response to the massive refugee flows from countries in Latin America which had been facing internal civil disturbances. The United States had provided the 'extended voluntary departure' status to nationals of countries that the United States thought needed a special kind of protection. Ethiopians, Iranians, Afghans, Lebanese, Poles, Ugandans, and Nicaraguans are among the nationals that had merited this kind of protection. This 'extended voluntary departure' was thus granted to nationals of countries which have civil wars or other tragic circumstances which are not conducive to their return to their countries of origin. These nationals are allowed to accept employment in the course of their stay. See U.S Immigration and Naturalization Service, Operations Instructions, 242.10e(3) (1979) reprinted in 4 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* 23-488.5 (1981), here cited by Perluss, D., & Hartman, J.F., (1986), P. 568.

Canada also adhered to the same policy of providing temporary refuge to nationals of countries which face civil wars and similar disturbances pending the change of the causing circumstances in the countries of origin.

category does differ from the protection accorded to Convention refugees in being a more passive protection, i.e., protection against refoulement. This point was elaborated by UNHCR in 1982:

"As regards persons not meeting the criteria of the refugee definition but coming within the High Commissioner's extended competence, it should be clear that protection does not necessarily imply the full range of treatment provided for in the 1951 [refugee] Convention and the 1967 [refugee] Protocol. It may be limited to protection against refoulement and to treatment according to various basic minimum standards. It should also be stressed that the circumstances that lead persons to become refugees according to the wider concept are frequently of a more transitory nature...for this reason, the protection extended to persons covered by the wider concept may be correspondingly limited in time pending a change in circumstances in their country of origin".²²⁰

Further elaboration on the norm of the temporary refuge continued at the UNHCR in the following period:

"Although there is a growing recognition that persons [displaced for reasons of severe internal upheavals or armed conflict] should be protected from danger through the granting of at least temporary asylum and not subjected to refoulement until conditions in their countries of origin permit their return, there is nevertheless at times an absence of agreement as to the form of protection measures to which they should be entitled. There is at present a steady growing number of such refugees and asylum seekers who leave their region of origin and travel in search of protection and assistance to other areas of the world where due to the application of a narrower definition, they are not regarded as refugees. The difficulty which has arisen for persons in this situation is that of defending

²²⁰Note on international protection, Thirty third Session of the Executive Committee of the High Commissioner's Programme, para 19, UN D.O.C A/AC.96/ 609/ Rev.1 (1982). Cited by Perluss, D., & Hartman J.F., (1986), p, 581.

their legal status, which should at least include protection against refoulement and permission to remain in their territory until an appropriate solution is found for them. There is a growing and increasingly acute need for this particular problem to be addressed".²²¹

Since UNHCR has been the main organisation dealing with refugees, it has thus assumed the responsibility of being the main promoter for the respect of the norm of the temporary protection status in its annual meetings.

The concept of temporary protection started gaining more importance in the 1990's as the calls for comprehensive approaches to tackle refugee problems intensified following the crises in Former Yugoslavia. The concept of temporary protection was thus presented in 1992 by the UNHCR as a part of the comprehensive response to the mass exodus resulting from the war in Former Yugoslavia. The concept provided a platform for providing protection from refoulement for persons fleeing from civil wars pending the cessation of violence in their home countries.²²²

Temporary protection was described by the High Commissioner to include: "admission to safety, respect for basic human rights, protection against refoulement, and safe return when conditions permit to the country of origin".²²³

²²¹ Note on International Protection, Thirty-Sixth Session of the Executive Committee of the High Commissioner's Programme, *Supra* note 124, para 37. See also *Supra* note 108 (appropriate legal status given according to needs). Cited by Perluss, D. and Hartman J.F., (1986), p., 581.

²²²

"[T]emporary protection offers a means of affording protection to persons involved in large scale movements that could otherwise overwhelm established procedures for the determination of refugee status while privileging safe return as the most desirable solution to refugee problem".

UNHCR, Background note, 'Comprehensive Responses to the Humanitarian Crisis in Former Yugoslavia', informal meeting on temporary protection (Geneva, 21 January 1993), p.7. Section III Note 21.

²²³ See General Conclusions on International Protection, N.74 (XLV)-1994.

It has also been perceived as a "flexible practical tool to provide international protection to those people who need it", mainly in situations of emergency as in the case of the Former Yugoslavia pending a safe return to their countries of origin upon the cessation of violence.²²⁴ The country of asylum thus bases its policy on the assumption that the refugee will be living in the specific country for a short time, since the concept does not entail permanent residence or resettlement in country of asylum.

Furthermore, the norm was seen as satisfying the rights of persons fleeing from civil wars and conflicts "to seek and enjoy asylum" in places where their life and freedom are not threatened. At the same time, the rights of states regarding the granting of asylum and having sovereign rights over its territory were recognised. In other words, temporary protection becomes a "link between non-refoulement and a durable solution"²²⁵

The flexibility and practicality of the norm in the Western countries context derives from the fact that it has been considered as a measure, by many of the receiving countries in the West, that saves the administrative and economic costs that are caused by the asylum procedures. The concept finally serves another purpose vis-à-vis public opinion in the receiving countries, that the refugee problem is of a temporary nature.²²⁶

Assessment

Despite the fact that the concept of temporary protection constitutes a pragmatic new response that deals with the new influxes of mass movement, nevertheless it provokes many questions vis-à-vis the refugees on the one hand, and the receiving countries on the other hand. These questions are mainly related to the

²²⁴ See UNHCR, Background Note, 'Comprehensive Responses to the Humanitarian Crises in the Former Yugoslav', Informal meeting on Temporary Protection (Geneva, 21 January 1993), p.1, Section I, Point 3.

²²⁵ See Kjaerum, M., (1994), p.445.

²²⁶ Ibid., p.450

security concerns in countries of asylum, to the state's practice regarding the protection principles, and the duration of the 'temporary' status.

The first area of concern that is associated with situations of mass influxes is related to security considerations. This is mainly relevant to Third World countries that face many security problems, such as countries in the African context. Whereas providing temporary protection for refugees from Former Yugoslavia was a flexible response to their situation in Europe, the same cannot be said about refugees fleeing from civil wars in less stable continents such as Africa. Providing temporary refuge for Rwanda refugees in Zaire, for instance, has contributed to the instability of this receiving country. The events in the Great Lakes region suggest to a great extent that the solution to the problem of the Rwanda refugees would be within their country of origin rather than in neighbouring countries like Zaire.

The second question about temporary protection is how 'temporary' is temporary protection supposed to be? In the context of Former Yugoslavia, persons were provided with this status expecting that the war will be of short duration. Those individuals thus stayed in the receiving countries on a 'temporary basis' much longer than expected. Moreover, in such a situation how easy would it be to sell the idea to public opinion that the refugee problem is of a temporary nature when temporary protection is extended over a long duration?

Further questions are related to the protection that individuals with a temporary protection status are granted. Such rights are related to the principle of non-refoulement, family reunification rights, and the right to work. As mentioned previously, the concept of temporary refuge was argued to be a 'mid way' between the right of persons to seek asylum and be protected from refoulement, and the sovereign rights of receiving states to grant asylum and to have control over its territory. This naturally means that the right of non-refoulement is observed by the receiving states. However, whether the receiving states are actually abiding by this principle is questionable. Many breaches of this principle have been noticed in the policies of

some of the receiving states in Western Europe, such as refoulement from the frontiers.²²⁷

Among the essential rights to which refugees are entitled are the right to work and the right for family reunification. There are questions whether persons with temporary protection²²⁸ status do in fact enjoy these legal and social rights. Whereas in countries like Switzerland, Spain, and Hungary, persons with this status have full rights to work and for family reunification, these rights are partially restricted in other countries.²²⁹

²²⁷ Many states in Western Europe have imposed visa restrictions for persons coming from the Former Yugoslav republics. Many of these restrictions aim at hindering the access of individuals fleeing from civil war conditions from reaching the territory of the receiving states. *Ibid.*, p. 448.

²²⁸ In most Western European countries, the concept of temporary protection thus came as a response to the situation in Former Yugoslavia. Those individuals might have benefited from a refugee status based on well-founded fear of persecution on account of religious or ethnic grounds. They were provided instead, with temporary protection status, and were denied consequently the full rights to which Convention refugees are entitled.

²²⁹ " the Danish Aliens registration declares that persons with temporary protection status are only entitled to family reunion with a spouse and/or children in exceptional circumstances. In the United Kingdom, those granted exceptional leave to remain are only eligible to apply for family reunification after four years, although those invited to the United Kingdom for temporary protection do have the possibility to apply for family reunion earlier. The majority of refugees from former Yugoslavia are either still pending in the asylum procedures or have been granted exceptional leave to remain".

...Regarding the right to work, persons with temporary protection are restricted in this right in different European countries,

"in Denmark and France persons with temporary protection status do not have the right to work or they are restricted severely in their access to the labor market. In other countries, like the Netherlands and Germany, where the asylum applications are 'frozen', persons have the same status as asylum seekers and have no access to the labor market. A refugee who has otherwise obtained asylum in all Western European countries under a scheme which is considered to be a durable solution will be granted a work permit...As the practice in several countries shows, a refugee granted temporary asylum will not obtain a work permit, and will thereby be excluded in the form of labor market". See Kjaerum, M., (1994), pp. 453-454.

Conclusion

The concept of temporary protection constitutes a new pragmatic response to a situation of mass influxes from war conditions. It is a manifestation of the new approaches in protection that addresses a wider category of people of concern to the High Commissioner's office. This category thus includes persons displaced due to civil war conditions rather than simply persecution.

Despite the practicality of the norm, for many European countries many questions are raised about the protection aspects that people under this status are acquiring. Whereas some receiving countries are realising the rights of persons with temporary protection status, many breaches of the basic rights are occurring in other countries, thus leaving individuals with such status in vulnerable conditions.

Finally, providing temporary refuge for persons displaced by civil war situations might not always be the preferred solution. This is mainly true in receiving countries which have unstable conditions. The events in The Great Lakes region suggest that providing temporary refuge for Rwanda refugees in some of the neighbouring countries has in some regards exacerbated their problems, and posed many security problems for some of the receiving countries.

The following chapter will study other alternatives that were adhered to by the international community, in an attempt to address the problem of mass exodus.

CHAPTER VII

SAFE HAVENS-NORTH IRAQ

Introduction

In a world of interdependence the refugee problem cannot be considered solely as a problem of the generating country. This is particularly relevant in cases of mass exodus, which have serious implications at regional and international levels. The attention of the international community, which was mainly focused on the receiving countries, started shifting gradually towards countries of origin, addressing the root causes of the refugee problem within such countries, through creating mechanisms for human rights monitoring and early warning. Moreover humanitarian action within countries which are threatened with mass exodus also became more frequent. Corridors of Tranquillity, Safety Zones, and Safe Areas were also established in some countries, which were threatened with mass exodus following the end of the Cold War.

Two Safe Havens in particular were chosen as case studies in this thesis. The first was the Safe Haven established in northern Iraq and the second was Rwanda. The fact that the two enclaves were first established by an action undertaken by individual states and then handed over to the United Nations was one reason for studying these two particular cases. In both cases as well, a positive outcome was achieved from a humanitarian perspective. Unlike the Safe Havens in Former Yugoslavia for instance, the Safe Havens in Iraq and Rwanda provided a certain degree of protection for the civilians seeking refuge in these areas. The fact that these areas were considered “safe” was another reason thus for choosing these particular examples as case studies.

International and multilateral action within countries of origin, and particularly in the form of the creation of Safe Areas in such countries of origin in the following

chapter. The legal and political aspects that are associated with the creation of these Safety Zones are analysed. The Safe Areas that were established in North Iraq will serve as the case study. The time frame for this study is limited to the first period of the creation of the Safe Areas, mainly to the years 1991-1992. The focus thus would be on the creation of Safe Areas and its impact on the repatriation of refugees. Later developments, such as the clashes between different Kurdish factions in the areas, and the Iraqi regime's attacks on these areas, are excluded from the scope of this study.

The Iraqi Case

The Iraqi invasion of Kuwait in August 1990 and the UN and the Coalition response that followed paved the way for internal challenges to the Iraqi regime. Following the withdrawal of the Iraqi army from Kuwait, an uprising started within Iraq. This was actually initiated by some of the repatriated soldiers in the Southern provinces of the country. At the same time an uprising also occurred in the North of the country by the Kurds who saw in this a chance to create their old aspirations for having a Kurdish state. Saddam responded to his defeat in the Gulf War by responding harshly to the uprising that occurred in the country.²³⁰

The Iraqi regime responded, particularly to the Shia revolt in the South, by applying severe measures against the population. Severe Human Rights violations and atrocities were committed by the Republican Guards of Saddam. Whereas the revolt in the South was contained by the regime without producing refugee flows, the case was different in the North of the Country. Kurds who had earlier been familiar with the regime's response towards them ran towards the borders with Iran and Turkey. Hundreds of thousands of internally displaced persons and refugees gathered either at the borders of these countries or took refuge within these countries, particularly within Iran.

The mass exodus occurring and the humanitarian crisis that resulted from it led to international public opinion asking for rapid action on behalf of the Kurds who were stranded in the mountains and the surrounding countries. The coverage of the press for

these events made people more aware of the situation and elicited demands for immediate action. In addition to the humanitarian aspect of the crisis, the political implications of the situation were also alarming. This is particularly relevant to the neighbouring countries, which have their own problems with the Kurdish population. Turkey, particularly, was worried about this outflow of Kurdish refugees into its territory or to the border of its territory. The Turkish government which was not flexible with the refugee problem and its implication was pushing for immediate action to solve the crisis on its border.

As a consequence of this humanitarian crisis and its political implications, enclaves within Iraqi territory were formed by the Allied forces to facilitate the return of the refugees to secured areas within North Iraq. These enclaves were called Safe Havens. The operation, which was initiated by British and American forces, was called Operation Provide Comfort. The political situation and the military situation prevailing in Iraq following the Gulf War did not present any opportunity to do anything to stop the creation of these areas on its territory, even though it was completely against it. The situation was different when the United Nations took over these Safe Havens. This followed an agreement between the United Nations and the Iraqi government known as the Memorandum of Understanding. The following case study aims at studying the legal, political, and historical implications associated with the creation of Safe Havens, in addition to studying its impact on the refugee flows that occurred in the particular case in North Iraq.

A. Legal Framework

The study of the legal framework that surrounds the creation of the Safe Havens in North Iraq is essential for any comprehensive study on this topic. The basic United Nations Resolutions that "authorised" the multilateral action against Iraq are to be analysed. Equally important is the study of the legal instrument that created the framework for the United Nations action within Iraq, i.e., the Memorandum of Understanding (MOU) between the UN and the government of Iraq.

²³⁰ 15 out of the 18 provinces in Iraq participated in the uprisings against the Iraqi regime.

Before studying these particular legal instruments, a study of the different Articles of the UN Charter that governs any UN or UN authorised action is essential.

1. The UN Charter

The use of force by the allied forces against Iraq was "authorised" by the Security Council's numerous Resolutions that were based on the United Nations Charter. The provisions of the Charter prohibit the use of force among and against member states, and emphasises the principles of sovereignty and non-intervention among states. However, it allows for some exceptions in some of its Articles, where enforcement action is authorised.

The study of Articles 2(4) and 2(7) constitutes a starting point for any analysis of the UN Charter on this issue. Article 2(4) calls on member states to refrain from "the threat or use of force". The indication that this applies to "any state" implies that even non-member states are also included.

The "Territorial integrity" and "Political independence" of states are protected under Article 2(4). Member states shall refrain from the use of force "against the territorial integrity and political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". This principle is not only applied to situations where the territorial existence or the independence of states are threatened. Thus

"an incursion into the territory of another state constitutes an infringement of Article 2(4), even if it is not intended to deprive that state of part of its territory and if the invading troops are meant to withdraw immediately after completing a temporary and limited operation".²³¹

²³¹ Simma, B., (1995), p.117.

Another essential Article within the Charter, of great relevance to the present topic, is Article 2(7). The Article reads as follows:

"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 or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII".

Two important principles are embodied in this Article. The first is directed towards the different bodies of the UN instructing them not to interfere in matters which are within the domestic jurisdiction of states. The principle of non-intervention became thus a cornerstone in the United Nations Charter. The second "is intended to maintain world peace and security and to forbid recourse to the clause of domestic jurisdiction in such circumstances"²³².

The first part of the Article gives rise to pertinent questions regarding whether certain issues are considered within the domestic jurisdiction of states. This is mainly relevant to human rights issues. Human rights issues are considered by many states to be falling within the domestic affairs of states. Increasingly, however, human rights violations, mainly severe violations, are becoming a question of international concern.²³³

²³² Article 2(7), *Ibid.*, p.149.

²³³ A draft Resolution was submitted, by the Institute of International Law to the Commission on Human Rights at its 46th session on 'The Protection of Human Rights and the Principle of Non Intervention in the Internal Affairs of States'. The clauses of this draft Resolution aimed at creating a balance between the concern for the issue of Human Rights and that of Non Intervention:

"A state acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction.....Measures designed to ensure the collective protection of human rights are particularly justified when taken in response to especially grave violations of these rights notably large scale or systematic violations, as well as those infringing rights that cannot be derogated from in any circumstances".(Article 2).

"An offer by a state, a group of states, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another state in whose territory the life or the health of the

The United Nations Charter thus emphasised the principles of non-intervention, sovereignty, territorial integrity, and the prohibition of use of force through Articles 2(4) and 2(7). At the same time, the Charter raised the possibility for enforcement measures when serious threats to international peace and security occur. Enforcement action by the United Nations was allowed under Chapter VII of the Charter. Three important Articles constitute the corner stone in Chapter VII. These are Article 39, Article 41, and Article 42.

Article 39 states that:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or acts of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security"

In accordance thus with Article 39, the Security Council will assess and determine whether a specific situation constitutes a "threat" or "breach" of the peace or an act of aggression. A term "threat" of the peace carries with it the broadest connotation among the three. It has been used to refer to relations between states, rather than to internal conflicts.²³⁴ Increasingly, though, situations of some internal conflicts have been considered as constituting threat to international peace by the Council. In the Resolutions 713(Sept., 1991) concerning Former Yugoslavia, and 733 (Jan. 1992) on Somalia, the Council determined that both conflicts constituted a threat to international peace and security.²³⁵

population is seriously threatened cannot be considered an unlawful intervention in the internal affairs of that State. However, such offers of assistance shall not, particularly by virtue of the means used to implement them, take a form suggestive of a threat of armed intervention or any other measures of intimidation; assistance shall be granted and distributed without discrimination" (Article 5).

UN Doc.E/CN.4/1990/NGO/55), cited by Simma, B., (1995), pp.153-155.

²³⁴ Ibid., p. 602.

A breach of peace occurs when "hostilities are engaged in between armed units of two states. In this connection it is irrelevant whether the hostilities are quickly ended because one side is militarily defeated..... A breach of peace also exists if force of arms is applied by or against an effective independent de facto regime which is not recognised as a state"²³⁶. The distinction though between a threat and a breach of the peace was not always very clear in Security Council Resolutions.

Aggression involves

"direct or indirect application of the use of force; thus it is also always a breach of peace. The particular designation is justified in that, with the determination of aggression, the party which has caused a breach of the peace is established. Where an act of aggression exists, there is an aggressor. An armed attack, as required for the application of Art. 51 of the Charter, is in any event aggression."²³⁷

Article 39 of the Charter constitutes a prerequisite for enforcement measures under Articles 41 and 42. The Council determines under Article 39 the existence of a threat to the peace or a breach of the peace, and decides to make recommendations accordingly. Such recommendations do not constitute binding measures on member states.

Enforcement measures, which were at the basis of the Resolutions adopted against Iraq have their legal basis in Articles 41 and 42 of Chapter VII of the Charter. Article 41 deals with measures which do not include the application of armed force, while Article 42 deals with those measures including the application of the use of force.

Article 41 reads as follows:

²³⁵ Ibid., p. 612.

²³⁶ Ibid., p. 609.

²³⁷ Ibid., p.610.

" The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

Article 41 thus involves the application of enforcement measures that do not include the application of armed force. These measures might include "complete or partial interruption of economic relations".²³⁸

The Council, could also recommend boycott measures under Article 39. These measures would not be of a binding character. Binding measures taken under Article 41 could also be applied following the use of armed force, as action to rebuild the peace and prohibit the renewed use of force by an aggressing state. Article 42, on the other hand, constitutes the provision within the Charter that allows for the use of force by the Security Council. The Article indicates that:

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of members of the United Nations".

The legal basis for enforcing military measures by the Security Council is derived from Article 42. Such measures could thus include the deployment of air, sea, or land forces to restore international peace and security. Blockade and demonstrations are clearly mentioned in this Article. Such decisions to use force by the Council have not

²³⁸ Resolution 661 (1990) against Iraq, which was adopted under Chapter VII, included complete economic boycott. In accordance with this Resolution, all states are to refrain from accepting any goods produced in Iraq or Kuwait following the adoption of this Resolution. The same applies for the exporting of any goods or services from member states to the territories of Iraq or Kuwait. *Ibid.*, p. 62.

been used frequently. A decision to enforce such measures should be preceded by a determination of a situation which involves a threat or breach of peace. Further, the Council should also determine that non-military measures are not sufficient to tackle the situation. This does not mean that these measures are already applied. Rather, the mere determination of the "inadequacy of non armed measures by the Council is sufficient for the application of armed measures. The issue of proportionality is also important when applied by Article 42 by the Council" (Article 39). The above mentioned measures are considered as sanctions as long as they are implemented against the will of the targeted state. When these measures are carried on in agreement with the state, they no longer fall under Article 42.²³⁹

In case of the implementation of the enforcement measures, the Security Council could carry on these measures on its own, provided that forces are put at its disposal by the member states. In such a case the Council would refer the military command to the Military Staff Committee, which would act under the authorisation of the Council.²⁴⁰

Measures under Article 42 could also be applied following the use of armed forces. Monitoring activities by the UN units in demilitarised zones could fall under the provisions of Article 42.²⁴¹ The Charter allows thus for some exceptions for the use of armed force under the provisions of Article 42. Another exception for the application of armed force exists also within the Charter in Article 51. The Article stipulates that:

"Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures to maintain international peace and security. Measures taken by members in the exercise of this right of self defence shall be immediately reported to the Security Council and shall not in any way affect the authority and the responsibility of the Security Council under the present Charter to take at

²³⁹ Ibid., p.632.

²⁴⁰ See Article 47 of the Charter, Cited by Simma, B., (1995), pp.644-651.

²⁴¹ Ibid., p.636.

any time such action as it deems necessary in order to maintain or restore international peace and security."

The provisions of Article 51 thus authorises the use of force by states, collectively or individually, in self defence against an armed attack. These states should, though, in accordance with the Article, report continuously to the Council. This does not imply that such action requires the prior determination of the Council, as under the collective enforcement measures under Article 42. As soon as an action is taken by the Security Council, the use of force by a state practising self defence ought to stop. This right is thus authorised upon the occurrence of an armed attack until the time the United Nations takes action.

The Security Council which was nearly paralysed during the Cold War period by the Superpowers' struggle, hardly ever applied enforcement measures under Chapter VII except in very few cases such as Korea and Southern Rhodesia. The situation changed, though, by the time the Gulf Crisis occurred. Major Resolutions, were adopted under the provisions of Chapter VII of the Charter. The main Resolutions in this context are Resolutions 678, 687, and 688. An analysis of these Resolutions will follow in the next part of the Chapter.

2. The UN Resolutions

The Security Council adopted several Resolutions following the lack of compliance that Iraq showed regarding the withdrawal from Kuwait. Resolution 662, adopted on the 9th August 1990, affirmed the previous Resolutions, decided that the "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void;". It further called upon "all states, international organisations and specialised agencies not to recognise that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation". On the 18th August, the Security Council adopted Resolution 664 under Chapter VII of the Charter. The Council re-affirmed its previous decisions, mainly 662 regarding the annexation of Kuwait, and demanded that Iraq "permit and facilitate the immediate departure from Kuwait and Iraq of third-State nationals"(para.1)It further

demanded "that Iraq take no action to jeopardise the safety, security or health of such nationals"(para.2).

Resolution 665 was adopted on the 25th August 1990. The provisions of this Resolution expanded the sanctions against Iraq, calling "upon those Member States co-operating with the government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to respect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990)". The Council further requested the concerned states to "co-ordinate their actions in pursuit of the above paragraphs of the present resolution using, as appropriate, mechanisms of the Military Staff Committee."(para.4) The main function of this committee, according to the Charter, is to give military advice to the Council.

Resolution 666 was deeply concerned "that Iraq has failed to comply with its obligations under Security Council resolution 664 (1990) of 18 August 1990 in respect of the Safety and well-being of third-state nationals". The Council, acting under Chapter VII of the Charter, expected Iraq thus "to comply with its obligations under resolution 664 (1990)".(para.1).

Resolution 678:

The Security Council adopted on the 29th November Resolution 678, which authorised

"Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in para. 1 above, the forgoing Resolutions, to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore peace and security in the area".²⁴²

²⁴² Resolution 678, op. Para.2.

Different legal analysts considered Resolution 678 to be falling under Chapter VII of the Charter. This was derived from the consideration by the Council, under 660, that the Iraqi invasion of Kuwait constituted a threat to peace and security, coupled with the enforcement measures imposed on Iraq in Resolution 665, and the conclusion by the Council, in the preamble of Resolution 678, that all peaceful means for obtaining compliance had failed, led some writers to conclude that the Resolution was adopted under Article 42 of the Charter.²⁴³

The Resolution was faced with many reservations. The Resolution, for instance, omitted reference to any role for the Military Staff Committee. The Council only requested the states to "keep the Council regularly informed". Many member states had reservations regarding this Resolution. China, for instance, stated that it had difficulty in voting for this Resolution since the term "all necessary means" would lead to the use of military force.

The unrestricted character of the Resolution, drew further criticism. This is first shown in the lack of clarity of the source of law. As mentioned earlier, this Resolution was not specific regarding the Article within the Charter under which it was adopted. The non restrictive character of the Resolution which authorised the above mentioned Member states to use "all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions" gave a space for the leading states, i.e., the USA for "interpretative and operational manoeuvre".²⁴⁴ The Resolution did not set a certain specific time for the application of all the necessary means. In addition it did not keep these member states under the guidance of the Security Council, and particularly under the guidance of the Military Staff Committee, made such writers consider that the Resolution gave "the UN members carte blanche vis-à-vis Iraq after January 15, including the waging of war on whatever terms and in whatever ways they might choose". The vagueness of the above mentioned Resolution was a source of criticism among the states within the General Assembly. The period following the beginning of

²⁴³ See Murphy, S.D., (1994), p. 228. Resolution 678 was reported to be adopted after the Council determined that economic sanctions were not sufficient for dealing with the Gulf crises and making Iraq comply with the previous Resolutions.

hostilities and the cease fire witnessed minimal presence of the UN involvement. The Secretary-General was notified of any act against Iraq only following the action that was taken after the 16th of January. This *carte blanche*, in accordance to some legal analysts, could be attributed to the domination of a single state, i.e., the USA over the Security Council. This Resolution according to them was achieved to match the political objective of the USA, and not the true nature of the United Nations.²⁴⁵

Following the acceptance of the cease fire, two additional Resolutions were adopted under Chapter VII of the Charter. The first was Resolution 687 and the second was Resolution 688.

Resolution 687:

A draft of Resolution 687 was distributed by the USA on 20 March 1991, after being drafted following the Iraqi withdrawal from Kuwait. The Resolution which was adopted on the 3rd of April constituted the fourteenth Resolution adopted by the Council in relation to the Iraq-Kuwait crisis. The Resolution welcomed the liberation of Kuwait and the return of its sovereignty, it further stressed the commitment of the Council to the restoration of peace and security in the region. The Resolution addressed the following issues between the two governments: boundary settlement, peace keeping, weapons of mass destruction, nuclear weapons capability, Compensation funds, Kuwaiti property, and oil and arms embargo and sanctions against exports to Iraq, repatriation, terrorism, acceptance and cease fire. In the boundary settlement section, the Council demanded the two countries to respect "the inviolability of the international boundary". In the peace keeping section, observer units were asked to be deployed in the demilitarised Zones. The Resolution further demanded Iraq to destroy the biological and chemical weapons. It further prohibited Iraq from developing nuclear material. The Resolution also held Iraq responsible for compensating the damages of the war, and for the return of Kuwaiti property. As mentioned earlier, The Resolution also set provisions for the continuation of the sanctions on Iraq.

²⁴⁴ See Weston, B., (1991), p. 525. *Ibid.*.

²⁴⁵ *Ibid.*, p.526.

"Decides, effective immediately, that the prohibitions against the sale or supply to Iraq of commodities or products, other than medicine and health supplies, and prohibitions against financial transactions related thereto, contained in resolution 661 (1990) shall not apply to the foodstuffs notified to the Committee established by Resolution 661 (1990) or, with the approval of that committee, under the simplified and accelerated "no objection" procedure, to materials and supplies for essential civilian needs as identified in the report of the secretary-general dated 20 March 1991 (S/22366), and in many further findings of humanitarian need by the Committee".²⁴⁶

It further decides that the council shall review these provisions

....."every sixty days in the light of the policies and practices of the Government of Iraq, including the implementation of all relevant resolutions of the Security Council, for the purpose of determining whether to reduce or lift the prohibitions referred to therein".²⁴⁷

....."Decides that, in accordance with Resolution 661 (1990) and subsequent related Resolutions and until a further decision is taken by the Council, all States shall continue to prevent the sale or supply, or promotion or facilitation of such sale or supply, to Iraq by their nationals, or from their territories or using their flag vessels or aircraft, arms and related material of all types....technology under licensing or other transfer arrangements used in the production, utilisation or stockpiling of items specified in subparagraphs (a) and (b) above".²⁴⁸

The Resolution required Iraq not to support "international terrorism". Finally the Resolution established that the formal cease fire between Iraq and Kuwait would be effective once Iraq accepted the provisions of this Resolution. It is worth noting that the

²⁴⁶ Resolution 687, section F, para. 20.

²⁴⁷ Resolution 687, section F, para.21.

²⁴⁸ See Resolution 687, section F, para.24.

Council affirmed in this Resolution that the provisions of all the previous Resolutions continue to be in force until Iraq accepted the provisions of the Resolution.²⁴⁹

Different statements made in the Council reflected the different opinions regarding the above mentioned Resolution. Whereas the representatives of the United States, the United Kingdom, and France were very enthusiastic for the Resolution and the role of the United Nations in general, representatives from some other countries expressed some reservations. The representative of the United States considered the Resolution as "unique and historic...It fulfils the hope of mankind to make the United Nations an instrument of peace and stability....This is a time of testing for the United Nations and a time of destiny as well".²⁵⁰

The Resolution drew varied responses from the different states. The representative of France while bringing attention to the suffering of the Iraqi population, considered that the provisions of the Resolution contributed to the long term objective of creating security in the region. Other representatives, on the other hand, were very critical. Countries like Cuba (which voted against the Resolution), Yemen and Ecuador(absent), questioned the legality of maintaining the sanctions regime against Iraq. These countries, particularly, Cuba and Yemen, considered that issues relating to boundary demarcation and compensation issues, were within the domain of the International Court of Justice rather than the Council. Iraq which considered the Resolution as "unjust" and containing "vengeful measures", acknowledged though that it had no choice but to accept the provisions of the Resolution. On the 6th of April, Iraq accepted the provisions of the Resolution, and on the 10th a letter was sent to the Council in this regards.²⁵¹

Resolution 688:

Following the cessation of hostilities between Iraq and the Coalition, the situation within Iraq deteriorated rapidly. As mentioned previously the uprisings that

²⁴⁹ See The United Nations, The United Nations and the Iraq-Kuwait conflict, 1990-1996, (1996), p.33.

²⁵⁰ See UN document S/PV.2981, Ibid., p. 33.

occurred both in the South of the country and the North were faced with repressive measures by the Iraqi regime. Consequently, hundreds of thousands were admitted to Iran, and others who moved to the Turkish border were less lucky. They were denied entrance to Turkish territory and they were left stranded in the mountains. Faced with such an unprecedented humanitarian crisis in the recent decade, the Security Council responded in adopting Resolution 688, which was used as an umbrella for action within Iraq to get access to the Kurds in the north of the Country. Upon the request of Turkey and France the Council met to discuss the issue. Both countries in addition to other countries whose representatives spoke in the deliberations in the Council considered the mass exodus from Iraq as constituting a threat to the peace and security of the region.

Following these deliberations, the Council adopted Resolution 688 on the same day, 5 April 1991, in which it recalled Article 2(7) of the Charter. The Council expressed its grave concern for "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas which led to a massive flow of refugees towards and across international frontiers and to cross border incursions, which threaten international peace and security in the region". The Council, after expressing in the preamble its disturbance by the magnitude of the "human suffering involved", reaffirmed "The commitment of all Member States to the Sovereignty, territorial integrity and political independence of Iraq and all States in the area".

Following the preamble, the Council decided the following:

"1. Condemns 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;

2. Demands that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this

²⁵¹ Ibid., p.35.

repression and expresses the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected.

3. Insists that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations;

4. Requests the Secretary-General to pursue his humanitarian efforts in Iraq and to report forthwith, if appropriate on the basis of a further mission to the region, on the plight of the Iraqi civilian population, and in particular the Kurdish population, suffering from the repression in all its forms inflicted by the Iraqi authorities;

5. Requested further the Secretary-General to use all resources at his disposal, including those of the relevant United Nations agencies, to address urgently the critical needs of the refugees and displaced Iraqi population;

6. Appeals to all Member States and to all humanitarian organisations to contribute to these humanitarian relief efforts;

7. Demands that Iraq co-operate with the Secretary-General to these ends;

8. Decides to remain seized of the matter"

The reactions of the member states varied considerably towards this Resolution. France, as mentioned earlier, was very much in favour of the Security Council's action in response to the situation in North Iraq. The French representative considered that massive violations of Human Rights, regardless of whether or not they amounted to a threat to peace or security, are conducive to a Security Council action. China, on the other hand, referred to Article 2(7) in the Charter to note that the Council should refrain from interfering in matters which are within the internal jurisdiction of states. China was one of the countries which abstained from voting in favour of this Resolution. Iraq considered this Resolution to be an infringement of its sovereignty. Countries like

Yemen and Cuba had similar responses to the Resolution. Resolution 688 affirmed the responsibility of the Council under the Charter to maintain international peace and security. It did not refer to Chapter VII as the basis of this Resolution. Some legal analysts consider that mentioning international peace and security in the preamble of the Resolution puts it under the provisions of Article 39 (chapter VII). Some of the legal analysts argued that acting under Chapter VII without explicitly indicating so is not a precedent in the Council. However, comparing this Resolution to other Security Council Resolutions on the Gulf crisis indicates a departure in Resolution 688 from the rest of the Resolutions, where it was indicated explicitly that the Council was acting under Chapter VII of the Charter. Some legal analysts expressed the view that Resolution 688 tended to be an extension of Resolution 687, which was adopted under Chapter VII of the Charter. The absence, however, of any such indication in the preamble of the Resolution seems to undermine this argument.²⁵²

Resolution 688 has been referred to as the legal basis for the establishment of Safe Havens in North Iraq by the Allied forces. Relying solely on Resolution 688 as a legal basis for the Allied action in the North might be inadequate. The Resolution carried no authorisation for the Allies to use force in the North. Rather it requested Iraq to allow international humanitarian organisations immediate access to all those in need. In addition to this, the call of the Secretary-General to use all resources to address the needs of refugees did not involve the use of military armed intervention.²⁵³ It thus did not include an authorisation for a unilateral or multilateral use of force. The function of the UN within the North was mainly based on several agreements Memorandum of Understandings that were signed by the UN and the Iraqi government. The Allied action in the North of Iraq would be viewed thus as a unilateral action or "humanitarian" "intervention" rather than an "Enforcement Action under Chapter VII". The role of the United Nations within the North was based, as mentioned earlier, on the agreements signed with the Government of Iraq. The Safe Areas were thus "handed over" from the Allied forces to the United Nations following these agreements.

²⁵² See Greig D.W., and Alton, P., (1990), p.146.

²⁵³ See Akhavan, P., (1993), p.45.

Resolution 688 breaks new grounds by linking refugee flows to threats to peace and security. This new element was received with much apprehension on the part of many countries which saw this as an infringement on the sovereignty of Iraq. The arguments that preceded the adoption of this Resolution reflected the tension surrounding the issue of access within Iraq.²⁵⁴

It is worth mentioning that although the Resolution is considered progressive in the sense of drawing a link between refugee flows and threats to peace and security, it did not draw a link between severe human rights violations per se and threats to peace and security. It is only when these violations result in massive refugee flows that it becomes a threat to international peace and security. This remains a serious limitation in the Resolution. Historically, the Council has refrained from taking action in situations which involved human rights violations. In 1988, the Council received calls from Amnesty International to act on behalf of the Kurds in the North of Iraq. The Council did not take any action on their behalf even though they were exposed to severe human rights violations amounting to genocide. In Resolution 688, the Council refrained from

²⁵⁴ During the deliberations preceding the adoption of Resolution 688, the Representative of Yemen noted the following:

"... We would have supported the present draft resolution had it been confined to addressing humanitarian issues. There are many bodies within the United Nations System that are competent to address them. However, the draft resolution now before the Council, although dealing with the humanitarian issues that face the Iraqi people, focuses on only one area and one category of the Iraqi population. We object to the draft resolution because it attempts to politicize the humanitarian issue. Indeed, that, in our view is the thrust of the draft resolution.

The draft resolution claims that there is a problem threatening international peace and security. We do not share that view. There is no conflict or war taking place across the borders of Iraq with its neighbours. The Draft Resolution also refers to political developments within Iraq, but according to Article 2 of the United Nations Charter it is not within the Council's purview to address internal issues in any country. Further, the draft resolution calls for internal dialogue, and that is obviously an attempt to intervene in the internal affairs of Iraq.

However, our position with regard to the draft resolution is based not only on certain provisions in its text but also on our objection to the fact that the whole issue is not within the competence of the Security Council. The Security Council is mandated only to safeguard international peace and security. In our view, the draft resolution sets a dangerous precedent that could open the way to diverting the Council away from its basic functions and responsibilities for safeguarding international peace and security

justifying its action on the atrocities that were committed. Instead, the threat to peace and security was linked to flows of refugees to neighbouring countries. The atrocities that occurred in the south of the country, which did not provoke similar refugee flows, did not get the same reaction from the Council until late. When the Council in Resolution 688 referred to the human rights situation, it only expressed the hope "that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens were requested".²⁵⁵

3. The Memorandum of Understanding

The formal involvement of the United Nations in the Northern part of Iraq was based on the Memorandum of Understanding that was signed by the government of Iraq and the United Nations. The United Nations were represented by Prince Sadruddin Aga Khan, the Executive Delegate of the Secretary-General for the Humanitarian Program for Iraq, Kuwait and the Iraq/Iran and Iraq/ Turkey border area. The Memorandum of Understanding was signed on April 18th 1991. It represented the summary of discussions that occurred in Baghdad in the period between 13 and 18 April between the Iraqi government and the United Nations Mission.

In accordance with the provisions of the Memorandum, both sides acknowledged the "importance and urgency of adequate measures, including the provision of humanitarian assistance, to alleviate the suffering of the affected Iraqi civilian population". The Iraqi government, on its part, gave its support for the United Nations humanitarian efforts aiming at assisting displaced persons and aiding the repatriation of refugees

In accordance with paragraph three of the Memorandum, both sides agreed that the "measures to be taken for the benefit of the displaced persons should be based primarily on their personal safety and the provisions of humanitarian assistance and relief for their return and normalisation of their lives in their places of origin." In accordance with paragraph four, the government of Iraq agreed to co-operate with the

and towards addressing the internal affairs of countries..." See General Assembly Security Council Materials-S/PV.2982, 5 April 1991.

²⁵⁵ Resolution 688, 5 April, 1991, para. 2.

United Nations "to have a humanitarian presence in Iraq, wherever such presence is needed, and to facilitate it through the adoption of all necessary measures. This shall be insured through the establishment of United Nations Sub Offices and Humanitarian Centres (UNHUCs), in agreement and co-operation with the government of Iraq". In other paragraphs of the Memorandum it was agreed that each of these centres would be "staffed with United Nations Civilian personnel which, in addition to the regular staff members of the relevant United Nations agencies, may also include staff cooped from the non governmental organisations, the International Committee of the Red Cross and the League of the Red Cross and Red Crescent Societies...". The UNHUC "shall facilitate the provisions of humanitarian assistance to the needy and would include, inter alia, food aid, medical care, agricultural rehabilitation, shelter and any other humanitarian and relief measures geared to the speedy normalisation of life, in conformity with the principles of this Memorandum. UNHUCs shall also monitor the overall

situation in this regard to advise the Iraqi authorities regarding measures to enhance their work." It was further agreed that routes of return "with relay stations along the way as well as logistic back up capabilities, will be set up urgently in co-operation with the Iraqi authorities to provide to civilians, particularly the women and children as well as the aged and the sick going back to their home areas, the food aid, shelter and basic health care they will need along the way. The United Nations staff will accompany such groups as required".

Paragraph eight of the Memorandum also dealt with the organisation of these Centres. It stated that the United Nations shall take urgent measures "in co-operation with the government of Iraq, for the early stationing of staff as well as the provisions of assistance and relief in all designated centres and, as a matter of priority, those close to the Iraqi borders with its neighbouring countries. For this purpose, the United Nations may, in agreement and co-operation with the government of Iraq, organise air lifts to the areas concerned, as required, as well as transportation by road of humanitarian assistance and relief goods from and through the neighbouring countries under United Nations or other humanitarian auspices. The Government of the Republic of Iraq shall adopt the necessary measures in order to render such aid in a speedy and effective manner". This humanitarian assistance in accordance to the Memorandum shall be

distributed to the people in need as well as the displaced population, to help normalise their situation. This assistance shall be distributed impartially, to whoever is in need of it, regardless of their location. The passage of this relief assistance will be facilitated by "all Iraqi officials concerned, including the military". Furthermore, the Government of Iraq will co-operate together with the United Nations to establish a "relief distribution and monitoring structure to permit access to all civilians covered by the relief Program, as soon as possible".

In order to co-ordinate the implementation of these humanitarian activities at the UN level, a co-ordinator would be assigned to Iraq at the level of Assistant-Secretary General. "He will have permanent access to a high-level government official responsible for emergency activities in the country, to discuss and resolve policy and operational issues that may arise during the implementation of the Program". The Memorandum also notes that the Iraqi government shall co-operate "in granting United Nations field staff access to the parts of the country requiring relief, by air or road as needed, to facilitate the implementation and monitoring of the Program". It further states that NGO's and other relief organisations would be encouraged to participate in implementing this operation.

The Iraqi government will further "help in the prompt establishment of the United Nations Sub Offices in support of the UNHUCs and other programs in towns". These offices would assist in the facilitation of the relief operations to internally displaced people and their voluntary repatriation. For the implementation of this programme, the government of Iraq "will make available cash contributions in local currency to help cover in-country operational costs".

In accordance with paragraph 20, the implementation of these principles shall be "without prejudice to the sovereignty, territorial integrity, political independence, security and non-interference in the internal affairs of the Republic of Iraq". Paragraph 21 established the deadline for the cessation of the application of these principles, which was December 31st 1991.

The above mentioned Security Council Resolutions constituted the legal umbrella for the operation of the multilateral action against and within Iraq. The Memorandum of Understanding, on the other hand, established the framework for the United Nations action within Northern Iraq. This action within the north of Iraq was thus a combination of multilateral action on 'humanitarian grounds' and institutionalised action represented by the UN. The two actions were complementary in this case, in the sense of leading to the establishment of the Safe Areas in the North of the country. The two actions carried very different connotations when studied separately. The first remains an action performed by one or a group of states upon the territory of another state due to 'humanitarian considerations'. The second represents an act performed by an international organisation, legally justified by the Security Council Resolution and written agreements.

Relevant questions are inevitable when discussing the issue of international action in countries of origin. First, what kind of action is needed? Unilateral or United Nations action; Second, what should the motivation for such an action be? Should severe violations of human rights lead to international action, or should it only merit such an action when it amounts to threats of peace and security; Third, should the issue of sovereignty stand as a barrier for such an action by the international community?

B. Political Framework

As mentioned earlier the problem of mass exodus is not only the problem of the producing countries, but it also has regional and international implications, and in many circumstances requires urgent international response. The situation of the Kurds in Northern Iraq is but one example. These humanitarian crises are often the result of severe human rights abuses in countries of origin, or resulting from internal conflicts within these countries.

International reactions to such crisis have varied considerably depending on many political, historical, cultural, and humanitarian considerations from the intervening parties, whether it is a state, or international organisations. In some cases, like in the case of northern Iraq, the motivation to preserve regional stability is the motive for action.

Historical ties, particularly in individual state's response, play sometimes a very important role. Cultural ties could be one motivation for external actions. Finally, humanitarian considerations also play an important factor. Public opinions in many of the states constitute the motive for action when faced with a severe humanitarian crisis in another state.

Different crises have elicited different kind of responses by the international community. These responses could be categorised into two main categories: intervention by individual states, and action by "transnational, intergovernmental and non-governmental" organisations. Further sub-categories are identified in the two categories.

Whereas the term humanitarian intervention has been used by some to refer to the two categories, it is essential to draw some distinction between action by individual states to which the term "humanitarian intervention" applies, and the other category of international action to which another terminology is required.

The first category, i.e., action by individual states involves two kinds of action: coercive and non-coercive. Coercive humanitarian intervention could involve either military action or non military humanitarian intervention. Whereas the coercive military humanitarian intervention involves the actual military involvement of one or a group of states for a declared humanitarian purpose, the non-military coercive intervention involves the application of sanctions rather than actual military involvement.²⁵⁶

Another form of humanitarian intervention by governments includes the application of non-coercive action. This might involve either the use of military or non-military action. Military action, which is non-coercive, could include different kinds of peace keeping activities by the intervening state, or the involvement of the military in response to disaster situations. This kind of action performed by the military aims at facilitating the distribution of relief materials to areas which face natural disasters.

²⁵⁶ See Ramsbotham, O., and Woodhouse, T., (1996), p. 115.

The other form of the non-coercive humanitarian intervention is non-military intervention. This involves the distribution of aid, relief, and humanitarian assistance by individual states or a group of states. It also includes the contributions/donations by government agencies.²⁵⁷

The above mentioned type of action is the activity performed by single or a group of governments forming a whole area of what is called humanitarian intervention. Another category of similar action is undertaken by international organisations where a different kind of terminology is needed to avoid any misleading. United Nations action, the inter-governmental and the non-governmental organisations falls into this category. Action by different UN organisations agencies, the UNICEF, UNHCR, UNDP, WFP, by organisations like the ICRC and different types of NGO's work falls in this category. The concentration in the following part will be around the United Nations role in cases of humanitarian emergencies rather than on other agencies action.

United Nations action could be divided into several categories including forcible action, non forcible-military action, and non military intervention. Forcible intervention by the United Nations implies the application of enforcement measures under the provisions of the Charter. The criteria for applying enforcement measures was covered in the previous legal section. The assessment by the Council that a situation involves a threat to international peace and security allows for enforcement action under the provisions of the Charter.

The other kind of action by the United Nations involves the application of the non-forcible military action, peacekeeping. Peacekeeping activities are described as operations:

"involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and co-operation. While they involve the use of military personnel,

²⁵⁷ Ibid., pp. 114-117.

they achieve their objectives not by force of arms, thus contrasting them with the 'enforcement' action of the United Nations Article 42".²⁵⁸

The Charter of the United Nations considers, under the provisions of Chapter VI, possibilities and means for peaceful settlement of disputes, which includes mediation, arbitration, and negotiation. Many writers tend to describe peacekeeping operations as falling between Chapters VI and VII.²⁵⁹ This is particularly true following the expansion of peacekeeping operations after the end of the Cold War.

The increase in the number of the peacekeeping operations in the Post Cold War era has also been accompanied by an expansion of the scope of the activities involved. Whereas classical peacekeeping operations involved the application of military forces for monitoring the peace between two factions, the peacekeeping operations following the Cold War involve further humanitarian and even political elements. Such operations occurred in the domain of human rights and protection of threatened groups, such as the refugees.²⁶⁰

The non-military intervention by the United Nations involves mainly the distribution of relief to the affected population. The success of such operations dictates that the United Nations applies strictly the principles of impartiality and neutrality.²⁶¹

After identifying some of the responses that have been used by the international community towards a crisis, some questions are ought to be addressed. The first question is what should be the motive for any response by the international community. The second is what kind of response is needed. The third is in which type of conflicts is this response possible.

²⁵⁸ See White, 1993, 183. Cited by Ramsbotham, O., and Woodhouse, T., (1996) P.123.

²⁵⁹ Ibid., p. 123.

²⁶⁰ Ibid., p. 126.

²⁶¹ Ibid., p. 122.

1. Motivation for International Action

During the Cold War period, the obligation, mainly by the United Nations, not to intervene within the internal affairs of states was pre-dominant. Gradually considerations of severe human rights violations, refugee crisis, and other humanitarian crisis resulting from civil war situations are becoming conducive for international action within countries of origin. The obligation is gradually shifting towards the protection of vulnerable groups.

Human Rights and International Action

Traditionally, human rights issues were considered by international law as falling within the domestic jurisdiction of states. However, a gradual internationalisation of human rights issues was brought about by the United Nations Charter and the subsequent Conventions and treaties. The United Nations Charter made specific provision for states to co-operate for enhancing the domain of human rights. In accordance with Articles 56 and 55 of the Charter, member states were requested to co-operate with the United Nations for achieving "Universal respect for, and observance of human rights and fundamental freedoms of all"(article 55).

Furthermore, the 1948 Universal Declaration of Human Rights gave further emphasis to the issue. This was followed by two UN Covenants (1966) which specified the civil, political, economic, social, and cultural rights. These two Covenants further internationalised these rights²⁶². Further treaties were later adopted affirming the rights of women, children, refugees, as well as general freedoms. All the above mentioned treaties helped to bring human rights issues into the international arena.²⁶³ Apart from the United Nations, organisations such as the Council of Europe and the Organisation of

²⁶² See International Covenant of Civil and Political Rights(16 December 1966),(entered into force on 23 Mar. 1976), Cited by Pease, k.k. and Forsythe, D. P., (1993), p.295.

²⁶³ Blaustein, A.P., Human Rights Sourcebook (New York: Paragon House Publishers, 1987), Cited by Pease, k.k. and Forsythe, D. P., (1993), p. 295.

the American States have played an important role in promoting human rights issues in their area.²⁶⁴

During the following period, action by the international community on behalf of human rights issues was slowly, but gradually improving. The situation in South Africa in 1967 was of concern to the United Nations Commission of Human Rights, which had established an expert's working group on the Southern African countries in general and South Africa in particular. Similar studies were launched on the situation of the human rights situation in the Arab territories occupied by Israel in the 1967 war. A further study was done following the 1973 military coup in Chile. This study was undertaken in 1975.²⁶⁵

During the last decades many states became signatories of the human rights conventions and treaties. Furthermore, increasingly states accepted to be subjected to varying monitoring systems. Many, on the other hand, still resist obligations under these legal instruments, since they consider this as an infringement on their sovereignty. A large percentage of these states fear that the concept of human rights might be abused as a pretext for the interference by other states within what they consider to be their internal jurisdiction.

Certainly, not all kinds of human rights violation call for international action. Many of the human rights issues remain within the domestic jurisdiction of states. Furthermore, different cultures view human rights issues in a relatively different manner. Cultural specificity, in this regard, ought to be respected. However, there exist certain situations which witness severe and systematic violations of basic human rights. Under such circumstances, like the case of genocide for instance, human rights issues cannot be considered as a domestic concern. The situation of the Kurds in Northern Iraq in 1988 was considered as a domestic concern. A genocide was committed against the Kurds in what was known as the 'Anfal Operation'. This genocide was witnessed by the

²⁶⁴ In the case of The Council of Europe, it concluded in 1950 the European Convention on Human Rights, and established an implementing machinery for it. The Organization of American States, has also established the Inter-American Commission on Human Rights in 1959, which worked on the promotion of the concept of Human Rights. See Rodley, N.S., (1992), p.19.

²⁶⁵ Ibid., p. 22.

international community which did not react to protect the targeted community. Following the Gulf War the Shia community in Southern Iraq was severely targeted by the Iraqi regime. Severe atrocities were committed against the Shia groups who were left to face their fate without receiving any help from the international community. This was justified by the fact that these atrocities did not produce refugee flows, such as in the case of the Kurds in the North.

Linking the issue of refugees flows to threats to international peace and security, as in Resolution 688, is a very important development in this regard. However, severe human rights violations, even if they do not lead to refugee flows should not be left unchecked by the international community, represented by the United Nations.

The United Nations has in fact applied its enforcement action in some situations which involved severe human rights violations which were seen as a threat to international peace and security. As mentioned previously, the human rights situation in South Africa and the policy of apartheid had called for international concern and action. Resolution 417 (October 31st 1977) expressed serious concern on "reports of torture of political prisoners and the deaths of a number of detainees, as well as the mounting wave of repression against individuals, organisations and the news media" and the belief that "the violence and the repression by the South African racist regime have greatly aggravated the situation and will certainly lead to violent conflict and racial conflagration with serious international repercussions"²⁶⁶. The Security Council had applied enforcement action at a later point against the South African regime in response to its apartheid policies. On the 4th November 1977, the Council adopted Resolution 418, under Chapter VII of the Charter, in which it imposed an embargo on any military or nuclear co-operation with the regime.²⁶⁷

The end of the Cold War was accompanied by an activated role for the UN on human rights issues. This is taking place despite the resistance of many countries, some of which are on the Security Council. The UN Secretary-General noted in his annual report in autumn 1991 the following:

²⁶⁶ See Resolution 417 on the 31 of October 1977, Cited by Rodley, N. (1992), pp.28.

"It is now increasingly felt that the principle of non-interference within the established domestic jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. The fact that in diverse situations the United Nations has not been able to prevent atrocities cannot be accepted as an argument, legal or moral, against the necessary corrective action, especially when peace is threatened"²⁶⁸.

This view was a reflection of the growing concern of the international community over human rights issues. It further reflected the increased association between severe and systematic human rights abuses and threats to international peace and security. In the case of Northern Iraq, the outflow of Kurdish refugees to neighbouring countries, due to atrocities committed against them by the Iraqi regime, was linked to threats to peace and security in the region. This was conducive to the adoption of Resolution 688 by the Security Council.

In the case of Somalia, the Security Council adopted Resolution 794, under Chapter VII of the Charter, in which it recognised the uniqueness of the situation, and authorised accordingly the use of all the necessary means for the delivery of humanitarian assistance and consequently the creation of a "secure environment"²⁶⁹

This was witnessed in the case of Former Yugoslavia, where the Council adhered to Chapter VII when it linked the situation of severe violence within Former Yugoslavia and threats to peace and security. Following the fighting in Bosnia-Herzegovina in May 1992, the Council, acting under Chapter VII of the Charter, adopted Resolution 757.

Despite these developments in international concern on behalf of human rights issues, the issue of sovereignty is in many cases still considered as the main impediment

²⁶⁷ See Resolution 418 (4 November 1977), Cited by Rodley N.,(1992), p.28.

²⁶⁸ UN Doc. A/46/1,(1991), cited by Pease, K.K. and Forsythe D.P., (1993), p. 308.

²⁶⁹ Ibid., p. 309.

with regards to action in this domain. In weighing the two issues, during the Security Council's deliberations preceding Resolution 688, the Representative of Ecuador stated that in order for his country to take a position on the issue, his country "has most carefully studied two fundamental principles of the United Nations Charter. The first is that of unrestricted respect of human rights", presented in the Charter's preamble, and the second is the principle of "non-intervention in the internal affairs of other States.", which is considered by the United Nations Charter as "one of the main pillars of the community of nations and the ability of nations to work together effectively". He affirmed that the principle of non-intervention "must be completely respected today, tomorrow, and for ever. It is a principle which admits of no question, and must be given our complete support. Non-the-less, the application of this principle prompts us to think that the international community cannot remain indifferent to what is happening in Iraq. It might perhaps have been a question of internal jurisdiction in Iraq, if the situation had not gone beyond the borders of the country. The phenomenon which we are considering, in fact, has now reached the borders of neighbouring countries; the use of force has now been extended up to the borders of two of those neighbouring countries; the human pressures of the displaced communities of over 1 million people are exerting on those borders constitute, my delegation believes, a threat to international peace and security. In other words, this is a situation that goes beyond the sphere of internal affairs of a state; it is a situation which is affecting international relations and may become a threat to peace".²⁷⁰

The Issue of Sovereignty

The issue of sovereignty, which was confirmed in the United Nations Charter, constituted the main barrier against interference within what has been considered by many Third World countries as domestic affairs. This could be understood when studied within the context of the recent history of many of these countries, which suffered for decades from colonisation. The following statement by the Chairman of the Group of 77 in the General Assembly in 1992 reveals this clearly:

²⁷⁰ See General UN Security Council Materials--S/PV.2982, 5 April 1991.

"Our worry stems out of our history when many of us, as colonial subjects had no rights. The respect for sovereignty which the UN system enjoins is not an idle stipulation which can be rejected in the name of even the most noble gestures. And an essential attribute of that sovereignty is the principle of consent... the UN cannot and must not be commandeered into forming an assistance brigade that will deliver its gifts by coercion. That will definitely be unacceptable to us".²⁷¹

This worry on behalf of many Third World countries is understandable and very legitimate if the intervention is done by one state or a group of states within the territory of another state, i.e., in case of a humanitarian intervention. Under many circumstances, human rights issues are used as an excuse for intervention by one state in the internal affairs of the other, for political considerations. On the other hand, when the action is a United Nations action, it carries further legitimacy, particularly when an increasing number of states are becoming themselves signatories to many international human rights treaties in this domain. Consideration of sovereignty, in such cases, could not thus be used as a blanket to cover human rights atrocities.

Furthermore, in our interdependent world, action occurring within the territory of one state has regional and international impact. A state which has serious refugee flows stemming from its territory into other countries would be much weaker to use the issue of sovereignty to prohibit an international institutionalised action upon their territories. Increasingly, more are willing to allow such action by international organisations upon its territory. Corridors of Tranquillity, and Safety Zones are gradually being accepted in cases of humanitarian emergencies.

2. Type of Response Needed

As mentioned earlier, responses by the international community towards refugee crises or severe humanitarian crises varied between states' sponsored response and United Nations response. When discussing the need for further involvement by the

²⁷¹ See Childers, E., in Ferris, E., (1992), p. 49.

international community in issues relating to human rights in countries of origin, or refugee crisis, an identification of the kind of involvement is very much needed.

Humanitarian intervention v. UN action on humanitarian grounds

The issue of humanitarian intervention was tackled extensively following the Gulf Crisis. Although this topic is not a new topic, the humanitarian crisis of the Iraqis, and the Kurds in particular, following the war has put further emphasis on the topic. A lot of talk in the international arena was witnessed about the 'right to intervene' (expressed by the representative of France to the Security Council) on behalf of the stranded Kurds. When tackling this topic, many writers referred to humanitarian intervention to mean United Nations action as well as unilateral action by other States. Broadening the topic in this manner is confusing and misleading. A distinction needs to be drawn between humanitarian intervention which is often a unilateral or multilateral action, and enforcement action by the United Nations based on humanitarian grounds. A report of an Advisory Committee on Issues of International Public Law on "The Use of Force For Humanitarian Purposes" defines the two situations differently. The Committee considers that the term humanitarian intervention often results in misinterpretation. The term might lead to the following different interpretations:

- "a. The provision of aid, without the consent of the country concerned, to relieve the overwhelming need which is endangering many lives;
- b. The use of the powers of the Security Council laid down in Chapter VII of the UN Charter in response to large-scale human rights violations in a particular country;
- c. Intervention, without UN authorisation, by a country or group of countries, involving the use or the threat of force, in the territory of another country, in response to large scale-human rights violations there".²⁷²

²⁷² See Advisory Committee On Human Rights and Foreign Policy & Advisory Committee On Issues of International Public Law, (1992), p.2.

Situation (a) according to the report is known as in a "humanitarian emergency situation". In a case where the country facing such a situation refuses the provision of aid, then it might give rise to one of the two other situations. In itself it does not constitute either humanitarian intervention, or United Nations enforcement action. Situation (b), on the other hand, occurs when the Security Council determines under Chapter VII, as discussed in the previous section, that a threat to peace and security does exist, and decides to take measures accordingly. These measures by the UN or authorised by the UN do not constitute humanitarian intervention²⁷³, but rather

"Enforcement Measures on Humanitarian Grounds. The Committee believes that the concept of humanitarian intervention applies only to the third situation i.e., to situations where one or more states intervene without the previous authorisation of the Security Council using the force of the threat of force, in the territory of a third country to put an end to large scale human rights violations taking place".²⁷⁴

Regarding enforcement action on humanitarian grounds, the Committee supported recommendations for the elaboration of some guidelines to govern the involvement of the Security Council in internal situations. The aim of these guidelines is not to restrict the "Council's power to interpret article 39". The aim is rather to "assist in ensuring greater clarity and consistency in the interpretation of Article 39 and in striking a balance between the UN's different objectives: the maintenance of peace and securityon the one hand and on the other the international promotion and protection of human rights".²⁷⁵

²⁷³The term was defined as

"the threat or the use of force by one or more states within the territory of another state, with the sole aim of halting or preventing large-scale, serious violations of fundamental human rights, which are taking place or which appear imminent, such rights being in particular the right to life of individuals, regardless of nationality, in cases where the threat or use of force is carried out without either the prior authorization of competent UN bodies or the permission of the legitimate government of the country in the territory of which the intervention takes place" Ibid., p. 15.

²⁷⁴ Ibid., p. 3.

²⁷⁵ These guidelines and recommendations, which could be a part of a Resolution including the following points:

Whereas Enforcement Action has its legal basis in the provisions of the Charter, particularly in Chapter VII of the Charter, the same cannot be said about the issue of unilateral humanitarian intervention. Unilateral intervention on humanitarian grounds has no legal basis in international instruments. It is seen instead as the failure of the system of collective security derived from the Charter under article 51, known as the link theory. This theory which assumes that customary international law has developed to give a legal basis for the application of this action. The Committee, which expressed reservations on this theory, doubted whether the "link theory can still be deemed applicable in the light of the closer relations between the great powers and hence the

1."The situation in question must be an emergency, in which fundamental human rights are being violated on a large scale. In the first place, this should be interpreted as attacks on people's right to life in the widest sense. This should be understood to mean not only actual killing, but summary executions or armed attacks by the military or the police on civilian targets, but all manner of large-scale life-threatening situations such as famine and natural disasters where proper care for the victims is rendered impossible. As regards the scale on which the violations must take place, the Committees are forced to the conclusion that it is impossible to provide a more definite yardstick than 'on a large scale'. Assessments will have to be based on individual cases.

2.The action taken should be in proportion to the gravity of the situation. First and foremost this means that armed intervention should be undertaken only if the less far-reaching, i.e., peaceful, means have failed or are impossible. Secondly, the proportionality requirement related to the way in which force is used or threatened and thirdly to the duration of the armed intervention. Here too, however, much will depend on the specific circumstances, for if human rights can be effectively safeguarded in the short term. A brief intervention in and a rapid withdrawal from the country concerned could entail the risk that the impact of intervention would be short-lived and might even add to the dangers of the situation. To prevent a negative impact of this kind, the action taken might also encompass various forms of what might be called after-care, such as assistance with building up of a new administrative apparatus and organising elections.....

3. The effect of intervention on the constitutional structure of the country against whom it is directed should be limited to the minimum necessary to achieve the original objective. As stated above this may mean, in certain circumstances, that interventions are designed to effect a number of changes in constitutional structure. The threat posed by intervention to international peace and security should not be of such a nature that it might result in the loss of more lives than were being lost in the situation which prompted intervention in the first place. This poses a dilemma in respect of the use of force for humanitarian purposes, in that sufficient force must be used to put a stop to large-scale human rights violations but not enough to destabilise regional relations, as this could result in a greater loss of life than the loss of life that originally prompted the intervention".Ibid., pp. 11-12.

removal of a major obstacle to the working of the system of collective security".²⁷⁶ The Committee further noted in its report that there exists no legal justification in international law for unilateral action apart from what is embodied in Chapter VII and the provisions of Article 51 of the Charter. While noting that there are situations where severe human rights violations do call for unilateral humanitarian action, the Committee stressed the risk that such an action could be abused for political objectives.

This reservation on humanitarian intervention, expressed in the Committee's report, is shared by many countries. This is particularly true with many Third World Countries with their history of colonisation. Unilateral intervention on humanitarian grounds is viewed with much reservation as being an excuse for intervention in political affairs within these states by other states. Discussions in the Security Council that accompanied the initiation of Operation Provide Comfort in Northern Iraq revealed these reservations clearly. Whereas Operation Provide Comfort was heavily criticised by the Iraqi government, the UN action that followed this operation was received with further co-operation from that government. The UN action, despite all the criticism that it faced from the Iraqi government and other governments, was viewed as more legitimate than any other unilateral action.

Historically, The issue of humanitarian intervention received varied reactions, depending on the different eras. In the pre-League of Nations period, humanitarian intervention took the form of intervening on behalf of communities threatened with severe human rights violations²⁷⁷. Writers on humanitarian intervention in that period viewed this kind of intervention as necessary to protect minorities from severe human rights violations. Some argued that this kind of intervention was acceptable in "extreme cases... where great evils existed, great crimes were being perpetrated, or where there was danger of race extermination"²⁷⁸. It should be noted though, that most of these

²⁷⁶ Ibid., p.7.

²⁷⁷ Interventions by France, Great Britain, and Russia in Greece (1827-1830), the French intervention in Syria (1860-1861), Intervention of Russia in Bosnia, Herzegovina and Bulgaria (1876-1878), the Austrian-Hungarian and Russian intervention in Macedonia (1903-1908), are some of the examples of interventions that were justified on Human Rights Grounds. Nanda, V.P., in Ferris, E., (1992), p.28.

²⁷⁸ Ibid., p. 28.

interventions that were partially justified on humanitarian grounds, carried other motives with them in addition to the humanitarian considerations.

In the League period, there was not any legal basis or justification for the concept of humanitarian intervention in the League's Covenant, nor in the Conventions of that period²⁷⁹. The principle of non-intervention was however confirmed in the Charter of the United Nations, particularly Articles 2(4) and 2(7). This was seen to include all kinds of interventions including humanitarian intervention. The principle of non-intervention was further confirmed in many of the subsequent declarations²⁸⁰. The United Nations Charter which had provisions on enforcement action by the United Nations, did not have similar provisions on unilateral humanitarian intervention. On the contrary, it had put reservations on the use of force by states, as indicated in Article 2(4).

The principle of non-intervention in internal affairs of states was further confirmed by the International Court of Justice, in relation to the 1949 Corfu Channel case:

"The alleged right of intervention as the manifestation of the policy of force, such as has, in the past, given rise to most serious abuses...cannot ...find a place in international law...[especially when] it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself".²⁸¹

²⁷⁹ Humanitarian intervention was not viewed as acceptable under Kellogg-Briand Pact of 1928. The 1928 Convention on the Duties and Rights of States in the Events of Civil Strife, the 1933 Montevideo Convention on Rights and Duties of States, and the 1936 Buenos Aires Additional Protocol Relative to Non-Intervention all affirmed the principle of non-intervention by one state in the internal affairs of another. *Ibid.*, p.29.

²⁸⁰ See the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. See also the 1970 Declaration on Principles of Law Concerning Friendly Relations and Cooperation Among States. Cited by Nanda, V.P., in Ferris, E., (1992), p.29.

²⁸¹ *Ibid.*, p. 30.

The concept of humanitarian intervention has been thus criticised as being the right that was applied often by the stronger states in relation to weaker ones, a right that was abused by many of these powerful states.

The principle of non-intervention which was confirmed in the Charter was not respected during the Cold War period, which was accompanied by many unilateral and multilateral interventions in the internal affairs of states. Such interventions, on humanitarian grounds, were in many cases justified by the paralysis of United Nations enforcement action. The rivalries of the Cold War left the Security Council almost paralysed. This left a chance for many powerful states to justify the concept of humanitarian intervention. The arguments given on behalf of the concept stated that the urgency, and severity of some situations justifies unilateral intervention, particularly when the United Nations is not able to take action. This was relevant particularly in rescue missions²⁸². The concept was thus used as a right to protect nationals within the territories of another state. Humanitarian intervention was thus justified as a form of self

²⁸² When justifying the Entebbe rescue mission before the UN, the US Representative to the UN stated the following:

"There is a well established right to use limited force for the protection of one's own nationals from the imminent threat of injury or death in a situation where the State in whose territory they are located is either unwilling or unable to protect them. The right.... is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury".

In similar operations which were faced with criticism within the UN, such as the Stanleyville operation in 1964, the representatives of countries like the UK, Norway, France, and Brazil supported such operations but for different reasons. Among these reasons was the inability of the UN to react rapidly to such urgent situations where civilians were in serious risk of death, and, particularly, since these operations were aimed only at saving the lives of the threatened civilians, and did not involve any further political objective. *Ibid.*, p. 31.

defence²⁸³. This notion developed over time to involve the use of force by one state to protect the nationals of another state²⁸⁴.

Many of the interventions, that followed, the United States in the Dominican Republic (1965), Cambodia (1975), Grenada (1982), Panama (1989), and Nicaragua(1982), the Tanzanian intervention in Uganda and the Vietnamese intervention in Cambodia (1979), were motivated by causes additional to humanitarian considerations. Many of these interventions²⁸⁵ led to some political or structural changes within these countries. Humanitarian motives have thus been used as a disguise for further political intervention.

Consequently, humanitarian intervention has been viewed by many weak states with much reservation and inhibition²⁸⁶. It has been seen as a right exercised by powerful states against weaker ones, a right that is associated with other interests of the intervening states. Many of these interventions lacked international support, particularly any legal institutionalised support. Criticisms in the General Assembly of some of these intervention captured the majority of the votes.²⁸⁷

²⁸³ The American intervention in Iran in 1980 to rescue the American hostages, was justified as a form of self-defence. The Israeli intervention in Uganda in 1976 at Entebbe airport on behalf of Israeli hostages was also justified as a form of self defence. See Fairley, note 4 above, 53-57, cited by Pease, K. K., and Forsythe, D. P., (1993), p.28.

²⁸⁴ The intervention of India in East Pakistan in 1971 was partially justified as a kind of humanitarian intervention on behalf of ethnic Bengali's murdered by the Pakistani military units. See Frank, T. M. and Rodely, N.S.(1973): pp. 273-305, cited by Pease, K.K. and Forsythe, D.P., (1993), p.297.

²⁸⁵ See Pease, K. K. and Forsythe, D.P., (1993), p.300.

²⁸⁶ Vewery notes that:

"probably there has been not one genuine example of a humanitarian intervention in history; genuine in the sense that the basic condition of 'relative disinterest' on the side of the intervenor was fulfilled, that humanitarian considerations clearly provide the only major objectives and that no overriding or equally important political or economic considerations were involved". See Verwey, W., in Ferris, E., (1992), p. 119.

²⁸⁷ See UN Chronicle 20 (December 1983): 17, cited by Pease K.K. and Forsythe D.P., (1993), p. 299.

It is worth noting that, when applied, humanitarian intervention was inconsistently applied. In many instances in recent history, severe human rights violations were witnessed, and humanitarian emergencies did evolve. However, due to the lack of political or economic interests of major great powers in these emergencies, no major humanitarian intervention took place.²⁸⁸

Furthermore, even if the concept of humanitarian intervention, was considered by some writers as unavoidable during the Cold War period, when UN enforcement action was partially paralysed, the justification for its applicability following the Cold War is contested. The end of the Cold War has left the door open for a revival in the role of the United Nations.²⁸⁹

²⁸⁸ See Frank T.M. and Rodley R.S., 'After Bangladesh; the Law of Humanitarian Intervention by Military Force', 67 American Journal of International Law (1973), p. 279, cited by Vewery, W.D., in Ferris, E.,(1992), p. 119.

²⁸⁹ Some writers on the issue of humanitarian intervention consider that, in severe cases if humanitarian intervention is to be allowed, it should be applied under strict conditions. Vewery, for instance, concludes in his paper on humanitarian intervention that even if humanitarian intervention was recognized at one point as being part of customary international law, its lawfulness nowadays is questionable, in view of the revived role of the United Nations. He however states that the possibility of humanitarian intervention should not be totally excluded. This is mainly relevant to extreme cases, where there is no possibility for a United Nations action. Vewery then poses the question that "if the proper conclusion would be that the potential legality of humanitarian intervention should not be entirely excluded even today, the question would arise whether or not, in the affirmative case how, conditions for its legality should be better regulated".

" This resolution should in any case stipulate that any state claiming to become or be involved in an act of humanitarian intervention shall submit convincing evidence to the United Nations, prior to intervention if possible, but subsequent to the intervention if necessary, that:

- (a) it has a 'relative disinterest' in the situation, in the sense that its overriding motive is the protection of human rights, without important motives of a political or other non-humanitarian nature being involved;
- (b) there is an emergency situation, in which fundamental human rights of a non-political nature, particularly the right to life, are (about to be) violated on a massive scale;
- (c) only a last-resort armed intervention can save the (potential) victims, after all peaceful efforts have failed;
- (d) action by the United Nations has proved to be ineffective or cannot be awaited, as the case may be;

Whereas humanitarian intervention by single states is considered by many weak states as an unacceptable approach, action by the United Nations on humanitarian grounds is more and more being accepted by Third World countries. The discussion on the United Nations role is limited here to two types of action: enforcement action and peace keeping operations. As discussed in the previous sections, the enforcement action by the United Nations is dependant on the Council's assessment that a specific situation constitutes a threat to international peace and security. Obviously this action does not depend on the consent of the targeted state. Enforcement action by the United Nations on humanitarian grounds seems to gain much more legitimacy than action performed by individual states for the same motives. Enforcement action, though, has been applied much less than other types of action, be it humanitarian intervention by individual states or United Nations non-coercive military action peacekeeping.

Peacekeeping operations remain a very viable response to many of the crises erupting these days. The kind of peace keeping that does respond to many of the present day crises are not the classical ones, that is strictly military ones, involving buffer forces between two fighting factions. Rather an expanded type of peacekeeping operations with more humanitarian involvement is needed.

The number of peacekeeping operations has actually increased dramatically during the period following the Cold War, and so have the functions associated with the peace keeping operations. These operations seem to be falling between Chapters VI (peaceful settlement of disputes), and Chapter VII (enforcement action) of the Charter.

(e) the impact upon the structure of authority of the target State is confined to a minimum, i.e., only to the extent necessary for the purposes of the protective operation;

(f) the magnitude of the military involvement is proportionate to the requirements of the protective operation; and

(g) the intervention does not constitute a threat to international peace and security of such a magnitude that it might trigger more human loss and tragedy than it purports to prevent or eliminate."

See Verwey, W.D., in Ferris, E., (1992), pp.121-122.

The peacekeeping operations taking place in Cambodia, Somalia, and Yugoslavia (1992) are recent examples of this expansion in the functions²⁹⁰.

The expansion in peacekeeping operations was also accompanied by some criticism of these operations. Some of the criticisms were at the operational level. The other kind of criticism was more about the nature of present day peacekeeping.

At the operational level, the criticism centred around the lack of sufficient co-ordination between the different agencies of the United Nations. The lack of co-ordination was also witnessed between the field and headquarters. The lack of efficiency of some of the troops involved in some of the peace keeping operations was also another source of criticism.

²⁹⁰ Ramsbotham and Woodhouse presented a wider classification for peacekeeping operations including:

"Military Functions

cease-fires: observation, monitoring, maintenance of buffer zones
disarmament of warring factions/regulation of disposition of forces
prevention of infiltration/prevention of civil war
verification of security agreements/supervision of cantonment
mine clearance training/reforming military units

political functions

upholding law and order

Assisting in establishment of a viable government/ensuring political independence
coping/negotiating with non-governmental entities
elections/administration/temporary authority
providing security/re-establishing economic life for local populations
management of local disputes
provision of confidence-building measures
training police

Humanitarian functions

protecting aid convoys (protection of delivery and relief workers)
provision of humanitarian assistance
establishing, supporting and protecting regional safe havens and protected areas
assisting in refugee repatriation and monitoring flows of refugees
logistical support for humanitarian assistance, including transportation, medical and engineer support
verifying human rights agreements"

(taken from Fetherston, 1994, 31-3; UK Ministry of Defence, 1995; US Army, 1994), Cited by Ramsbotham, O. and Woodhouse, T., (1996), p. 127.

The other form of criticism is at the nature of the peacekeeping operations themselves. Many writers on the subject criticise of the way peace keeping operations were taking place. The neutrality that is associated with the operations is in many times a source of criticism. Many criticise the fact that the neutrality practised in areas like Former Yugoslavia and Rwanda resulted in 'slow-motion savagery'²⁹¹. The criticism that accompanied the peace keeping operations in Bosnia and Rwanda led some to question the viability of the operations, particularly in its expanded form:

"If UN peacekeeping is helpless in Bosnia, an inappropriate vehicle for protecting Tutsis in Rwanda, and so on, and if the practitioners for peacekeeping do not believe it can be transformed then the question that needs to be asked is why peacekeeping is needed at all, or, at least, why its activities should not be radically scaled back."²⁹²

Despite this criticism of peace keeping operations by some, an expanded type of peace keeping operations seems to be inevitable for some type of recent crisis:

"The truth, then, is that we need the United Nations and its peace keeping capabilities. Faced with the threat of rising global chaos, we must work with other states to contain the violence and address the underlying causes of conflict-tasks that can only be performed effectively under the UN auspices. No other organisation can mount a response to ethnic and religious warfare with the same degree of international support, or bring to bear the same range of military, diplomatic, and humanitarian capabilities."²⁹³

Furthermore, these multi-dimensional peacekeeping operations whether they are in the domain of human rights, refugee issues, or victims of civil war situations seem to be well accepted by many countries in the Third World. Many of these countries increasingly view action by the UN on their territories as acceptable. Corridors of Relief

²⁹¹ Betts R.K., (1994), cited by Ramsbotham, O., and Woodhouse, T., (1996), p.149.

²⁹² See Rieff, 1994a, 13, cited by Ibid., p. 150.

²⁹³ See Klare, M., 1995,62, cited by Ramsbotham, O. and Woodhouse, T.,(1996), p.146.

that were established by the UN on different territories, and that were accepted by these countries are an example. The creation of Safe Havens in both Iraq and Former Yugoslavia is another example. In the case of Iraq, where the Iraqi government was extremely critical towards Operation Provide Comfort it was much more co-operative when dealing with the UN officials like Prince Sadruddin Aga Khan while negotiating the terms of the Memorandum of Understanding.

Type of conflicts which allows for such actions

The question about the type of conflict areas in which humanitarian action by the United Nations could take place remains one of the most difficult questions to address. Clearly in countries which still have a valid government, this kind of action is easier, be it a peace keeping operation, enforcement action, or any kind of humanitarian action. In the case of northern Iraq, for instance, reaching an agreement with the Iraqi government facilitated the United Nations action within the Safe Areas created.

Humanitarian Action in countries with no central government, and with different fighting factions becomes much more difficult. This is particularly true because of the different factions that are involved. Another difficulty in this kind of situations is that the same vulnerable groups that the humanitarian action is bound to assist or protect might be the target of these attacks by different factions due to political considerations.

The question of selectivity is also very important. Some humanitarian crises were met by immediate international actions, while other crisis have been left neglected. Consistency is thus essential for such an action to become further legitimised.

Safe Havens

The rationale behind creating Safe Havens in countries of origin is derived from several considerations. The first is that the creation of such areas would act as a preventive mechanism for refugee flows in areas which are threatened with such flows. Secondly, the concept of creating such areas would act against the total removal or destruction of a whole population.

Creating Safe Havens in countries threatened with refugee flows acts as a preventive measure. The UN approach so far has been a reactive approach, when creating the Safe Havens, rather than a preventive one. Safe Havens have been created both in Iraq and Former Yugoslavia as a reaction to refugee flows. This measure, however, could be used as a preventive measure prior to the refugee flows. A close co-ordination between different UN agencies, could lead to an identification of places which have a high risk for refugee flows. Creation of such areas in places which are threatened could provide persons who do not wish to leave a chance to stay in relative security in such areas. A close co-ordination is required in this regard with UN specialised agencies in the domain of human rights and refugee work. A lot of early warning mechanisms are also necessary to be able to identify such places which are threatened with forced population movements.²⁹⁴The Sri Lankan experience, to be discussed at a later point, serves as an important experience in this regard.

The creation of Safe Havens also serves as a protective measure against the complete annihilation of vulnerable groups. In the case of Northern Iraq as well as Former Yugoslavia, Safe Havens have stood as a barrier in front of further atrocities and ethnic cleansing. In the case of Northern Iraq, thousands of Kurds were subjected to grave atrocities in 1988 by the Iraqi regime without having any kind of international protection. The creation of Safe Havens in 1991 saved the Kurds in the North from being exposed to a similar situation, and provided a safe place of refuge within their own country. This was not the situation of the Shia Iraqis who were left facing atrocities in the South of the country without any kind of international protection.

²⁹⁴ See in this regard Tiso, C. M., (1994), P.583.

3. Criteria For United Nations Action

Obtaining Consent Of States

Obtaining the consent of the state is an important element with operations which witness UN involvement. Such a consent could gradually increase the countries fears that such an action is an infringement on their sovereignty. It could further facilitate the relief and humanitarian work of the specialised international organisations. Most of the Safe Havens and Safety Zones that were initiated by the ICRC or even by the UNHCR (to be studied at a later point), were initiated only after an agreement was reached with the parties concerned. In almost all of these cases, this prior agreement contributed greatly to the success of these cases.

Even in the case of North Iraq, the Secretary-General refused any involvement of the United Nations in the North of the Country prior to the signature of the Memorandum of Understanding. Furthermore, the annual renewal of the MOU also indicates that the consent was needed prior to the involvement of the UN in the North of Iraq.²⁹⁵ Obtaining state consent prior to a United Nations action thus could greatly facilitate such involvement. Obtaining such agreements is not always possible though.

Lack of Consent and Enforcement Action

Under some circumstances, consent for institutionalised international action is almost impossible to obtain. International action, thus, in the form of Safe Havens could take a more difficult direction. At the same time, such action might be most needed due to the gravity of the situation, and enforcement action might be most needed. The United Nations Charter allows, as mentioned earlier, under Chapter VII, for enforcement action.

²⁹⁵ When discussing the Iraqi context, with all the political and military considerations that accompanied the signing of the agreement, one cannot ignore the fact that the Iraqi government was in a very difficult position to refuse such an agreement. The Iraqi government, however, was very critical of the Allied action on its territory despite its weakness. It saw such an action as a serious infringement of its territory. At the same time, the government was very cooperative

This is particularly true when a certain situation constitutes a threat to international peace and security.

When discussing the issue of enforced Safe Havens, it is very essential to note the concern that many workers in this field have regarding these areas. Many note that in such cases where Safe Havens are actually imposed within a certain country without the agreement of the different factions in the conflict, these Safe Havens should be well protected. Creating Safe Havens in such difficult conditions without providing enough armed forces to protect these areas and to respond to any threat, would make these areas useless or even in some cases more dangerous. Some of the Safe Areas in Former Yugoslavia were actually dangerous areas since they were often targeted.

The United Nations and its growing involvement

When discussing a wider role for the United Nations within countries of origin, as in the case of creating Safe Havens, one concern from many Third World Countries needs to be noted. Many states view the UN as becoming increasingly dominated by one state, or a group of states. Such countries view the under representation of Third World Countries in the Security Council as an element affecting the role of the Council and consequently the UN in general. In reacting to the different Resolutions that were adopted by the Council concerning Iraq, some members considered that the UN was acting very much under the influence of one country, i.e., the USA. They also considered that the policy adopted was not always consistent²⁹⁶. This they view as a

with the Representatives from the United Nations, mainly with Sadr-eldine Aga Khan who was negotiating this agreement.

²⁹⁶ The representative of Cuba stated during the discussions preceding Resolution 688 that:

"...it is equally important, legitimate and appropriate - and even more urgent - for the Members of the United Nations to show their concern about stemming the tendency to manipulate the Security Council and the organization into conforming with the convenience and interests of just a few of the Members, because this is something that affects the entire world, the civilian populations of all countries, whether or not they are members of the Security Council, and the most cherished and legitimate interests of the entire international community"

When discussing the issue of the inconsistency of the Council's policy, the representative noted the following:

weakness affecting the functions of the UN. They consider that if a greater role is to be performed by the UN, some restructuring in the system is needed. Further representation for Third World Countries in the Council would be needed. The discussions preceding the adoption of some of the Resolutions concerning Iraq clearly revealed these concerns.

Since international action is thus very much needed within countries of origin, particularly in case of refugee flows which might be a threat to peace and security at regional and international levels, and furthermore, such action is also needed when there are serious atrocities committed, even if no refugee flows occur, an enhanced role for regional organisations in this domain might make such action acceptable to countries which have such concerns.

The former UN Secretary-General Javier Perez de Cuellar tackled the issue of sovereignty v. human rights in his last report to the General Assembly. He noted that:

"It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which Human Rights could be massively or systematically violated with impunity...The case for not impinging on the sovereignty, territorial integrity and political independence of states is by itself indubitably strong. But it would only be weakened if it were to carry the implications that sovereignty, even in this day and age includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection."²⁹⁷

"...It is also a bit surprising to see the Security Council dealing with humanitarian aspects or consequences affecting the civilian population in Iraq when, at the same time, the Council has been extremely reluctant to consider the situation on the basis of specific, objective, impartial reports submitted to it at its own request".

See the speech of Mr. ALARCON de QUESADA, (Cuba), General UN Security Council Materials --S/PV.2982, 5 April 1991. Cited by Weller, M., (1993), p.130.

²⁹⁷ See UN doc A/46/1.p.10.

At a later point, the former Secretary-General Dr. Boutros Boutros-Ghali further elaborated on the issue. He stated that:

"State sovereignty takes a new meaning in this context. Added to its dimension of right is the dimension of responsibility, both internal and external. Violation of State Sovereignty is and will remain, an offence against the global order. But its misuse may also undermine human rights and jeopardise a peaceful global life. Civil wars are no longer civil and the carnage they inflict will not let the world remain indifferent".²⁹⁸

Humanitarian Action and the International Community

The creation of Safe Havens, in my view, in north Iraq represents a precedent since it represents an international response by the international community towards a situation which witnessed severe human suffering. It was an action carried on by an organisation representing the international community against a widely condemned action by an individual state against its citizens. The United Nations action in the North represents a shift from a state sponsored response towards an international community response in protection of commonly held principles. Even though this response carries with it the elements of an individual state's involvement, particularly in the beginning, it could also be considered as a important step towards strengthening the international organisation role in such situations.

The issue of legitimacy comes into the picture when discussing greater involvement for the United Nations, as representing the international community, in such emergencies, mainly the relation of the United Nations vis-à-vis strong member states. Many countries view the United Nations as an instrument for implementing a super power's politics and giving it a sense of legitimacy. This impression among many Third World countries withdraws the sense of legitimacy from the organisation. Many countries do call for restructuring within the United Nations to undertaken, particularly with regard to increasing the representation of these countries in the Security Council.

This in the view of many could help in increasing the legitimacy of the international organisation to help it better to become an organisation representing the international community rather than an organisation representing the interests of powerful.

Conclusion

The legal framework for creating the Safe Havens in the North of Iraq was studied in the previous section. Relevant Articles within the UN Charter were analysed as well as different Security Council Resolutions and agreements leading to the establishment of the Safe Havens were analysed. The political implications for establishing these areas were also studied. Issues of sovereignty, non-intervention, human rights, and international action were studied. The following section will assess the historical framework for Safe Havens.

C. Historical Framework

Review of Cases

Safe Havens or Safety Zones are not a new development. The creations of Zones "under special protection" has been earlier established to protect civilians in war zones. These zones were created under different conditions from the Safe Areas in Northern Iraq and Former Yugoslavia.

Historically, the protection of civilians in war situations is a very old concept²⁹⁹ In recent history the concept has evolved, particularly with the development of International Humanitarian Law. The idea evolved with Henry Dunant in the 1870's

²⁹⁸ See UN Docs.SC/5359, 31 January 1992, Cited by Koshy, N., in Ferris, E.,(1992), p.104.

²⁹⁹ In case of the ancient Greek civilization, special places were provided as protected areas for civilians in times of wars. The Islamic tradition, as well, offers many examples about the protection of non-combatant in war situations by claiming some cities as protected cities. For further elaboration on the topic see Ténékides, Georges, "Droit International et Communautés fédérales dans la Grèce des Cités", "Recueil des Cours de l'Académie de Droit International de la Haye", Vol. 90, 1956 (II), pp. 462-649, particularly p. 552 ff. See also Zemmal, Ameer "Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire", cited by Sandoz, Y., (1994), p.119.

when he suggested that some cities should be declared "neutral territories" in which injured persons could seek refuge³⁰⁰. This idea, which was further proposed by other persons, became later a part of the 1949 Geneva Conventions.

Prior to the adoption of the 1949 Geneva Conventions, some Protected Zones were actually established in the present century. In November 1936 General Franco declared Madrid as a protected city for civilians. The ICRC was informed and the initiative was a success. Another Safety Zone was created also during the same year during the Sino-Japanese War called the Shanghai Safety Zone. This Zone provided protection for 250,000 Chinese evading the fighting in the Shanghai Region³⁰¹.

Further Safety or neutralised Zones were established in 1948 in Palestine. The ICRC which led this initiative in view of the dangers surrounding civilians, suggested the creation of these Zones in Jerusalem which then had a population of 150,000 inhabitants. These Zones were very helpful in providing refuge for threatened populations.³⁰²

Following the Adoption of the Geneva Conventions on 12 August 1949³⁰³, several Safety Zones were also created by the ICRC. One was a Protected Zone in

³⁰⁰ This was suggested in a letter sent by Henry Dunant to Empress Eugenia. The suggestions were to be given by her to the Prussians. See Sandoz, Yves.(1994), p. 119.

³⁰¹ Ibid., p.122.

³⁰² Ibid. .

³⁰³ Article 23 of the First Geneva Convention and Article 15 of the Fourth Geneva Convention tackles the establishment of the Safety and Neutralized Zones. Article 23 of the First Geneva Convention states that:

"in time of peace, the High Contracting parties and, after the outbreak of hostilities, the Parties to the Conflict may establish in their own territory and, if the need arises, in occupied areas, Hospital Zones and localities so organized as to protect the wounded and the sick from the effects of War..".

Article 15 of the Fourth Geneva Convention related directly to Safety Zones that were established at an earlier period. The Article states that Safety Zones should be created in regions,

"where fighting is taking place.....the delimitation, administration, food supply and supervision of the Zones"... should be based on an agreement "in writing and signed by representatives in of the parties to the conflict".

Dekha in 1971 during the Bangladesh war³⁰⁴ and another during 1974 in Nicosia³⁰⁵. Additional Protected Zones were also created by ICRC following the adoption of Additional Protocol of 8 June 1977³⁰⁶. One of these Zones has been the Protected Zone of Nicaragua(1979), and the Protected Areas in the Falkland-Maldives conflict in (1982)³⁰⁷.

Apart from the Safe Areas that were created by the ICRC, a similar case of a Safe Haven was created by UNHCR which is worth mentioning. The Safe Haven created in Sri Lanka is valuable experience in this regard, since it managed to provide humanitarian aid in a very risky environment, and consequently helped as a preventive measure against refugee flows. The Safe Havens programme was established in Sri

See Pictet, Jean(edit), *Commentary on the IV Geneva Convention of 1949*, ICRC, Geneva, 1958, p.132, Cited by Ibid., (1994), p.124.

³⁰⁴ The ICRC delegation found it essential to establish Protected Zones within Dekha to protect civilians from the scourge of war. Since the area was still then under Pakistani control, the ICRC negotiated this agreement with them rather than the Indian authorities. Three Protected Zones were created, but due to the difficulty of the situation they were mainly open to the sick and the wounded. The three zones were created in a college, a hospital and a hotel, and were marked by the ICRC emblem. These Zones lasted for one week, until the Indian authorities took control of the area, but they played a very important humanitarian role during that period. See Ibid, p.125.

³⁰⁵ Three neutralized zones were established in Cyprus in 1974 (August) by ICRC, following a written agreement with the authorities. These Zones provided refuge to 2,000 civilians during the fighting. Ibid., p.125.

³⁰⁶ The Additional Protocol aims at the creation of Protected Zones for a whole population, and not only for the sick and the wounded as in the earlier cases. However, these areas do not imply areas where people seek refuge in, but rather a whole areas which is threatened would be declared as neutral. i.e. "to ensure that a place in which a large number of persons are already assembled is recognized and protected". In accordance to Article 59 of the Additional Protocol, these areas should meet the following conditions: that they should be devoid of any combatant or weapons, and that "no hostile use shall be made of fixed military installations or establishments", it further specifies that acts of hostility from the population and the authorities are not accepted, neither is accepted the support activates for military operations. (Article 59 of Additional protocol I of 1977). Cited by Sandoz, Y., (1994), pp. 126-127.

³⁰⁷ Safe Zones were established in Nicaragua before the arrival of the Sandinista forces to power in Nicaragua. These Zones were established in churches, hospitals, some red cross centres, as well as some embassies. These Zones not only received civilians, but also some combatants who had laid down their arms. The protected areas that were established during the Falklands-Maldives conflict were created in the centre of the Capital Port Stanley-Puerto Argentino. It included a cathedral and a limited area around it. It however, was not used because of cessation of the hostilities. For further information See Sandoz, Y.,(1994), p. 128.

Lanka in 1990 during the conflict between the Tamil and the Sinhalese communities in the island³⁰⁸.

The risk of refugee outflow to India threatened the Indian authorities who were unwilling to receive these masses on their territory. This motivated them to ask for help from the United Nations to avert refugee flows, they also requested the assistance of UNHCR in this regard. The development of a "containment" concept was thus seen in the work of the Office of the High Commissioner, when a "containment relief programme" was initiated. This programme began after the approval of the Sri Lankan Government in November 1990.

A chain of Safe Havens, named as Open Relief Centres, were established in Sri Lanka with the aim of providing a safe place of refuge for civilians within their own countries that would minimise the pressures on them to leave their land³⁰⁹. This operation which was launched by UNHCR witnessed the involvement of many non-governmental organisations which played a very important role in the relief programmes. The ORC provided refuge for a large number of Sri Lankans. It is estimated that 50,000 Sri Lankans were seeking refuge in these Centres in February 1991. These centres also provided a place to which Sri Lankans who had earlier fled to India were able to return³¹⁰. These centres also served as places of residence for some people, and in other cases as places for some temporary refuge for others when the situation worsened. The ORC were very much respected by the belligerents and

³⁰⁸ A peace accord was signed between the government and the Tamil rebels in 1987. However, the renewed fighting between the Tamil rebels, who rejected this accord, and the government rendered this accord inefficient. The government army replied by attacking civilian Tamils and committing several atrocities.

³⁰⁹ "A temporary place where displaced people on the move can freely enter or leave and obtain relief assistance in a relatively safe environment. The subcenters (also part of the overall ORC network) are decentralized relief centers which offer safety in remote areas and permit those in danger of displacement to remain and maintain vital agricultural or socio-economic activities". See UNHCR Report, supra note 122, at 15. Cited by Tiso, C., (1994), p. 598.

³¹⁰ It was estimated that 700-800 persons were returning every 10 days from India to the ORC in Sri Lanka by April 1991.

provided also a sense of security to the people inside them and even to those in surrounding villages.

The UNHCR Operation in Sri Lanka is also very interesting since it did not involve any military presence. It was strictly an humanitarian operation, where the UNHCR played a very neutral role. The fact that the UN had launched this operation following long negotiations with the parties and following an agreement to establish these areas might have also contributed to the success of this operation. Noting the need of the Sri Lankan civilians to stay in their homes, this operation could be viewed thus as providing the chance for them to stay in safety. It could thus be viewed in the context of a preventive measure against forced departure, rather than a prevention of persons from seeking asylum³¹¹.

Conclusion

A major distinction exists between the Safe Areas/Zones established by the ICRC and the ORCs (UNHCR) in Sri Lanka on one hand, and the Safe Areas created at a later point in Northern Iraq and Former Yugoslavia. The distinction lies in the following points.

The first point of distinction is based on the fact the previous Safe Areas (by ICRC/and UNHCR-Sri Lanka) were strictly humanitarian operations which did not include any political engagement such as in the case of Northern Iraq. ICRC and UNHCR in these operations were viewed in the countries of operations as neutral organisations.

³¹¹ "The ORCs provided the population with a realistic alternative to flight, which also proved instrumental in preventing a mass exodus from Sri Lanka. Realizing that indigenous populations are generally unwilling to leave their homeland, the UNHCR created an environment that was stable and free from violence. In addition, the ORCs in both territories were places where humanitarian aid was distributed to the needy, regardless of that person's political loyalties or ethnic background. To accomplish this goal, UNHCR personnel deployed in the region were familiar with Sri Lankan culture, institutions, and the languages spoken in the Region". See Tiso, C., (1994), based on Clarence, *supra* note 127, at 590.

The second area of distinction is derived from the fact that in earlier cases the ICRC and UNHCR initiated their operations after negotiations/agreements with the parties concerned. In the case of Northern Iraq particularly, the operation was started by Allied forces preceding the signature of the Memorandum of Understanding. Safe Havens, were thus in the case of Northern Iraq, primarily imposed on Iraq by a unilateral action. The action later took a different direction with the actual involvement of the UN in the action.

The emergence of a new kind of Safe Haven thus appeared in the cases of Northern Iraq and Former Yugoslavia. The next section will be looking into the actual implementation of the Safe Haven in North Iraq and its impact on refugee flows.

D. Implementation of Safe Havens in North Iraq

The aftermath of the Gulf War was associated with an humanitarian emergency in the north of Iraq. The Iraqi regime which was defeated in the Gulf War was faced with uprisings in the north and the south of the country. The regime responded by sending its troops to try to curb the uprising both in the south and the north. Whereas the situation in the South did not result in a serious refugee flows to neighbouring countries, the situation in the north had an opposite result. Forced mass movements were moving towards the neighbouring countries. By early April almost 1.5 million persons were by the Iranian³¹² and the Turkish borders.

This situation threatened the neighbouring countries which did not have the means to meet the evolving needs of this humanitarian crisis. Furthermore, these countries and particularly Turkey had its own internal problems with the Kurdish population, and such an influx was certainly not welcome on its territory. Whereas Iran responded by permitting Kurdish refugees into its territory, Turkey responded by closing its borders. Almost 500,000 refugees were stranded on the mountains bordering Turkey,

³¹² The Iranian Government kept its door open for the Iraqi Kurdish refugees, and almost one million from the total number of displaced people were heading to seek refugee on Iranian territory.

and the death toll of children and women dying from starvation and the cold weather reached 1,000 per day.

Faced with such an humanitarian emergency, the two countries, unable to handle a problem of such magnitude on their own, responded by launching an appeal for assistance from the international community. This massive displacement was seen by these neighbouring countries to pose a threat to peace and security in the region.³¹³

³¹³ The Representative of Turkey noted during the deliberation in the Security Council, on the 5th of April 1991 the following, that taking into account the "scale of the human tragedy and its international implications" the Council cannot afford to play the role of a "spectator". He further noted that:

"the threat posed by these events to the security of the region needs no elaboration. In the chaotic conditions prevailing in northern Iraq, it is conceivable that a million people might be forced to move from that country to Turkey. No country can cope with such a massive influx of destitute people fleeing for their lives. Turkey will not allow its border provinces to be overwhelmed by such a flood of displaced persons.

We expect the Council to take urgent and forceful action to secure an immediate cessation of the repression of the inhabitants in this area. The Council must send a clear signal to Iraq demanding respect for international borders and respect for human rights.... At the same time, we are duty bound to take whatever measures we deem necessary to prevent the anarchy and chaos reigning on the Iraqi side of the border from spilling over into our country... We have the greatest sympathy and compassion for the plight of the victims of this man made disaster. It will be recalled that in the Summer of 1988, Turkey admitted over 60,000 Iraqis in similar circumstances; however, the scale of this calamity bears no comparison with what occurred in 1988. Our efforts render Humanitarian assistance are being swamped by the magnitude of the needs of these uprooted people....Efforts are being made to provide temporary shelter for those who have already crossed into Turkey.

But, clearly, this is an operation which requires the full backing and generous support of the international community....The Secretary-General should be requested to send a humanitarian mission urgently to this region to assess the situation, to report on the magnitude of the requirements in terms of humanitarian assistance to the displaced persons."

Before concluding, the representative referred to Article 2(7) of the Charter and stated that it should be

"scrupulously observed. The steps we have taken have been because of the threat posed to the stability, security and peace of the region by Iraq's method of repression. We firmly support the independence, sovereignty and integrity of Iraq".

The representative of Iran, while noting his country's commitment "to the territorial integrity and political independence of regional countries" and its objection to "the long term presence of foreign forces in the region", viewed the crisis occurring within Iraq and spilling over to neighbouring countries as "threatening the security of the neighbouring countries and presenting the potential to further destabilize inter-

Following this humanitarian crisis in the north of Iraq, and the appeal of the neighbouring countries for urgent international action, international action was witnessed at two levels. The first of these levels was the unilateral action by individual states, the USA, France, and Britain in what they called Operation Provide Comfort. The second was the action of the United Nations

1. Operation Provide Comfort

Operation Provide Comfort was started initially by authorisation given by President Bush for the distribution of aid supplies by air lifts to the stranded Kurds in the mountains of Northern Iraq. This came following a British donation of urgent aid of 20 million pounds on April 4th. This distribution of aid by airlift proved to be difficult due to the presence of the refugees in inaccessible areas and due to the difficult weather conditions. Practical problems of distributing the aid ended up adding further complications to the process. Actually some of the aid which was distributed ended up causing some harm for some refugees who could not avoid the crates that were thrown from the planes.

On April 7th, President Ozal suggested to "get the Kurds better land under UN control and to put those people in Iraqi territory and take care of them".³¹⁴ The following day, during a Summit Meeting of the European Community (EC) in Luxembourg, John Major suggested the creation of UN protected areas within the northern part of Iraq to facilitate the return of the refugees. The European leaders who were present in the meeting endorsed the proposal by Major.³¹⁵ The proposal was also viewed by the

state relations in our region." See UN doc. L. S/PV.2982, 5 April 1991. Cited by Weller, M., (1993), pp.124-125.

³¹⁴ Donald MacIntyre, *The Independent on Sunday*, 14 April 1991, cited by Fredman, L. and Boren, D., in Rodley, N., ed., (1992), p.2.

³¹⁵ *Ibid.*, p. 53.

Americans as a possible solution to the Kurdish refugee problem generated in north Iraq.³¹⁶

Towards mid April, refugee camps in the north of Iraq were established and American equipment started arriving to these camps forming a bridge, for the supply of aid, with the American troops present in Turkey. By April 16th, Bush announced that American troops would enter these created enclaves.³¹⁷

³¹⁶ The White House Spokesman announced, following this suggestion, that Iraq was warned against interfering with the humanitarian relief operation on the way to the North. He further added that :

"We informed Iraq that the United States, the United Nations, and other coalition officials would be operating in those areas to distribute other humanitarian assistance to the Kurdish population. We expect these officials to be allowed to operate safely and without primarily threat from Iraq . Without going into specific operational instructions, we do not anticipate military threat from Iraqi air or ground forces. We continue to pursue this matter with UN officials. The refugee tragedy must be alleviated." Dian Macdonald, USIA, 12 April 1991, Cited by Fredman, L., and Boren, D., in Rodley, N.S., (1992), p. 53.

³¹⁷ President Bush stated that:

"Following consultations with Prime Minister Major, President Mitterand, President Ozal of Turkey, Chancellor Kohl and this morning, UN Secretary General Pérez de Cuéllar, I am announcing an expanded, a greatly expanded and more ambitious relief effort. This approach is quiet simple: if we cannot get adequate food, medicine, clothing, and shelter to the Kurds living in the mountains along the Turkish-Iraq border, we must encourage the Kurds to move to areas in northern Iraq where the geography facilitates, rather than frustrates such a large-scale relief efforts. Consistent with United Nations Security Council resolution 688 and working closely with the United Nations and other international organizations and our European partners, I have directed US military to begin immediately to establish several encampments in northern Iraq where relief supplies for these refugees will be made available in large quantities and distributed in an orderly manner...adequate security will be provided at these temporary sites by US, British and French air and ground forces, again consistent with United Nations Security Council Resolution 688...I want to underscore that all we are doing is motivated by humanitarian concerns. We continue to expect the government of Iraq not to interfere in any way with this latest relief effort. The prohibition against any Iraqi fixed-or rotary-wing aircraft flying north of the 36th parallel thus remains in effect....All along, I have said that the United States is not going to intervene military in Iraq's internal affairs and risk being drawn into a Vietnam-style quagmire. This remains the caseSome might argue that this is an intervention into the internal affairs of Iraq, but I think the humanitarian concern, the refugee concern is also overwhelming so that there will be a lot of understanding about this....We intend to turn over the administration of the security for

The implementation of this plan thus followed President Bush's announcement. This plan involved the presence of United States and European soldiers in Northern Iraq. These troops had the possibility to operate over a territory of 100 kilometres inside Iraq. Air forces were also made available to provide protection to the ground troops as well as the returning refugees in case it was needed. Further more, six protected zones were foreseen by this plan as the suitable zones for refugees to return to. Infrastructure was established to facilitate the distribution of relief to these areas, and the distribution of air relief would thus shift from the mountains areas, which proved inconvenient under such circumstance, to the Safe Areas.

To facilitate the transfer of the returning refugees to the newly created Safe Areas, corridors called blue routes were identified as the linking routes between the mountain areas and the established camps. In addition, relay stations were established on these routes to provide the needed food, medication, fuel, and means of transport to the returning refugees. These relay stations proved to be very efficient, since many of the refugees lacked the means for return, or were either too sick or weak to carry on without the necessary support or aid.³¹⁸

The operation which was declared an humanitarian operation by the United States. However, the enforced security measures by the Americans in the north added further elements to the operation. Under these arrangements, all the Iraqi troops that were still present in some of the areas in the north of the country were asked to withdraw. This was justified as a measure to encourage the Kurds to come down from their mountain refuge. Finally 50 Iraqi soldiers were allowed to stay in some areas in the North, but these police officers had to have their names registered with the Allied troops. The Iraqis rejected this operation considering it as a serious intervention in the internal affairs of Iraq.

these sites as soon as possible to the United Nations, just as we are fulfilling our commitment to withdraw our troops and hand over responsibility to UN forces along Iraq's southern border, The border with Kuwait."

³¹⁸ The first blue route operation linked the camp of Isikveren , considered as one of the worst camps at the Turkish border, to the town of Zakho. On April 30th, the first group started heading towards Zakho along the blue routes. By the May 13th, Isikveren Camp was nearly empty. See *Refugees* , no. 86, June 1991. p. 14.

The creation of the Safe Havens was thus initiated by the Allied troops within the north. The establishment of the camps to facilitate the return of the refugees was initiated thus prior to the signature of the Memorandum of Understanding which constituted the framework for the United Nations action within the North. The idea was that following the initiation of the plan and the creation of the infrastructure, the operation would be carried on by the UN.

2. United Nations involvement

The role of the United Nations in North Iraq started, as mentioned earlier, with the signature of the Memorandum of Understanding which established the framework for the United Nations action. However, prior to this agreement, the United Nations representatives sent to Baghdad were trying to find ways for dealing with the emerging humanitarian crises in the North. Among these representatives was Prince Sadruddin Aga Khan.

Iraq was more willing to co-operate with the United Nations rather than the Allied groups. In accordance with the terms of the Memorandum, a humanitarian plan of action for North Iraq was to be implemented by the different UN³¹⁹ agencies. UN centres were to be established, which would be staffed with UN civilian personnel. This in addition to creation of relay stations, sub-offices and reception centres in the North. The Memorandum of Understanding also allowed for the presence of UN guards in the North. The United Nations action within the Safe Areas occurred on April 24th³²⁰, after being officially requested by the Iraqi government to take over by April 21st 1991.

³¹⁹ The plan of action aimed at establishing a presence in areas which had refugee presence, and at providing the necessary aid to those refugees and particularly to the vulnerable groups of displaced persons within Iraq.

³²⁰ The United Nations representatives visited the Camp of Zakho, which was run by the Allied forces on the 28th of April, and took charge of it some days later. See Fredman, L. and Boren, D., in Rodley, N.S., (1992), pp. 60-61.

Faced with the reluctance of the Kurds to come down from the mountains due to security considerations³²¹, further security arrangements were being requested. John Major suggested the idea of placing UN Police force in the North. The idea, which was under consideration at the United Nations, was first rejected by the Iraqis. It was later agreed upon, and included in the Annex of the Memorandum of Understanding. Based on this agreement, lightly armed UN police guards were allowed to operate in some of the centres in the North³²².

The role of specialised agencies within this Humanitarian emergency was based upon the request of the Secretary-General, and the provisions of the Memorandum of Understanding.

Specialised agencies like the UNHCR and non-governmental organisations played a very important role in the relief programmes as well as the repatriation and the rehabilitation process that occurred in the North. Many of the returning refugees and internally displaced persons did not return to their original place of residence. This was due to the fact that many of these areas were government controlled areas, or at least neighbouring on such areas, which inhibited the refugees from returning. Temporary shelters were thus created to provide residences for this category of refugees and displaced persons. The UNHCR, appointed as the "lead United Nations Agency" to follow up on this operation, aimed at assisting the returning persons, whether they were in these temporary shelters or in their original places of residence. The office created stocks of food and aid at the borders, in case another exodus emerges again. Further Offices and Sub-offices for the UNHCR were established in different places in the north

³²¹ Iraqi military force was gathered by mid May on the Hills surrounding the areas of Dahuk, even though they agreed to pull out earlier, and arrests of some targeted Kurds were being witnessed. Such actions were increasing the Security fears of the Kurds, and who were thus calling for further security arrangements by the UN, which were further reached at a later point. Ibid., p. 62.

³²² Instead of the 21,700 Allied troops who were deployed in the Safe Areas at the hight of the crisis, 500 UN guards took over, based on an agreement that was signed on May 23rd. Ibid., p. 63.

which constituted Safe Havens, and which were responsible for providing the aid needed during this repatriation process.³²³

A lot of co-ordination among the different UN specialised agencies and the NGOs present there helped in making the relief, repatriation and rehabilitation project a success³²⁴. The assistance programmes provided to the Kurds involved different fields. Providing shelter was in the north following the crisis. Many of the towns and villages were destroyed due to the repetitive attacks from the Iraqi regime. Different UN agencies and NGOs helped following the repatriation, in the rehabilitation projects. Furthermore projects that aimed at providing clean water, food, and health care services were also implemented.³²⁵

The creation of these Safe Havens had an immediate impact on the return of refugees and internally displaced from the borders with Turkey and from Iran. It was estimated that by the end of April voluntary repatriation started from Turkey, and by May 1991, around 250,000 Kurds have returned to the Safe Areas. It was further estimated that by the end of September 1991 almost all of the refugees have returned.³²⁶ As for the refugees in Iran, substantial numbers were estimated to be returning from the Iranian border by mid May.

The operation in the north performed by the Allies and the UN differed in many ways. The first is that whereas Operation Provide Comfort aimed at assisting the Kurds in the North, the plan proposed by the UN aimed at providing assistance to all the civilians in need wherever in Iraq they were present. Secondly, Operation Provide Comfort was not simply a relief operation, but a clear example of humanitarian intervention. This intervention was done by a group of states on the territory another

³²³ See UNHCR Report on Northern Iraq, April 1991-May 1992,(1992), p.5.

³²⁴ It is noted that 1,300 villages were rehabilitated during this period in the North of Iraq.

³²⁵ On the May 15th, during a speech given by Sadruddin Aga Khan in Geneva, he indicated that whereas the death toll reached a high percentage, a month earlier on the mountain areas, " Now it is over, ...no-one is dying on the mountain tops. Thanks to the "blue routes" we were able to set up , many displaced people could return to the plains". See Refugees , no. 86, June 91 , p. 16

³²⁶ See UNHCR report on Northern Iraq, April 1991-May 1992, (1992), p.2.

state without its approval. The UN role, on the other hand, followed a clear approval from the state of origin. Third, a co-ordination was witnessed between the UN and the Iraqi government which participated in the provision of aid to the affected population³²⁷. This Co-ordination was obviously not existing between the Allies and the Iraqi government.³²⁸

What Type of Action Does The Establishment of Safe Havens in North Iraq constitute?

The establishment of the Safe Havens in the north of Iraq and all the circumstances that surrounded it were very controversial at the time and still are. Faced with a severe humanitarian crises following the war, the international community reacted by providing aid and creating enclaves to provide refuge for the stranded Kurds who were either in Iran or at the borders with Turkey. The act, as mentioned earlier, has been controversial. It was considered by some to be constituting a precedent, and by others to be another form of infringement on the sovereignty of another country by more powerful ones.

The process of establishing Safe Havens in the north of Iraq entailed more than one precedent. For the first time, the Security Council established a link between refugee flows and threats to peace and security in resolution 688. This constituted in itself an important precedent and revealed the concern of the international community concerning the refugee problem.

Establishment by the United Nations of Safe Havens and Corridors of Tranquillity within countries of origin, due to human rights considerations, refugee issues, and severe humanitarian crisis constitutes the precedent. The involvement of the United Nations and its special agencies in Iraq following the resolution 688 and the Memorandum of Understanding could be thus considered as a precedent. Such Safe Areas under the UN control, on such a scale, was not seen prior to the establishment of

³²⁷ Articles within the Memorandum of Understanding had regulated this coordination.

the Safe Havens in Iraq. Furthermore, the impact that the establishment of these Safe Havens had on the repatriation of refugees is remarkable, and could be considered as a very important approach in this regard.

What does not constitute a precedent, in my view, is the action done by the United States and the United Kingdom. Operation Provide Comfort has, no doubt, played an essential role in establishing the grounds for the United Nations agencies action. The military involvement of the Allied troops facilitated the distribution of aid in the first period. However, military involvement for humanitarian considerations have been witnessed in earlier decades. In the case of Iraq, it is very clear that the humanitarian reasons were not the sole reason. Political motivations of the intervening states played an important motive as well. The Iraqi Kurds were targeted in the 1980's with chemical weapons, and the atrocities committed on them were grave. Still the international community did not react to their humanitarian crises then. Political motivations thus were very strong behind the United States and United Kingdom's action. Despite, thus, the humanitarian considerations involved, which are many, this action remains another form of intervention within another states territory. This form of "humanitarian intervention" was seen a lot and may be in different forms, during the Cold War period. This leads to the conclusion that in itself it does not constitute a precedent.

The question that was very much debated is whether the creation of Safe Havens constitutes an enforcement action or not. The United States and British representatives at the United Nations tried to establish that the creation of the Safe Havens in north Iraq was authorised by resolution 688. Referring back to the resolution, it did not allow for the use of military forces in the north of Iraq. After condemning the repression of the civilian population, the resolution insisted on Iraq to allowing "immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq". The resolution, thus, did not call for any military action by individual states on the Iraqi territory. The attempt thus to base the enforcement of Operation Provide Comfort on this resolution seems un valid. Operation Provide Comfort, is in no doubt an

³²⁸ See Adelman, H. (1992). p. 20.

enforced action, but one which is not authorised by the United Nations. It is rather, as mentioned earlier, a new form of humanitarian intervention, with both humanitarian and political motivations. The humanitarian crises that the displaced Kurds were facing constituted the humanitarian consideration, while the political consequences for the outflow of refugees to Turkey constituted the political motivations.

Whether the United Nations action within the Iraqi territory is an enforcement action that constitutes another question. The United States and the United Kingdom also tried to conclude that the Security Council Resolution 688 falls under the provisions of Chapter VII and its enforcement action. Threats to peace and security were mentioned in the preamble of the resolution, but the fact that this was not at all mentioned anywhere within the articles of the resolution casts doubt upon this conclusion. Also the Council indicated clearly in other resolutions on the Gulf Crises that it was acting under Chapter VII of the Charter, while nothing of this sort was indicated in resolution 688.

If the UN involvement is to be studied separately, it could be seen to be an advanced type of peace keeping operation that have been evolving following the end of the Cold War and the emergence of severe humanitarian crises. The fact that the Secretary-General, then, refused any action to be taken within Iraq prior to the signature of the Memorandum of Understanding draws the operation closer to Chapter VI of the Charter. However, in the particular context of the Gulf War and the circumstances that surrounded it puts the UN involvement somewhere between Chapter VI and VII of the Charter.

The question that remains controversial is whether the establishment of such Safe Havens on another state's territory is a justified action? In order to answer this question properly, the distinction that was drawn earlier between unilateral state intervention and United Nations action is necessary. In my view, no considerations of sovereignty could justify the continuation of human suffering which occur under certain regimes. Many dictatorships and countries, which face internal turmoil's, refuse any interference in its affairs due to considerations of sovereignty. It is important thus that the issue of sovereignty doesn't stand as a barrier in front of international action for suffering populations. This action should be through an action done by international

community represented by the United Nations. The application of the international law could not be taken into the hands of a few powerful states, which would apply it whenever it matches with their political interests.

Thus from a humanitarian point of view, the action in the north of Iraq was more than needed. The humanitarian crisis was too severe to be ignored. The United Nations involvement was more than essential. Whether the same could be said about the way the Allied troops were involved is a different matter. What makes this a controversial matter is the fact that the involvement of these troops facilitated the application of the Safe Havens, and maybe without their involvement it would have taken the United Nations a longer time to be involved. However, the fact that the Allies were involved in the north without a United Nations authorisation makes the operation less appealing despite its impact on the humanitarian crisis.

In order for such an action to be applied in the future, the United Nations mechanism for involvement in crises situations needs to be enhanced, and the application of International law needs to be left to the United Nations and its agencies.

Conclusion:

The creation of the Safe Havens in the north of Iraq had thus a direct impact on the evolving refugee crisis. Traditionally, three solutions are used to tackle a particular refugee problem. The first is resettlement abroad; the second is settlement in the first country of asylum; and the third is repatriation.

The first option, resettlement abroad which is usually applicable with individual cases, was not an available solution for situations of mass exodus, as in the case of the Kurds in Northern Iraq.

The second option, i.e., resettlement in the first country of asylum, did not also seem possible under the prevailing political conditions. Turkey, which itself had its internal problems with the Kurdish population living there was very reluctant to receive, and not certainly not willing to resettle on its territory, this large number of Kurdish

refugees. This occurred despite the fact that Turkey has been a signature on the 1951 Convention.

Repatriation seemed thus as the most viable solution to the crisis. Repatriation is usually a solution which is directed towards refugees, but in the case of Kurds, many of them were still within the territory of their own country. A solution within their country of origin seemed thus the most adequate to respond to the urgency of the situation. The creation of the Safe Havens thus has facilitated the repatriation of more than one million of the Kurdish refugees who fled to Iran, and managed to find a solution for those Kurds who were internally displaced under severe humanitarian conditions. The creation of these zones has resulted in a fast repatriation process.

Some would argue that by creating these areas within the country of origin, the right to seek asylum is threatened. The Safe Havens in Northern Iraq, have provided the quick possibility for refugees to be repatriated to their places of origin. This was particularly relevant to the refugees who fled to Iran, The creation of Safe Havens did not thus threaten their right to seek asylum, but rather given them the chance to return home quickly. As with the case of the Kurds on the Turkish borders, Safe Havens have provided them with a possibility to avoid further suffering on the mountain areas. The creation of these havens did not thus affect their chances to seek asylum abroad. What has threatened their right to seek asylum elsewhere was the response of the Turkish government which closed its borders in front of the Kurdish exodus.

The process of creating these Safe Havens was started first by an unilateral action by the American, French, and British in what they called Operation Provide Comfort. The three countries legally justified this action by the Security Council Resolution 688. This Resolution which condemned the Iraqi repression of its civilian population and linked these acts to threats of peace and security in the region, did not however, facilitate any military action within the north of Iraq. Instead it had requested the Iraqi government to facilitate the access of the humanitarian organisations on its territory.

The United Nations took over the operation following its initiation by the American, British, and French troops. The role of the international organisations followed the signature of the Memorandum of Understanding with the Iraqi government, which had created the framework of the international organisations action within Iraq. This Memorandum of Understanding was renewed annually with the Iraqi government strengthening thus the necessity for the Iraqi consent for this involvement.

Whereas the creation of Safe Havens had a positive effect on the refugee problem in Northern Iraq, the creation of these areas could be sometimes associated with difficulties. These difficulties do arise under certain circumstances, like the situation of a War Zone, and where it requires a long term commitment.

The situation of Former Yugoslavia is one example where the creation of Safe Havens is associated with difficulties. The United Nations had identified six areas as Safe Areas. These were Srebrenica, Gorazde, Tuzla, Bihac, Sarajevo and Zepa. The main problems generating in the context of Safe Havens in Former Yugoslavia were the security consideration in these areas and the provisions of aid. The continual outbreak of violence, within these areas have rendered these areas as dangerous areas rather than safe areas³²⁹.

The UN, some would argue, could be partially blamed for this result. The fact that these areas were not demilitarised had in a way increased the security risks. These areas, thus, became shelters to civilians and to military factions as well, in making the justification for targeting them by the Serbs easier. Furthermore, The UN was also criticised for applying the security measures around these areas in a lenient way, increasing the risks for their inhabitants. When these areas were targeted by the Serbs, the UN was criticised for not replying, or with replying very late.³³⁰

³²⁹ Many of these towns that were designated as Safe Areas were continuously subjected to shelling from the Serbs. Hospitals as well as airports in some of these areas were targeted. This has led to the prohibiting of the arrival of aid into some of these areas. See C. Tiso, "Safe Havens Refugee Programs: A method of Combating International Refugee Crises", in Georgetown Immigration Law Journal, Vol. 8, Fall 1994 No. 4, p.585.

³³⁰ The UN peace keeping troops were authorized by the Security Council Resolution number 836 to:

In addition to the security problems in these areas, there was another problem emerging. The distribution of aid proved very difficult under the prevailing circumstances. Since the airports in some of these areas were targeted, it proved very difficult to arrange the distribution of aid to the needed groups. Furthermore, the fact that these areas were also dispersed in the war zone also accentuated the problem. Airdrops were used under these circumstances to provide some of the necessary aid.³³¹

The creation of Safe Havens is thus problematic if it is not accompanied with the necessary force needed to protect these areas in case they were endangered. As the experience in Former Yugoslavia shows, when insufficient protection to these areas is witnessed, these areas end up becoming very dangerous areas.

Furthermore, when the creation of these areas is not accompanied with a long term involvement by the United Nations, such as in the case of peace settlement, the problems are bound to recur.

Despite the above mentioned difficulties, the creation of Safe Havens has many positive results. The impact that the creation of these areas has on the refugee problem is undoubted. The rapid repatriation of the Kurds in North Iraq and the relief of the severe humanitarian crisis is an indication of the effectiveness of this response. The refugee problems evolving in this decade, particularly in Africa show clearly that the solutions for many of the refugee problems could be tackled properly with a homeland oriented approach. Many refugees, particularly in situations of mass exodus, would prefer any solutions within their countries rather than being stranded in camps in neighbouring countries. Safe Havens within countries of origin provide a possibility for such solutions.

"take necessary measures, including the use of force, in response to bombardments against the safe areas by any of the parties or to armed incursions into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of the protected humanitarian convoys" .
S.C. Resolution 836, U.N. SCOR, 48th Sess., 3,228th mtg. at 3, U.N. Doc. S/RES/836(1993).
Cited by Tiso, C., (1994). p. 586.

³³¹ Ibid., p. 587.

In addition to its impact on the refugee problem, this approach has prohibited another genocide from recurring in the north of Iraq. Many people leave their countries of origin because of the fear of being exposed to genocide's and severe human rights atrocities. The creation of protected areas in countries where targeted groups face such atrocities serves as a good protection for these groups within their homeland, a solution which would be very much preferable to fleeing to other countries to save your life.

The creation of Safe Havens could also serve as a good preventive mechanism, particularly when applied in advance in countries which are threatened with mass exodus. This indeed involves the application of early warning mechanisms to identify which countries are at risk of severe human right violations and different forms of conflict.

Chapter VIII
The RWANDA CASE

Introduction

The crisis in Rwanda in 1994, the genocide, and the refugee flows that accompanied this crisis raised many questions relating to the role of the international community in situations with such dimensions. The ethnic conflict, which had its roots in earlier decades, resulted in 1994 in a genocide that left hundreds of thousands of people killed as well as millions of refugees in neighboring countries. As in the Iraqi case, the problem that started as an internal problem was internationalized in view of the massive refugee flows and the media coverage for the crisis. The crisis highlighted the link between refugee issues and humanitarianism in the Post Cold War period. This chapter assesses that international community's intervention in Rwanda - an intervention that "in many respects.....did *not* happen" in a timely manner.³³² The crises that took place after the failed international involvement in Somalia left the international community hesitant to commit itself in similar operations. The result was a wide-scale genocide and a crisis that was left to spread out into extreme limits.

Unlike Iraq, the strategic interest in Rwanda was not strong. Faced with a deteriorating situation, in a country that is not of equal strategic interest, the international community opted to pull out and reduce its presence. The belated response of the international community following the genocide could have yielded better results and curbed the bloodshed if it had come at the right time. An expanded role and further United Nations involvement, in the form of the timely deployment of a modest size force, was required to stop the violence that was unfolding.

Despite its shortcomings, the international community's controversial response to the crisis in Rwanda is worth assessing as it sheds light on the link between humanitarianism and refugee issues in the Post Cold War period. The changing nature

³³² See Kofi A., 'Peace Keeping, Military Intervention, and National Sovereignty in internal Armed Conflict, in Moore, J. (ed.), (1998), p. 61.

of the international community's involvement on behalf of refugees and IDPs is also examined.

The complex nature of the refugee problem in Rwanda further emphasized the need to address the root causes of displacement and strengthened the preventive approaches within countries of origin rather than asylum oriented approaches for the refugee issues. Furthermore, the mass exodus to neighboring countries highlighted the link between regional peace and security challenges to these countries, and emphasized the link between security issues and refugee flows. The problems that occurred within the refugee camps in the countries of asylum revealed to a great extent the complexity of the problem and the urgent need for strong international efforts in the country of origin to help solve the problem. The severe humanitarian crisis, the human suffering involved, and the degree of human rights violations did put further pressure on the international community to act.

Once more, developments showed the evolving notion of sovereignty and put in question the conventional interpretation of this concept. A different interpretation for the concept of sovereignty was being witnessed, a notion that became gradually linked to international responsibility. The transformation of the refugee regime, the link between human rights violations, refugee issues and international peace and security gave currency to a new perspective: i.e., "sovereignty as a matter of responsibility, not just power".³³³

This transformation in the international outlook towards concepts of sovereignty, refugee issues and human rights was also associated, and perhaps partially prompted, by the wide media coverage for the severe humanitarian crisis. As in the situation of Rwanda, the media coverage for the genocide and the humanitarian crisis exerted further pressure strain on the international community to take action. An ABC News correspondent described the catastrophe in Rwanda by stating that "it is not like anything I've ever seen in 30 years as a reporter. It is, I think, the standard

³³³ Ibid., p. 57.

against which all further tragedies are measured".³³⁴ Special emphasis is given throughout this chapter on the French involvement in Rwanda and the creation of the Safety Zone.

Historical background

The conflict in Rwanda is not a new one, it is rather a manifestation of a long period of ethnic, political, and economic tension that has characterized the history of Rwanda for many decades and which has been greatly reinforced by the colonial powers that dominated the region for a long time.

Prior to the 1994 conflict, seven million persons were living in Rwanda constituting the main ethnic groups in the country, the Hutus (85 per cent of the population), the Tutsis(14 per cent), and the Twas (1 per cent).³³⁵ The tensions between the two main ethnic groups were not new. Even though the two groups spoke the same language and enjoyed the same culture, the economic and political rivalries between the two groups dated back to the nineteenth Century. At that time, the Tutsis dominated the higher levels of the social system and the Hutus the lower. A clan system was also created, and the Tutsis were known to be the strongest in this system. A central state named Rwanda was formed in the second part of the century, and by 1890, this state and its neighboring one Urundi was placed under German indirect rule, which kept in existence the previous governing system. Following the First World War, the territory was placed under Belgian administration, which further reinforced the ethnic divisions between the two groups through requiring them to show their ethnic origin on their identity papers.³³⁶ Colonialism made deeper the distinction between the two ethnic groups mainly through the attributing stereotyped

³³⁴ ABC News 1994.

³³⁵ See The United Nations, The United Nations and Rwanda 1993-1996, (1996), p.7.

³³⁶ *Ibid.*, pp.7-8.

features to them as Hutu or As Tutsi and through ascribing a higher political status to the Tutsi minority.³³⁷

The situation within the country was on two critical occasions the source of concern to the international community represented by the United Nations. The first time was in the period between 1946 and 1962. Rwanda, which was under the Belgian trusteeship, was undergoing some attempts by the Belgian government aiming at installing democracy within the country. These attempts were very much encouraged by the United Nations General Assembly and Trusteeship Council to prepare the country for independence.

Tension grew when the Hutu political movement started gaining more influence on the grounds of majority rule, and this was resisted by some sections within the Tutsis who were threatened with the loss of their traditional powers and privileges. These tensions resulted in an outbreak of violence and much causality among the Tutsis amounting to hundreds of dead people. Subsequently, large number of Tutsi refugees fled to neighboring countries and considerable number settled in Uganda.³³⁸ In the meantime the Belgian government was preparing the grounds for the formation of a local government that would eventually govern the country following independence. Between 1959 and 1961, the “Hutu Peasant Revolution” was accompanied by a shift in the power balance from the Tutsis to the Hutus. This was evidently accompanied by an increase in tension within the country and among the ethnic groups.

The United Nations in the meantime was stressing the importance of a peaceful transition of power to a democratically elected government. It also called for a referendum to be held to determine the future of Rwanda. The General Assembly further called for amnesties to allow people in prisons and exile to participate in the referendum. This was happening at the time when the tension was increasing between

³³⁷ See Clapham, C., ‘Rwanda: the perils of the peacemaking’, in Journal of Peace Research, Gleditsch, N.P. (ed.); March 1998, Vol.35, No.2., p. 197.

³³⁸ See Suhrke, A., and Jones, B., in Jentleson, B., (2000), p. 239.

the Belgian administrators and the traditional Tutsi authorities that rejected this transfer of power.

In September 1961, legislative elections and a referendum confirmed the Hutu domination over political power, and the referendum was in favor of ending the monarchy and replacing it by a republican regime or system.³³⁹ By the first of July 1962, Rwanda-Urundi became two separate independent states named as Rwanda and Burundi. This date marked the end of the Belgian trusteeship agreement.

The independence of Rwanda did not bring peace to the country. The ethnic tensions that accompanied the transition from the Belgian trusteeship to independence were accentuated after 1962. The number of refugees, mainly Tutsis, in neighboring countries was about 120,000 by 1962. They were mainly present in Burundi, Uganda, United Republic of Tanzania, and Zaire. From these countries, the Tutsi refugees started organizing themselves into political groups aiming at regaining their power within Rwanda. Attacks were launched against Hutu targets. Counterattacks were launched against Tutsis within the country, which increased the number of refugees to 150,000 by 1964, according to a UNHCR estimate. In 1973 a military *coup d'état* brought a Hutu Major-General to power, which distributed the country's political and social power in accordance to a quota system. The economic situation within Rwanda was rapidly improving and was much better than in the surrounding countries. This brought more assistance and investment in the country by European countries. During the seventies and the eighties the situation in Rwanda was much better than the situation in many of the surrounding countries. This, however, was not accompanied by increasing stability due to ethnic tensions. This was also accompanied by an increase in the number of refugees in the surrounding countries. It was estimated that the number of refugees by the end of the eighties reached 480,000, constituting half the number of the Tutsi community. These refugees were mainly present in Burundi (280,000), Uganda (80,000), Zaire (80,000), and the United Republic of Tanzania (30,000).³⁴⁰

³³⁹ See The United Nations, The United Nations and Rwanda 1993-1996, (1996), pp.8-9.

Refugees in neighboring countries were continuously organizing themselves and demanding to return to their home country, and in 1988, a Rwandese Patriotic Front (RPF) was formed in Uganda with its primary goal to call for the return of the refugees to Rwanda and to secure a fair distribution of power within the country. The call for the return of refugees did not receive a positive response from the authorities in Rwanda who stated that there already existed huge population pressures inside the country which made the return of the refugees more difficult unless they could prove that they would be self sufficient upon return.³⁴¹

Earlier Efforts by the International and Regional Bodies on Behalf of Refugees and IDPs Prior to the Genocide

A possible solution for the refugee problem followed an agreement in September 1990 between the government of Rwanda and Uganda on the return of refugees. This agreement was a culmination of two years of talks on the issue of refugees supervised by UNHCR and the OAU. However, the situation started deteriorating when an attack was launched by the Rwandese Patriotic Front (RPF) from Uganda in October 1990. The Rwandan government pushed back the forces that attacked, but the fighting continued from the territory that the RPF controlled at the borders with Uganda. This fighting displaced more people and increased the number of refugees.

Following pressures from the international community and the OAU, the Rwandan government resumed the talks, this time with the RPF on the issue of refugees. A cease-fire agreement was reached between the Rwandan government and the RPF on 26 October in Zaire, and an agreement was also reached in Zaire on 20th November to deploy 50 OAU observers to oversee the implementation of the cease-fire. However, the actual number of observers deployed did not reach 50.

A regional conference to address the issue of refugees was already planned to include the major countries affected by these problems. The RPF was also to be

³⁴⁰ Ibid., pp.10-11.

included in this conference. This conference was held in Dar es Salaam, the United Republic of Tanzania on 19 February 1991. These talks included the Presidents of Rwanda, Burundi, Uganda, Zaire, and the United Republic of Tanzania. The talks also included representatives of the OAU and UNHCR.

The conference was concluded by the Dar es Salaam Declaration, which asked the Rwandan Government and the RPF to arrange for a cease-fire to be supervised by the OAU, and to start political talks with a view to a long-term peaceful solution to their problems. The Declaration also committed the Rwandan government to find a solution to the refugee problem, either through permitting them to return to Rwanda, or giving them the chance to stay in their countries of asylum while maintaining Rwandan nationality, or finally giving them the chance to obtain the nationality of their host countries.³⁴²

Successive meetings resulted in different agreements between the two sides and the establishment of a buffer zone between the RPF-held territory and the rest of the Rwandan territory. It also resulted in establishing an OAU Neutral Military Observer Group to monitor the buffer zone. This move was very much supported and welcomed by the United Nations.

Significant pressure was exerted by the United States and France on the Rwandan parties to push for the start of the Arusha peace talks. Washington threatened Uganda with stopping aid if Uganda did not encourage its “Rwandan clients” to negotiate. Similarly, France convinced the Habyarimana regime to negotiate a settlement for the war³⁴³. Against this background, peace talks started on 10 August 1992 in Arusha, United Republic of Tanzania under the co-ordination of the OAU. It went on for over a year and was internationalized to a great extent. The OAU kept a very high profile and the United Nations was represented following an invitation from the OAU.³⁴⁴ The OAU leadership viewed the RPF attack not as an

³⁴¹ Ibid., p. 12.

³⁴² Ibid., pp.14-15.

³⁴³ See Suhrke, A., and Jones, B., in Jentleson, B., (2000), p. 244.

³⁴⁴ See Clapham, C., ‘Rwanda: the perils of the peacemaking’, in *Journal of Peace Research* Gleditsch, N.P. (ed.); March 1998, Vol.35, No.2.,p. 204.

invasion but rather as a demarche by the children of the exiled refugee community to return back to their land.³⁴⁵

The talks witnessed the participation of government representatives from countries like Senegal, Burundi, Zaire, and other non-African countries such as Germany, Belgium, France, and the United States. Those representatives were present in the peace talks as observers. The long peace talks resulted in the signatures of several protocols that dealt with issues relating to power sharing, the rule of law, and the repatriation of refugees. The main issues of the negotiation further included repatriation and resettlement of refugees, the distribution of posts within the transitional government, the formation of an integrated army. The high level of success reached by the RPF during these talks was partly attributed to their high ability of their negotiating team in addition to their military strength and it was clear that the RPF was emerging to be the main beneficiary of the Arusha talks.³⁴⁶

The Arusha talks were however suspended following a new outbreak of violence that occurred in February 1993. The RPF launched an attack in the northern part of Rwanda and occupied parts of the buffer zone. This came following an accusation by the RPF that the Rwandan government was committing human rights violations against the Tutsi ethnic group within the country. This new outbreak of violence resulted in an increase in the number of refugees and displaced people (900,000).³⁴⁷

³⁴⁵ See Melvern, L. R., (2000), p. 52.

³⁴⁶ See Clapham, C., 'Rwanda: the perils of the peacemaking', in Journal of Peace Research Gleditsch, N. P. (ed.); March 1998, Vol. 35, No.2., pp. 204-206.

³⁴⁷ On the above mentioned attack, the United Nations High Commissioner for Human Rights wrote in his report on his mission to Rwanda that:

“The RPF breached the January 1993 cease-fire agreement, accusing the government of President Habyarimana of continuing human rights violations, including the massacre of more than 300 Tutsi in north-western Rwanda in January 1993”.

See the Report of the United Nations High Commissioner for Human Rights on his mission to Rwanda of 11-12 May 1994. E/CN.4/S-3/3, 19 May 1994.

Arusha Agreement – An Analysis

How sincere was the Rwandan government in its attempt to achieve a peaceful settlement through the talks in Arusha? A lot of doubt is shed on the real intentions and motives of the Rwandan government. The Arusha accord specified that a transitional government would take over on a transitional basis until a new government comes to power following a democratic election. According to the terms of the agreement, an international impartial force will be deployed and the French forces will be withdrawn. The transitional government should include representatives of the RPF, the opposition parties within Rwanda and President Habyarimana's political party and allies. As for the RFP and the Rwandan army, they will be incorporated into one army.³⁴⁸

The West and the international community saw the agreement as the best option and solution to the ongoing conflict in Rwanda. However, the terms of the agreement were interpreted differently by the Habyarimana group in power. Internationally, however, the pressure was very high on the Rwandan President to take part and conclude an agreement. Among the points relating to the negotiations was the issue of including the Coalition pour la De'fense de la Re'public (CDR). The RPF had serious problems in accepting the CDR to be represented in the interim government as it viewed it as an extreme and fascist party responsible for a lot of the human rights violations committed. Habyarimana however, and backed by the French, was keen on having the CDR in the transitional government.³⁴⁹

The terms of the agreement actually meant that the Habyarimana regime would be losing the bulk of its power to the RFP. Habyarimana was literally being deprived of the power structure that he had. Eventually, and in accordance to the agreement, the regime will be represented with five seats in the transitional government. Such terms of the settlement were evidently not acceptable to the regime and its clients. But as mentioned earlier, since the international and regional pressure was too high on both

³⁴⁸ See Melvern, L. R., (2000), p. 53.

³⁴⁹ Ibid., pp. 54-55.

sides to resume negotiations, these negotiations were carried on. For many of them, the agreement was viewed as a peaceful transformation of power for the RPF.

The idea of an eventual shift in power and democratization was also unpopular in Rwanda, as it would have exposed many of the people in power positions surrounding the President. Many of whom were implicated in human rights violations. A peaceful transformation thus runs the risk of eventually bringing them to justice. A regime with high level of corruption would definitely dread a peaceful transformation towards democratization and the rule of law.

These considerations lead to the belief that Habyarimana was not sincere in his quest for peace. The campaign to arm the population and increase the ethnic hatred that went simultaneously to the peace process in Rwanda seemed to confirm this belief. It was known at a later point that at the time when the Habyarimana regime was participating in the Arusha negotiations, the regime had signed one of the largest arms deal with a French company. Information about the purchase was made available to many western embassies through the Manger of Rwanda's Bank.³⁵⁰

The distribution of arms on the local population was clear in this period as well and this sheds further doubts on the regime's commitment to the peace process. The regime used the pretext of the RPF attack to justify the distribution of arms on the population to be used in self-defense. All indications seem to suggest that the power groups within the regime were trying to promote and actually hide behind the image of Hutu victims to justify the acts that were undertaken. Within the country, the ethnic hatred propaganda was heavily repeated through the Radio and televisions.

United Nations Involvement

In the meantime, the United Nations involvement within the country and the region increased. In accordance with Security Council Resolution 846(1993), the

³⁵⁰ See Contrat pour la fourniture de materials techniques militaires. Contrat No. 01/93 Dos 0384/06.1.9Pour l'acheteur: le Ministre de la Defense, Dr. James Gasana. Le Ministre des

United Nations Observer Mission Uganda-Rwanda (UNOMUR) was established to be deployed on the Ugandan border. The mission followed a request from both Uganda and Rwanda.³⁵¹ In accordance with this Resolution, military observers were deployed in Uganda on the 18th of August 1993.

By the 3rd of August 1993, the Arusha peace talks were positively concluded, and on the 4th of August the peace agreement was signed by the President of Rwanda and the Chairman of the Rwandese Patriotic Front. Among the people who were present for the signature were the Representative of the United Nations Secretary-General, the OAU Secretary General, and the President of the United Republic of Tanzania.³⁵²

In the period leading to the signature of the Arusha peace agreement and the period that followed, insecurity continued to mount in the country, particularly in the north and the southern parts of Rwanda. Civilians continued to be among the main targets in these attacks. Information from Rwanda indicated that death squads in the President's circles were planning to undertake execution campaigns against political opponents and to that end they circulated death lists.³⁵³ The human rights situation in the country was so severe that it was a subject of successive reports. Most of these

Finances, Marc Rugenera. *Pour le vendre: Dominique Lemonnier*. Cited by Melvern, L. R., (2000), p. 55.

³⁵¹ In accordance with the resolution, the Mission:

“ shall monitor the Uganda-Rwanda border to verify that no military assistance reaches Rwanda, focus being primary in this regard on transit or transport, by roads or tracks which could accommodate vehicles, of lethal weapons and ammunition across the border, as well as any other material which could be of military use;”

The resolution further urged:

“ the Government of Rwanda and the Rwandese Patriotic Front strictly to respect the rules of international humanitarian Law;” See the Security Council Resolution 846. S/RES/846(1993), 22 June 1993.

³⁵²See The United Nations, The United Nations and Rwanda 1993-1996, (1996), pp.22-23.

³⁵³ This was mainly emerging towards the end of 1992 and early period of 1993. See Suhrke, A., and Jones, B., in Jentleson, B., (2000), p.252.

reports indicated that many people in power in the Rwandan regime were implicated in human rights abuses against the Tutsi.³⁵⁴

Concerned by the mounting insecurity, the Secretary-General recommended in his report to the Security Council in December 1993, the deployment of additional troops in UNAMIR to make it better equipped to deal with the unstable situation. Following these recommendations, the Council adopted resolution 893 on 6 January 1994 in which it increased the number of troops.

The tension within the country increased during the delays in forming a transitional government and institutions. This was also accompanied by a report received in January by the UNAMIR Force Commander about plans developed by some Hutu Militia extremists to launch attacks in Kigali against Tutsi people. The Force Commander suggested that Kigali should become a weapon free zone as a precaution to protect civilians but this did not receive a positive response from the Department of Peace keeping Operations in New York that stated that this went beyond the UNAMIR mandate.³⁵⁵

Early warning signals continued to come and many of these signals came from the UN itself, yet the international community ignored these signals. The first was the Ndiaye report on the human rights abuses in Rwanda that was part of report for the UN Human Rights Commission on extra judicial killings. This report indicated that earlier claims made by the International NGO Commission of the Rwandan government's involvement in massacring civilians were correct. He further added that Article II (a) of the Genocide Convention would apply on these massacres³⁵⁶. Ndiaye blamed the Rwandan government of propaganda activity aiming at establishing circumstances whereby "all Tutsi inside the country were collectively labeled accomplices with the RPF". He further noted with reference to the mascaras "such

³⁵⁴ See the International Federation of Human Rights (FIDH), Africa watch, InterAfrican Union of Human Rights, and International Center of Rights of the Person and of Democratic Development. Report of the International Commission of Investigation of Human Rights Violations in Rwanda Since October 1, 1990 (January 7-21, 1993), Cited by Melvern, L. R., (2000), pp. 56-57.

³⁵⁵ The United Nations, The United Nations and Rwanda 1993-1996, (1996), pp.30-31.

³⁵⁶ See (/CN.4/1994/7Add.1). Cited by Suhrke, A., and Jones, B., in Jentleson, B., (2000), p. 257.

outbreaks were planned and prepared, with targets being identified in speeches by representatives of the authorities, broadcasts on Rwanda radio, and leaflets... [and] the persons perpetrating the massacres were under organized leadership".³⁵⁷ This leadership that was trying to stay in power through encouraging ethnic hatred.

The other strong signal from within the UN came from General Dallaire in Kigali when he sent a cable on January 11, 1994 in which he uncovered plans of Hutu extremist to kill the Tutsi in Kigali. The plans further included an attack on UNAMIR. General Dallaire received his information from a reliable informant. Through this cable, he requested authorization to search for arms in the places identified by the informant. His request, which was repeated in the month that followed, was rejected by the DPKO. The DPKO asked Dallaire to notify the US, French and Belgian Embassies in Kigali but no change of policy was deemed necessary.³⁵⁸ Obviously, a different analysis of the situation clearly existed between the field and New York and had an influence on the overall approach towards the situation. The Secretariat feared being drawn to another Somalia experience whereby the UN and the US were in conflict with General Aideed's groups following an arms search.³⁵⁹ The Somalia experience had in no doubts left its marks on the reaction of the Secretariat to the alarming indicators from Rwanda.

Few months earlier peacekeepers as well as American soldiers lost their lives in Somalia. It is very reasonable to assume that the UN, supported by the US did not want any similar experience in Rwanda. The Secretariat consequently advised the Secretary-General Special representative for UNAMIR and General Dallaire that the arms seizure was beyond UNAMIR mandate and asked them instead to follow a more diplomatic approach aiming at addressing the issue with President Habyarimana. Consequently, the two men met with the President and shared the information with him. They advised him that he would hold personally responsible for such violence. The same information was conveyed with Western diplomats in Kigali.³⁶⁰

³⁵⁷ See (E/CN.4/1994/7/Add.1) 11 August 1993. Cited in Melvern, L. R., (2000), p. 57.

³⁵⁸ See Suhrke, A., and Jones, B., in Jentleson, B., (2000), pp.257-258.

³⁵⁹ Ibid. .

³⁶⁰ See Melvern, L. R., (2000), pp. 94-95.

The situation however continued to deteriorate and tensions increased from January until April 1994 in Rwanda. This period witnessed an increase in the number of political assassinations, violence and demonstrations in Kigali. This was also coupled with a further distribution of weapons to different militias. On 5 April 1994, the Security Council adopted resolution 909 extending the mandate of UNAMIR for another four months.³⁶¹

The death of the Presidents of Rwanda and Burundi in a plane crash on the 6th of April was associated with unprecedented acts of violence within Rwanda that amounted to genocide. The two presidents were coming back to Kigali after a meeting of the OAU in Dar es Salaam. Their plane was attacked by a rocket as it drew closer

³⁶¹ The resolution stated that after

“ Expressing its deep concern at the delay in the establishment of the broad-based transitional Government and the Transitional National Assembly....

Concerned at the deterioration in security in the Country, particularly in Kigali,

Concerned also at the deterioration of the humanitarian and health situation,

1. *Welcomes* the report of the Secretary-General of 30 March 1994;2/

2. *Decides* to extend the mandate of the United Nations Assistance Mission for Rwanda until 29 July 1994, on the understanding that the Security Council will, within the next six weeks, review the situation in Rwanda, including the role played in that country by the United Nations, if the Secretary-General informs it in a report that the transitional institutions provided for under the Arusha Peace Agreement have not been established and that insufficient progress has been made for the implementation of phase 2 of the Secretary-General’s plan contained in his report of 24 September 1993;5/

3. *Regrets* the delay in the implementation of the Arusha Peace Agreement, and urges the parties to resolve their latest differences without delay with a view to the immediate establishment of those transitional institutions still required for the continuation of the process, and particularly the implementation of phase 2;

See the Security Council Resolution regretting the delay in implementing the Arusha Peace Agreement and extending UNAMIR’s mandate until 29 July 1994. S/RES/909(1994), 5 April 1994.

to Kigali airport. This resulted in the death of all the passengers on the plane and clearly opened the situation to further complications.³⁶²

Wide-scale killings and acts of violence followed the accident, which was directed at the Tutsi minority and members of the Hutu opposition. The killings were clearly intended to exterminate the Tutsis present in Rwanda. The scale of the acts of violence and the killings had never been witnessed before in Rwanda despite the continued cycles of violence that occurred in the country since the 1950's.³⁶³

The killings not only targeted the Rwandan people, but also members of UNAMIR military personnel. Some of the Western countries that were participating in operation UNAMIR started pushing for withdrawal. This can be attributed to several factors. The first might be the security risks that that peacekeepers were facing in Rwanda, particularly following the brutal killing of 10 Belgian peacekeepers on the 7th of April. Furthermore, the mandate of UNAMIR, which was operating under Chapter VI of the United Nations Charter rather than Chapter VII, did not equip it to deal with the operation properly. Finally, many Western countries at that stage, believed that the United Nations could not afford another failed peace keeping operation like the Somalia case.

³⁶²In a statement that followed from the Secretary-General following the killings, he stated that he had:

“learned with horror, and profound personal grief, of the reported deaths of President Cyprien Ntaryamira of Burundi and President Juvenal Habyarimana of Rwanda in an air crash at Kigali last night. I have already presented my condolences to the families of the Presidents and to the peoples of the two countries.....This tragedy will further complicate the task entrusted to the United Nations of helping the Governments and peoples of Burundi and Rwanda to restore internal peace in their countries. I implore all concerned to act with responsibility and restraint at this very difficult time”.

See the Statement by the Secretary-General expressing grief over the deaths of the Presidents of Burundi and Rwanda. UN Press Release SG/SM/5259, 7 April 1994.

³⁶³ See The United Nations, The United Nations and Rwanda 1993-1996, (1996), p.37-39.

On the 13th of April, Belgium told the Secretary-General about its decision for withdrawal. On the 9th of April, Under Secretary-General Kofi Annan, told the Council that the choices for UNAMIR would be either to act under Chapter VII, or it would need to withdraw. The concept of humanitarian intervention to protect the civilians in Rwanda was suggested on the 13th by Assistant Secretary-General Iqbal Riza.³⁶⁴

In the meantime, the “interim Government” in Rwanda addressed on a letter to the Security Council dated on the 13th of April to ask for an extended presence for the UNAMIR Forces.³⁶⁵ Similar requests from the President of Uganda and the OAU Secretary-General were directed to the United Nations Secretary-General and to the Security Council in a letter addressed to the President of the Security Council on the 21 April 1994, Uganda appealed to the Council: “that the United Nations Assistance Mission to Rwanda (UNAMIR) should maintain its presence in the war-torn neighboring country”. The letter stated that the UN presence was needed to “continue

³⁶⁴ See the Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, ‘The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management’. (1996), p. 41-42.

³⁶⁵ It was stressed in this letter that:

“The Rwandese Government remains deeply committed to the search for a political solution to the Rwandese Conflict within the Framework of the Arusha peace agreement.

In this connection, it has set itself the goal of pursuing the discussions with the Rwandese Patriotic Front for the establishment, without delay of broad-based transitional institutions as provided for in the Arusha peace agreement and reaffirmed in the relevant resolutions and declarations of the Security Council.

.....Lastly, the Rwandese Government would like to stress that an expanded and continuing presence by the United Nations Assistance Mission for Rwanda (UNAMIR) represents, at this critical phase in the peace process in Rwanda, a stabilising factor in the present Situation”.

See the letter from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, transmitting a note from the Minister of Foreign Affairs and Cooperation of Rwanda explaining the political situation in Rwanda after the assassination of its President on 6 April 1994. S/1994/428, 13 April 1994.

providing humanitarian assistance to the Rwandan people who are in great need.”³⁶⁶
The OAU Secretary-General also voiced his concern regarding the decision of some of the countries to withdraw from Rwanda at such a critical time.³⁶⁷

These concerns expressed by the different African leaders did not get the response they hoped for. On 21 April 1994, the Security Council adopted resolution 912(1994) reducing severely the UNAMIR forces acting in Rwanda. The resolution condemned the violence in Rwanda and the attacks on the UNAMIR as well as on other United Nations personnel in Kigali.³⁶⁸

³⁶⁶ See Letter from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council, Conveying an appeal by the President of Uganda that UNAMIR maintain its presence in Rwanda. S/1994/479, 21 April 1994.

³⁶⁷ In a letter addressed to the Secretary-General of the United Nations on 21 April, he stated:

”It is true that conflict in Rwanda is essentially an African Problem but it is equally true that it has security and humanitarian implications which are clearly of universal concern.....

Bearing in mind the complexity and the enormity of the crisis, and cognisant of the primary responsibility of the United Nations Security Council for the maintenance of international peace and security, it would indeed be a tragic irony that at a time when African leaders and the Organisation of African Unity are intensifying their efforts in support to those of those United Nations to end the Conflict in Rwanda, an impression should be created of reluctance, to (say)nothing of outright withdrawal, on part of the United Nations from Rwanda. Such a position of the United Nations will certainly be a tremendous let-down to the people of Rwanda.....It will clearly not be understood by Africans who might interpret it as a sign of indifference or lack of sufficient concerns for African tragic situation.”

See the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p.266.

³⁶⁸ The resolution then decided “in the light of the current situation in Rwanda, to adjust the mandate of the Mission as follows:

(a)To act as an intermediary between the parties in an attempt to secure their agreement to the cease fire,

(b)To assist in the resumption of humanitarian relief operations to the extent feasible,

(c)To monitor and report on developments in Rwanda, including the Safety and Security of the Civilians who sought refuge in the Mission ...”

The resolution also called upon the parties “to cooperate fully in ensuring the unimpeded delivery of humanitarian assistance to all in need throughout Rwanda, and in this regard appeals to the international community to provide increased humanitarian assistance commensurate

As the situation further deteriorated in Rwanda with increasing massacres and a growing number of refugees and internally displaced persons, another course of action was clearly needed by the United Nations. The 270 personnel in UNAMIR proved unable to have any effective role in this deteriorating situation. Based on these facts, the Secretary-General urged the Security Council to review its decision regarding the mandate of UNAMIR. The Secretary-General later recommended on 13 May 1994 that the Security Council authorize the establishment of UNAMIR II, with a number of troops amounting to 5,500 soldiers well armed and equipped to deal with the situation. The Secretary-General also asked for an expanded mandate for UNAMIR to allow it to address the severe humanitarian crisis of the internally displaced people and refugees by providing them with humanitarian assistance through working to provide safety to those groups and to the humanitarian agencies working with them.³⁶⁹

These recommendations were followed by Security Council resolution 918 on 17 May 1994. The resolution was composed of three sections and addressed the following issues. In the first section (A) of the resolution, the Council decided to expand the UNAMIR mandate, which was still acting under Chapter VI of the Charter. The number of forces were increased as suggested by the Secretary-General to 5,500 persons. In addition, the force was asked to provide safety and security to vulnerable groups such as refugees and internally displaced persons, and to secure the access and work of the humanitarian organizations working with them. Section (B) of the resolution, acting under Chapter VII of the Charter, decided to impose an embargo on the supply of arms to Rwanda. In Section (C) of the resolution, the Security Council asked the Secretary-General to report on any violations of International Humanitarian Law committed within the Country.³⁷⁰

with the scale of the human tragedy in Rwanda". The number of forces within UNAMIR was reduced to 270 men.

See Security Council Resolution adjusting UNAMIR's mandate and authorizing a reduction in its strength. S/RES/912(1994), 21 April 1994.

³⁶⁹ See the United Nations, The United Nations and Rwanda, 1993-1996, (1996), pp.45-47.

The deployment of UNAMIR II in accordance with Security Council resolution 918 was proving very difficult. This was attributed to the reluctance of the international community to deploy more troops in the region. It was the Secretary-General who was pushing the international community to take a more active and forceful role facing this genocide that was occurring in Rwanda.³⁷¹

In a report addressed to the Security Council on 31 May, he noted “The delay in the reaction by the international community to the Genocide in Rwanda has demonstrated graphically its extreme inadequacy to respond urgently with prompt and decisive action to humanitarian crises entwined with armed conflict”.³⁷²

The United Nations maintained a slow pace in its reaction to the genocide, despite its knowledge of the nature of what was happening, and despite the continuous statements of the Secretary-General about the gravity of the situation from a human rights perspective.

³⁷⁰ Ibid., p.47-48.

³⁷¹ On May 25th, he stated in a press conference in the United Nations that:

“It is a genocide which has been committed. More than 200,000 people have been killed, and the international community is still discussing what ought to be done. I have tried. I was in contact with different heads of State, and I begged them to send troops. I was in contact with different organisations and tried my best to help them find a solution to the problem. Unfortunately, let me say with great humility, I failed. It is a scandal. I am the first one to say it and I am ready to repeat it”.
SG/SM/5297/Rev.1

³⁷² He further added that :

“Having quickly reduced UNAMIR to a minimal presence on the ground, since its original mandate did not allow it to take action when the carnage started, the international community appears paralysed in reacting almost two months later even to the revised mandate established by the Security Council. We all must recognise that, in this respect, we have failed in our response to the agony of Rwanda, and thus have acquiesced in the continued loss of human lives. Our readiness and capacity for action has been demonstrated to be inadequate at best, and deplorable at worst, owing to the absence of the collective political will”.

See the report of the Secretary-General on the situation in Rwanda, reporting on the political mission he sent to Rwanda to move the warring parties towards a cease-fire and recommending

Impediments for quick action

The delay of the Western powers response raises several questions about the reasons behind such a slow reaction vis-à-vis genocide of such a magnitude? Various considerations, such as the financial constraints and the security risks involved, could explain the delay of the international community's response to genocide of such a magnitude. Yet policy considerations remained the main factor determining the western powers involvement in Rwanda. The risk factor for the peacekeepers might have been a reason for reluctance for some western countries. The Somalia experience had left a negative impact on the decision of the United States in particular regarding involvement in Rwanda. The situation was different though, since the force acting in Somalia was acting under Chapter VII and aiming at disarming the various fighting factions. UNAMIR forces in Rwanda, on the other hand, were acting under Chapter VI with the aim of protecting civilians. This, however, did not eliminate the risk factor in Rwanda. The deteriorating situation also did not help.

Policy Considerations: An Analysis

An analysis of the policy considerations in some of the Western countries suggests that a lack of will to intervene existed among the major powers at the Security Council. The United States, for instance, played the major role in the Gulf war. It deployed military forces in north Iraq when the Kurdish flow of refugees occurred. The situation was however different in Rwanda, where the United States was extremely reluctant to be involved.

During the presidential campaign and the following months in office, President Clinton spoke about the need to provide humanitarian assistance and aid to those in need. Yet following the involvement in Somalia, hesitation and reconsideration for the US involvement in humanitarian crises was taking place. The Clinton Administration introduced stringent guidelines for any future US involvement in humanitarian crises.

that the expanded mandate for UNAMIR be authorized for an initial period of six months. S/1994/640, 31 May 1994.

In this regard, the Presidential Decision Directive (PDD) 25, of May 1994 introduced a set of conditions that needed to be met prior to any involvement in peacekeeping operations. Accordingly, a clear statement of American interests in the operation, an endorsement from the Congress, the availability of funds, stating the exact date of withdrawal, and agreeing on the command structure are conditions that constituted a pre-requisite for any involvement. All these conditions thus made any future involvement rather difficult³⁷³.

In addition Rwanda, in comparison to Iraq, did not constitute a strategically conducive commitment for the US. The United States however was not the only country showing reluctance to participate in a timely involvement in Rwanda. Most of the Western countries showed very little interest in contributing forces to UNAMIR II.

French Policy

French involvement in Rwanda dates back to an earlier period. France signed the first “Technical Military Assistance Agreement” with Rwanda on 18 July 1975, which was not a defense agreement but rather an agreement providing financial assistance and training for the Rwandan gendarmerie and the army. In the period that followed until 1990s the French assistance and presence was rather modest. Despite the good relations between the French President Mitterrand and his Rwandan counterpart Habyarimana. Following the RPF invasion in October 1990, the French role and involvement took on a different dimension. President Mitterrand launched Operation Noroit, which was proclaimed officially as an operation to protect the French expatriates in Rwanda.³⁷⁴

From a political point of view, the French intervention satisfied two main objectives: first, it represented a response to what was perceived to be an external aggression of the RPF from the Ugandan border. And second, it aimed at preserving

³⁷³ (Minear and Wise, 1995). Cited by Livingston, S., and Eachus, T., in Adelman, H., and Suhrke, A., (eds.), (1999), p. 224.

³⁷⁴ See Callamard, A., in Adelman, H. and Suhrke, A. (eds.), (1999), p.160.

French influence in Rwanda. The RPF was considered to be a threat to the francophonie or francAfrique. Reports from the ground confirmed the belief that the Rwandan army would not have survived the attacks of the RPF without French support. By 1991, and against this background, the French government was pushing for the peace process, supporting military disengagement and calling for peacekeeping forces, preferably UN forces in Rwanda. France was further lobbying for a UN presence with double action to monitor the Rwandan and Ugandan borders and to act as a separating force between the Rwandan army and the RPF troops. Despite its involvement in the Arusha peace talks, Rwanda was not the main issue on the agenda of French foreign policy with only one French representative present in the peace talks. The French military went to Arusha on various occasions for consultation with the French representative. In theory, the role of French military in Rwanda was confined to the protection of the French citizens in the country. Yet according to Journalists from the field, the French army had further involvement including engagement in combat, fighting the RPF and questioning some of their fighters.³⁷⁵

The role of the French diplomacy operating in Rwanda was also criticized at the time, especially during Ambassador Marter's presence in Rwanda from 1990-1993. According to the French Ministry of Foreign Affairs, the Ambassador never reported on the rise of extremism and violence during this critical period. Human rights activists, who met the Ambassador during that period, also expressed their shock vis-à-vis his reaction to their discussion with him on human rights violations in Rwanda.³⁷⁶

An analysis of the French role and responsibility in Rwanda reflects the failure of the French political and military institutions to draw the line between what seemed to be a response of the Rwandan government to the 1990 RPF invasion and between severe human rights violations against civilians that evolved rapidly to become a genocide policy against the Tutsi minority. Prior to the genocide, human rights violations against civilians were justified by military measures and civil strife. The line between the two became subsequently vague. French personnel, whether

³⁷⁵ Ibid., pp.163-167.

diplomatic or military, were accused of turning a blind eye towards violations of human rights committed by a regime that they supported with military assistance and training. Analysts further highlight that French policy aimed at containing extremism rather than isolating it. They believe that this trend was not only witnessed with the Rwandan extremists but also with others. A third interpretation for the French responsibility in Rwanda considers that the French military in Rwanda enhanced the expansion of the extremists' strategies of destroying the peace process. The support for Hutu extremism, the lack of reporting on the rising violence coupled with the military support to the regime in Rwanda, are elements that seem to be confirming this view. Following the assassination of Rwanda's President, French troops were sent to Kigali on the 8th and 9th of April. They were entrusted with a limited mandate to evacuate the French expatriates. Subsequently, 1,361 persons were evacuated and the rest of the French troops withdrew on 14 April.³⁷⁷ The decision taken by the French Government to have a limited involvement in Rwanda in 1994 might have been prompted by an awareness that any further involvement would lead to a military confrontation with the RPF group. An option that had been excluded by French policy makers since 1990. The French President's decision to support the Rwandan government did not include at the time fighting or confrontation with the RPF.

Preventive Action - An Assessment

The Rwandan experience clearly highlights the failure of the international community preventive action in Rwanda. It is very likely to assume that if timely action was undertaken when the alarming signs of growing violence and severe human rights violations started showing, the sequence of events would have been changed. The international community responsibility is even greater because of its knowledge of the disturbing indicators. Foreign diplomats in Rwanda were briefed about the regime's preparations. Months before the eruption of the genocide, increasing signals were brought to the attention of the decision makers in different parts of the world and many of these signals came as well from the UN itself. It is hard to believe that with

³⁷⁶ Ibid., p.170. (Interview done in Paris in 1995).

all the intelligence information about Rwanda, this information was not known to decision makers in different part of the world. Yet the signals were ignored by the international community.

Policy considerations discussed earlier showed major countries' interests, or lack of interests, in being involved in the conflict. But other reasons could be attributed to the inaction of the international community. Policy vacuum could be one of them. The international community was evolving from the Cold War period with no clear vision on how to respond to many of the erupting conflicts around the globe. A trend to avoid political involvement in support of more humanitarian engagement seemed to be emerging. Limited humanitarian involvements in conflicts seemed also more appealing. The West saw the conflict in Rwanda as an ethnic conflict, and many of these conflicts were erupting following the Cold War period. The Former Soviet Union and the emergence of many small states with ethnic diversity and potential for ethnic conflicts is one example. The Balkans and the ethnic conflict emerging there is another. No clear political will or vision was available in the aftermath of the Cold War on the response needed for such conflicts.

Globally and more urgently, the situation in Former Yugoslavia was evolving and this attracted more attention from the international community. Yugoslavia was after all close by and the repercussions of any conflict erupting in Europe are more felt than else where. Rwanda on the other hand was further away and for many countries did not seem to be priority. After all the conflict is in a far away land. It is worth noting though that in the three months that followed the death of the Rwandan President, more Rwandan people were killed than during the entire conflict in Former Yugoslavia.

In addition, the experience of Somalia left its scars on the international community represented by the UN. This impacted the way the organization reacted towards the Rwandan crisis. The US, the only remaining superpower, was particularly marked by this experience. Foreign policy involvement was becoming very restricted.

³⁷⁷ Ibid., pp. 170-175.

The Somalia experience has greatly affected the UN reaction as the operation in Somalia was considered by the UN to be a very bad experience. No repetition of the experience was welcomed or encouraged by the Secretariat.

Related to this factor, is the fact that the world got used to the conflicts in Africa. The West became used to news of ethnic conflicts erupting in Africa and most likely believed that the undergoing situation in Rwanda was another one of these conflicts. Only few months earlier, the conflict in neighboring Burundi resulted in hundreds of thousands of persons killed. This did not result in an outcry within the international community that seemed to get used and actually expect such similar news coming out of Africa.³⁷⁸ Subsequently, the West was very reluctant to expose the lives of soldiers in another ethnic African conflict. This was particularly so when the images of peacekeepers and American soldiers in Somalia were still very fresh in mind.

At the same time, Arusha peace talks were underway. The agreement with the eventual share of power and the democratization process that it entailed was very promising. In the eyes of the Western governments and diplomats involved, Arusha provided a lot of hope in finding a peaceful resolution to the conflict. This was actually true, yet the problem was not in the agreement, but rather in the will to implement the terms of the agreement by the political regime in Rwanda. Reports from Rwanda indicated that the closer the time came to implement the agreement, the more intense the situation became.

Against this background, it is very likely to assume that the international community failed to assess the situation properly in Rwanda and was rather confused with all indicators. Adding to this confusion may have been the image that the Habyarimana regime was promoting, i.e., the victim's image. Human rights

³⁷⁸ Suhrke & Jones state that " This failure of the international system to be startled or to respond reflected a pre-existing propensity to expect disasters out of Africa. The threshold for international response seemed to increase accordingly: if one hundred persons could be killed with impunity, the possibility of another massive slaughter did not seem so extraordinary, nor did it require particular response". See Suhrke, E., and Jones, B., in Jentleson, B., (2000), p. 256.

violations, arms distribution to the civilian population and popular instigation were all portrayed as a form of self-defense against an external aggressor. Seemingly, the international community fell for this manipulation by the regime. Statements made at a later point by members of Operation Turquoise seem to have confirmed this view. Many arrived to Rwanda believing that the Hutu were actually the victims. History provides many similar examples where the victimizer portrays the victim's image to justify human rights violations

The genocide in Rwanda left the international community in a state of shock. In the minds of many Westerners, the term genocide is mostly linked to the Nazis. The idea that it might be occurring in a place like Rwanda seemed far-fetched. It was noted as well that even the terminology referring to the genocide was being avoided. In the US for instance, the term genocide had to be used very carefully as per the instructions of the Clinton administration. The official terminology accepted by the administration was "acts of genocide may have occurred".³⁷⁹ The US, one of the signatory states to the 1948 Convention on Genocide, was committed to take action along with other signatories in accordance with the Convention. The US did not want to have this commitment, the term thus was avoided.³⁸⁰

In addition, the financial considerations seemed to have played an important role in the reluctance of the international community to commit itself to preventive action in Rwanda. A United Nations mission acting under Chapter VII of the Charter was a costly commitment. A UN peacekeeping operation, like UNAMIR, was rather cheaper. Already the UN was having difficulty in convincing member states to reinforce UNAMIR. A study however of the costs paid by the international community's involvement in Rwanda following the genocide; prove that preventive action would have proved to be cheaper and more cost effective. An assessment of the costs needed to reinforce the UNAMIR troops and make them better equipped to undertake preventive action indicates that an approximate \$500 were needed. And an overall cost of preventive action over the course of couple of years would have cost the international community \$ 1.3 billion. The international community's later

³⁷⁹ See Gourevitch, P., (2000), p. 152.

involvement, however, was estimated to have cost \$4.5 billion.³⁸¹ This figure was divided between the military, humanitarian, economic, and individual nations costs.³⁸² Financially thus, a total of \$ 3.2 billion could have been saved by undertaking a timely preventive action in Rwanda.

B. Operation Turquoise and the Establishment of a Safe Humanitarian Zone

Legal framework

Resolutions 925 and 929 constituted the legal basis for the French operation in Rwanda. Resolution 929 followed an official announcement by the French Government together with the Senegalese Government to send an immediate force to Rwanda. The French suggested that the force would stay in Rwanda until mid-August. They also suggested that the force should operate under Chapter VII of the Charter to be able to maintain international peace and security.

The Security Council adopted Resolution 929(1994) under Chapter VII of the Charter, which authorized the deployment of these forces in Rwanda. In this Resolution, the Security Council “agrees that a multinational operation may be set up for humanitarian purposes in Rwanda until the United Nations Assistance Mission for Rwanda is brought up to the necessary strength”. The Security Council also welcomed the suggestion of some member states to establish “a temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, on the understanding that the cost of implementing the offer will be borne by the member states concerned;”. The Council then authorized the state to act under Chapter VII of the United Nations Charter, and decided that the mission would last for two months following the adoption of the resolution. The resolution also called upon

³⁸⁰ Ibid., pp.153-154.

³⁸¹ See Talentino, A. K., in Brown, M.E., and Roescrance, R.C., (1999), p. 56.

³⁸² Ibid., p. 69.

member states to "respond urgently to the Secretary-General's request for resources".³⁸³

Resolution 929 had several important features such as drawing a link between the humanitarian crisis and the threat to international peace and security (article 39), delegating the command of the force to member states taking part in this operation and specifying the objectives of the operation by referring back to resolution 925. The objectives were the creation of a Safe Humanitarian Area for protecting refugees and IDPs and allowing for the provision of safety and security for refugees.³⁸⁴ The two resolutions gave the international legitimacy to the French involvement and acted as the basis for the French proposal to create a Safe Humanitarian Zone and launch Operation Turquoise.

Accordingly, French troops in the field were not under the command of the United Nations, even though the operation was authorized by the organization. These troops were instead under the direct command of their national governments. Yet in practice, there was a close coordination between the Secretary-General and the French Government that allowed the Secretary-General to exercise the proper supervision ensuring that the French were fulfilling the objectives set forward by the Council in resolution 929.³⁸⁵

Preparatory work and actual implementation of the operation

The most disturbing issue for the French government following the start of the genocide was the issue of training. France was accused of training and protecting the perpetrators of genocide. These accusations raised questions relating to the actual motives for Operation Turquoise, which was seen by many as an attempt to curb Anglo-Saxon influence and protect and save "our men". Subsequently, many weapons

³⁸³ See S/RES/929, 22 June 1994.

³⁸⁴ See Saroosdi, D., (1999), p.225.

³⁸⁵ Ibid., p. 226

were secretly smuggled into Rwanda during the month of May despite the UN embargo.³⁸⁶

The increased violence was coupled with a delay in the deployment of the UMAMIR II forces. The RPF forces were gradually taking control of more areas, and they were increasing their attempts to take over the capital, Kigali. A large number of people were fleeing from the country to neighboring countries such as Zaire. Another group of people became internally displaced in the southwestern part of the country.

Internal French politics were also divided over Rwanda. The legislative elections of 1993 brought to power a conservative majority. Mitterrand however stayed in power until 1995. Even within the Conservative side, there were divisions between the followers of Prime Minister Balladur, who was rather reserved concerning involvement in Rwanda, and the followers of Chirac (the RPR leader). Yet by late May, media coverage, public opinion and the activities of the NGOs were all elements putting pressure on French Political institution to take action. Finally, Mandela's statement to the OAU on 13 June to take action constituted another challenge to France.³⁸⁷ In Paris, Mandela's call had serious effect. He was one of the 'representatives of the 'Anglo-Saxon World' who was openly saying that he was about to intervene in French speaking Rwanda.... The danger was felt to be too pressing'.³⁸⁸

In this atmosphere, the decision to intervene and launch Operation Turquoise was taken. On 14 June, the French President announced that France would intervene in Rwanda. This was followed by a letter that was sent to the Security Council by the French Government including a proposal to deploy forces in Rwanda pending the deployment of the UNAMIR forces in the country to secure the safety of civilians within the country.³⁸⁹

³⁸⁶ See (Observatoire Permanant de la Cooperation Francaise : Rapport 1995, 157-59) Cited by Prunier, G., in Adelman, H. and Suhrke, A. (eds.), (1999), p. 284.

³⁸⁷ Ibid, pp. 285-286

³⁸⁸ See Prunier, G., (1995), p. 281.

³⁸⁹ In a letter to the president of the Security Council the Secretary-General stated that:

In Paris, drawing up the intervention plan was underway amidst accusations of French intervention aiming at protecting the Hutu extremists. Against this background, the details of the intervention plan made a considerable difference. According to the first intervention plan, French troops would intervene through Gisenyi, the heartland of the Hutu extremists. This plan was considered inappropriate, as it would have confirmed the accusations. Such a plan would have meant that the intervention would have taken place in the midst of President Habyarimana's troops, the actual perpetrators of the genocide. It would also have meant that the operation would be undertaken in areas without any Tutsi population, as they had all been killed at an earlier stage. The French groups would also be at a close proximity to the area of fighting, which would have exposed the French troops to the fighting.³⁹⁰

On 20th June, an alternative plan to enter Rwanda in an area close to Cyangugu was adopted, an area where a large number of surviving Tutsi were still

"It is evident that, with the failure of Member States to promptly provide the resources necessary for the implementation of its expanded mandate, UNAMIR may not be in a position, for about three months to fully undertake the tasks entrusted to it by those resolutions. Meanwhile, the situation in Rwanda has continued to deteriorate and the killing of innocent civilians has not been stopped.

....In these circumstances, the Security Council may wish to consider the offer of the Government of France to undertake, subject to Security Council authorisation, a French-commanded multinational operation in conjunction with other Member States, under Chapter VII of the Charter of the United Nations, to assure the security and protection of the displaced persons and civilians at risk in Rwanda....If the Council decides to authorise an operation on these lines, I consider it would be necessary for it to request the Governments concerned to commit themselves to maintain their troops in Rwanda until UNAMIR is brought up to necessary strength to take over from the multinational force and the latter has created forces operating under Chapter VI of the Charter would have the capacity to carry out its mandate. This would imply that the multinational force should remain deployed for a minimum period of three months".

.See S/1994/728, 20 June 1998. Letter dated 19 June 1994 from the Secretary-General to the President of the Security Council, suggesting that the Council consider France's offer to undertake a multinational operation to assure the security and protection of civilians at risk in Rwanda until UNAMIR is brought up to strength.

³⁹⁰ See Prunier, G., (1995), p. 284.

present. The idea of a “humanitarian intervention in a place where there was nobody left to save would indeed have been embarrassing”.³⁹¹

The French intervention, which was gaining momentum in France, was however criticized by the RPF, who perceived the intervention as an attempt to save the extreme government. Lack of enthusiasm was also witnessed among other agencies that were asking for a clarification of France’s responsibility in what happened in Rwanda. On 21 June, Prime Minister Balladur specified five pre-conditions for the French intervention in Rwanda starting with the acquisition of the UN Mandate, to set a clear time limit for the intervention, to avoid any in depth intervention in Rwanda, to have a limited humanitarian mandate for the operation and finally to have allied groups involved. Whereas conditions three and five were more difficult to maintain or even achieve, the other options were more applicable. France went in alone and the idea of no in-depth intervention was not feasible.³⁹²

The criticism for the French intervention was echoed among diplomats at the UN as well. Boutros-Ghali’s decision to support France in intervening in a conflict that it was very implicated in was upsetting for many. The Secretary-General stated that there was not much to do, as France was the only country that offered to take role in Rwanda and without imposing any costs on the UN.³⁹³ General Dallaire was in a state of disbelief when he heard the news of the French intervention. For him and his troops, the French intervention would diminish the probability of him getting further support from other countries to UNAMIR. The UN decision meant that his troops operating under Chapter VI would be caught in the middle between the RPF belligerents and French troop operating under Chapter VII of the Charter. Dallaire was also among those who were critical from the French intervention and its underlying motives. He believed that the French intervened to stop the RPF take over the whole country and he believed that the real intention was to split Rwanda into two parts like Cyprus.³⁹⁴

³⁹¹ Ibid., pp. 285-286.

³⁹² Ibid., p. 287.

³⁹³ See Melvern, L., R., (2000), p. 210.

³⁹⁴ Ibid., pp. 211-212.

The timing of the operation undertaken by the French also confirms many of the doubts about the motives of the French intervention and its humanitarian nature. Towards the end of May, the massacres that had been underway for several weeks were going slowly as the majority of the Tutsi were killed.³⁹⁵ So the decision to intervene at a time when the intensity of the massacres was decreasing and the RPF was steadily taking control of Rwanda confirm the concerns raised by many on the humanitarian nature of the intervention.

In spite of all the scepticism concerning the operation, the preparatory work continued from the French side and involved some meetings with RPF envoys who were in Paris and who were received on 22 June by Alain Juppe. The meeting yielded positive results and on the 23rd of June the first elements of operation Turquoise started arriving in Goma.³⁹⁶ The operation consisted of French and Senegalese troops. They were first deployed in some refugee areas in Zaire, mainly in Goma and Bukavo, two areas in which there was a large concentration of the Rwandan refugees.³⁹⁷

Following the arrival of the French Turquoise troops in Goma, the situation continued to deteriorate with the advance of the RPF forces, resulting in an increased number of refugees, particularly in Zaire (1.2 million), and an increase in the number of internally displaced in south-west Rwanda. The number of the internally displaced, which fled to that region, was estimated to be 1.5 million, coupled with the hundreds of thousands that had already gone there.

International concern over the situation of refugees and internally displaced persons was increasing. France suggested the establishment of a Safe Humanitarian Zone in the southwestern part of Rwanda to provide protection for the displaced persons fleeing to that area. In a letter addressed to the Secretary-General, the French government expressed the wish to create a Safe Humanitarian Zone to protect the

³⁹⁵ See Gourevitch, P., (2000), p. 156.

³⁹⁶ See Prunier, G., in Adelman, H. and Suhrke, A. (eds.), (1999), pp. 290-291.

³⁹⁷ See the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p.54-55.

internally displaced³⁹⁸. Despite the opposition of the RPF to this action, troops were deployed on 9 July 1994 in the area designated as a Safety Zone. On the 16th of July, the Hutu Power President and majority of his cabinet members took refuge in the Safe Zone and France stated that it would arrest him. Instead, he moved on 17th of July to Zaire together with his associates.³⁹⁹

The troops of Operation Turquoise that took control of the Safe Zone numbered 3000 soldiers, who were well armed, and it also had air support. The RPF thus did not seek any confrontation with the forces.⁴⁰⁰ Some field commanders, especially French ones, announced that attempts by the RPF to enter into the Safe Humanitarian Zone would be answered by the use of force. Despite their criticism that

³⁹⁸ “very grave concern on the part of the French authorities at the deterioration of the situation in Rwanda and the danger of a further humanitarian tragedy in that country....The continued fighting is creating a situation in south-west Rwanda that, in humanitarian terms, will quickly become completely uncontrollable. If steps are not taken to remedy the situation, that entire part of the country will be the scene of major outbreaks of violence, with the movement of hundreds of thousands of persons fleeing in complete and with the danger of physical elimination of minorities in the area which already arose during the months of April and May...If a cease-fire cannot be brought about immediately, France will be faced with the following choice: to withdraw from Rwandan territory, while endeavouring to save human lives through ad hoc actions, which would be extremely difficult and limited; or to organise, on the basis of Security Council resolutions 925(1994) of 8 June 1994 ,and 929(1994), a safe humanitarian zone where the population would be protected from the fighting and its tragic consequences in Rwanda. The Franco-Senegalese forces would seek to ensure, within their mandate, that no activities threatening the security of the population in question were carried out within or from the zone. The zone would need to be centred on the region where the humanitarian problems are most acute and should be sufficiently large, in view of the number of persons involved, and contiguous, in order to stabilise the population in the area and facilitate the provision of humanitarian relief”

See S/1994/798,6 July 1994. Letter from the permanent Representative of France to the United Nations dated 1 July 1994 concerning the establishment of a safe humanitarian zone in Rwanda.

³⁹⁹ See Gourevitch, P., (2000), p. 162.

⁴⁰⁰ Gourevitch reports that on few occasions when the RPF and the French troops were close to be engaged in a confrontation , mainly close to Butare. This mainly happened when the French asked clearance to come back to Butare to rescue some Catholic sisters and some orphans , after the area had fell into the hands of the RPF. The RPF stated that their main concern was to let any FAR soldiers or militia men escape with the French convoy. A confrontation nearly took place when the French refused to allow the search of the convoy cars where actually two militia men were fighting. The situation was about to be turned into a confrontation, the French

the Safe Zones were protecting the perpetrators of the genocide, the RPF did not get into confrontation with Operation Turquoise forces. Regarding the issue of the perpetrators of the genocide, contradicting announcements were declared by the French side. Whereas the French Ministry of Foreign Affairs declared that the perpetrators would not be allowed to enter and stay within the Safe Zone, the military on the ground made no effort to arrest and stop any military forces from the previous Rwandan regime, many of whom over the years had been trained by the French military.⁴⁰¹

The RPF was critical regarding the French proposal to establish the Safe Zone, stating not only that the zone provided protection to Rwandan civilians, but also to military people who were involved in the genocide. This claim was not an invalid claim, and it applied not only to the camps of the internally displaced within Rwanda, but also to the refugee camps in Zaire, which included military people and perpetrators of the genocide in Rwanda. When the RPF took control of the territory, many of them filtered among the refugees and stayed with them in these refugee camps in Zaire, an element that contributed greatly to the element of instability within these camps. Even within the Safe Havens within Rwanda, disturbing information about incidents of killing that targeted Tutsis continued to emerge. Hutu military power groups used the French military flags on their cars to ambush the Tutsis and bring them out of their hiding to be killed.⁴⁰²

A dividing line was established between the RPF and the Operation Turquoise forces. Neither of the two sides crossed this line. Within the Safe Humanitarian Zone, the situation was very calm, the French and other troops were operating in an environment. The Hutu leaders within this zone welcomed the operation, and the links that the French had formed with the previous regime, which was supported by the French, resulted in this friendly, non-hostile atmosphere. The operation was not a

soldiers were instructed to allow the search. Indeed two militia men were found hiding in the jeeps. Ibid., pp. 158-159

⁴⁰¹ See the Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, 'The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management', (1996), pp. 54-55.

⁴⁰² See Gourevitch, P., (2000), p. 158.

high-risk operation.⁴⁰³ It was also noted that the French troops that were deployed were better equipped with military paraphernalia than with relief equipment. In the mean time, it was noted that the interim government was trying to provoke a confrontation between the RPF groups and Operation Turquoise.⁴⁰⁴

With the collapse of the interim government, thousands of people were leaving the Kigali area and heading towards the last areas under government control areas or towards the “Safe Humanitarian Zone” proclaimed by the French forces in the Southern part of the country. A few days following the fall of Kigali, about 1.5 millions moved towards the French Humanitarian Zone.⁴⁰⁵

On July 19th, the new government was under oath and an attempt to bring some normality to the situation was made. Yet the country was in a state of disaster and shock with almost 10 percent of the population dead and 30 percent in exile. The new government had to deal with a wide scale range of problems. The French groups yet remained aloof from any form of involvement in these problems. The French did not even try to talk to the RPF or send missions to its areas. The RPF was still seen as the enemy and it was not considered acceptable to help people in areas controlled by the RPF.⁴⁰⁶ In brief, Operation Turquoise remained distant from the political developments in the country.

With the developments in Rwanda and mainly following the fall of Gisenyi, many of the Hutu political leaders who were in a position of responsibility were allowed into the Safe Zone and were discreetly allowed by operation Turquoise troops to cross the borders to Zaire, creating a feeling of anger among the RPF. This was justified by French military leaders by saying that France had no mandate “to arrest the members of the former government”.⁴⁰⁷

⁴⁰³ See the Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management, (1996), p.56.

⁴⁰⁴ See Prunier, G., in Adelman, H. and Suhrke, A. (eds.), (1999), pp. 292-293.

⁴⁰⁵ Ibid., p. 295.

⁴⁰⁶ Ibid., p. 297.

⁴⁰⁷ (SWA/Radio France International 1994). France was seen as becoming an “accomplice of the militiamen”(SWB/France 1TV Channel 1994). Ibid., pp. 299.

As for the disarming of soldiers within the Safe Humanitarian Zone, France did not clearly announce its policy. The troops of Operation Turquoise were supposed to disarm the militiamen present in these zones. Reports indicated that no serious efforts were made to disarm refugees present in the Safe Areas. Paramilitary troops were disarmed when they moved openly around the French troops, but no serious efforts were made to look and disarm the groups. It was not easy for the French military to disarm the people that they had trained for years.⁴⁰⁸

Refugees started to panic when the deadline set for the departure of the French troops from the Safe Humanitarian Zone came closer. Refugee outflow took place towards the borders with Zaire. By the 21 August, the date of the actual departure of the French troops, half a million refugee had left to Bukavu.⁴⁰⁹ Across the borders, the humanitarian crisis erupting in Goma with the outbreak of the Cholera epidemic brought the involvement of the French troops in Operation Turquoise into the main news again.

1. Humanitarian Impact

Operation Turquoise had a positive start from a humanitarian perspective by saving 8,000 persons near Cyangugu. In an attempt to add further legitimacy for an operation that was viewed with suspicion by different sides, the French troops were trying to save as many Tutsi refugees as possible. In general, the French troops managed to save refugees and IDPs scattered in accessible areas but failed to achieve similar results with refugees hiding in the bush. In general, the French were accused of exaggerating the humanitarian result of the operation in an attempt to disguise the political motivations of the operation and for propaganda considerations. With the outbreak of the Cholera epidemic in Goma, French soldiers were at the forefront of the news.⁴¹⁰

⁴⁰⁸ The French reached an initial agreement with the RPF that the zone would be demilitarised once the French withdraw. *Ibid.*, p. 299.

⁴⁰⁹ *Ibid.*, pp. 301.

⁴¹⁰ The French Minister of Defence proudly stated that:

The turn of events that changed the status of the perpetrators of the genocide to victims had important media coverage together with the humanitarian role played by the French troops. The suffering seen on the TV Channels all over the world helped to ease the tense feelings stemming from the genocide. French soldiers were pictured digging trenches, burying the dead and assisting the vulnerable. The situation was best analyzed by the Secretary-General of Medecins Sans Frontie`res, Alain Destexhe:

“Yesterday the genocide of the Tutsi by the Hutu militia, today the genocide of the Hutu refugees by the Cholera. This comparison, which one can see widely used in the press, puts on the same plane things, which have nothing to do with each other. Through this confusion the original, singular and exemplary nature of the genocide is denied and the guilt of the perpetrators became diluted in the general misery”.⁴¹¹

In addition to the this statement that clearly states the paradoxical nature of the operation, the operation had additional shortcomings from the humanitarian perspective. Providing protection for refugees and IDPs on a temporary basis was one of these shortcomings. Refugees within the Safe Zone would be on the move once their safety and security was threatened again.⁴¹² Actually, thousands of people started stemming out of the Safe Havens once the deadline of the withdrawal for the French groups was coming closer.

This limited duration of the operation was a subject of statement given by the French Minister of Defense on 19 August, in which he stated that:

“We did all possible to stabilize and reassure the population...it is now up to the RPF to make the necessary gestures... I don’t think it is fair to say that our intervention has only saved people

“we have stopped the violence, cared for the victims and prepared the way for those who deserve the beautiful name of humanitarians”. See the ‘Liberation’ 22 July 1994

⁴¹¹ The ‘Liberation’ 27 July 1994.

temporarily... let us not forget that the safe humanitarian zone now contains more population than the rest of Rwanda put together”⁴¹³

This statement, which was made forty-eight hours prior to the departure of the Turquoise troops lacked accuracy regarding the figures stated. The French proclaimed Safe Areas hosted 1.5 million refugees whereas 3.2 million were still present inside Rwanda. Other French officials recognized this point and stated that the French has taken” all the necessary precautions. We did not simply leave during night and put the key under the door mat”⁴¹⁴

The limited duration of the operation was specified from the beginning in the UN mandate given to Operation Turquoise. Turquoise was authorized to stay for a two-month period pending the takeover of UNAMIR II forces. This implied that whatever impact Operation Turquoise had was of a limited nature.

Despite its shortcomings, the operation had some positive impact on the refugee problem on one hand, and on the internally displaced people on the other hand. The presence of these troops in the south-west part of Rwanda and the creation of a Safe Area for people to seek refuge minimized to a certain degree the outflow of refugees to Zaire and to other countries that were already overwhelmed by the problem. The Safe Humanitarian Zone was a host to 1.5 million persons. It is also estimated that Turquoise managed to save the lives of 10.000-13.000 persons. And the assistance given during the outbreak of the Cholera epidemic also reinforced the humanitarian image of the operation. As stated by some, from a public relations and diplomatic parameters, Operation Turquoise was a complete success⁴¹⁵. Indeed Operation Turquoise was a very good humanitarian escape from political involvement.

⁴¹² See Prunier, G., in Adelman, H. and Suhrke, A. (eds.), (1999), p. 296.

⁴¹³ The ‘Liberation’ 20-21 August 1994. Ibid., pp.301.

⁴¹⁴ Alain Juppe during a radio interview on 22 August. SWB/Radio France International 1994.

⁴¹⁵ Ibid., pp. 301-303.

In spite of its limited time, the Safe Humanitarian Zone helped to curb the outflow of 1.5 million persons to neighboring countries. Instead of dealing with the refugee problem in asylum countries, this operation presented another option for handling the refugee problem within countries of origin. The Safe Humanitarian Zone within Rwanda, did not threaten the right of those people to seek refuge in other countries. Whoever wanted, at that point to leave to Zaire or to other neighboring countries, was not denied this right to seek asylum elsewhere. What the Safe Zones provided, even for a limited period of time, was a safe place for refuge for people who did not want to leave their country.

Within the zone, aid was distributed to the threatened population. The worsening situation in Rwanda after April 1994 had a negative impact on the role of the humanitarian organizations functioning in the country. Many of these organizations and NGO's had withheld their operations with the deteriorating situation. Between the beginning of the genocide and the deployment of the troops of Operation Turquoise, the only organizations that managed to operate were the ICRC, CRS/Caritas, and WFP. Among these organizations, ICRC had the most freedom of movement within Rwanda, and there was a close co-ordination between the different agencies. The ICRC contributed greatly to sustaining many hospitals, orphanages, IDP camps and different ICRC centres. It was estimated that ICRC had distributed around 800 tons of medical supplies, food, and relief to the FAR controlled area during the months of May and June. The ICRC was also closely co-coordinating with WFP for the distribution of aid throughout Rwanda. According to an agreement between the two organizations, WFP was responsible for distributing the relief supplies in the southern part of the country to IDPs and to victims of conflict as well as Burundian refugees close to the border, while the ICRC would be responsible for the distribution of aid in the northern parts of the country.⁴¹⁶ The relief work done by the few organizations that were left there was surrounded by many risks, and with a worsening of the situation; it became increasingly difficult to operate in the country.

⁴¹⁶ See The Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, 'The International Response to Conflict and Genocide: Lessons from the Rwanda Experience, Humanitarian Aid and Effects', (1996), pp.41-42.

The mandate of Operation Turquoise stipulated that the troops would, among other responsibilities, facilitate the relief work of the humanitarian organizations within the safe humanitarian zone. The French were working hard within the two months period that they were in these areas to create programmers for the assistance of the internally displaced within the zone. The number of the internally displaced within the safe area was estimated to be 1.5 million. The aim of the international organizations and the military troops was to distribute relief as quickly and efficiently as possible to curb the outflow of refugees to Zairian territory.

The scepticism that surrounded the initial stage of the implementation of Operation Turquoise, and resulted in the reluctance of some NGOs to cooperate in relief work within the Safe Humanitarian Zone. The French role was seen not on a purely humanitarian base, but political elements were also advised as the motive for this operation. Many NGOs were also reluctant to distribute and cooperate with Hutu officials and military men, many of whom they saw as the perpetrators of the genocide. This led sometimes to a delay in the work of the operation and to frustration from the French side due to this delay.⁴¹⁷

Despite this reluctance in the beginning, the relief work started gaining momentum over time. ICRC and WFP were among the primary organizations that were responsible for the distribution of the relief supplies to the camps of the IDPs. It was estimated that the ICRC distributed 600 tons in the IDP camps in July, the amount increased to 4000 in August and by September, the amount of relief supplies distributed was 3,700 tons. The supplies were brought through the Operation Turquoise routes from other countries. Other NGOs as well, those, which were not participating in the beginning, started contributing to the relief work within the safe humanitarian zone. In the month of July NGOs like MSF, which had stopped its activity earlier, started operating again. Other organizations such as CARE, AICF, UNICEF, SCF-UK started becoming operational and started programmers within this zone.⁴¹⁸

⁴¹⁷ Ibid., pp.43-44.

Despite these extensive efforts to address the severe humanitarian crisis in the IDP camps in Rwanda and the refugee camps in Zaire, the operation was able only to meet the most urgent needs of these vulnerable populations. This was stated by the Government of France to the Secretary-General on 4 August 1994 in which it indicated that the resources available for Operation Turquoise did not allow it to meet the urgent humanitarian needs resulting from the outflow of refugees to the safe humanitarian zone and to the refugee camps in Zaire.⁴¹⁹

In accordance with Security Council resolution 929, Operation Turquoise forces were preparing to withdraw by 22nd August from the Safe Humanitarian Zone, and the UNAMIR II forces were being prepared to be deployed. The preparation, however, was still facing some difficulties. Out of the 5,000 troops that were supposed to be deployed, 3,000 were in need of equipment, and only 500 were in Rwanda by 25 July 1994.⁴²⁰ The Secretary-General urged Member states to make more efforts to deploy these troops in Rwanda. In his letter to the Council he indicated that UNAMIR II would be entrusted to “establish conditions of safety and security to encourage the refugees to return...Instability must also be contained in the south-west zone from where the French force will withdraw in three weeks. I reiterate my urgent request in the strongest terms to Governments to provide the essential reinforcements for UNAMIR....Rwanda needs the help of the international community and will continue to need it for the foreseeable future. I am convinced that resources do exist. What is required is the political will in the countries around the world coalescing into a collective political will at the United Nations.”⁴²¹

The fear that the withdrawal of Operation Turquoise troops would result in the outflow of more refugees to neighboring countries intensified the efforts of the international organizations within the safe zone in August. UNAMIR II troops started being deployed from the 10th of August, and they took control of the Safe Humanitarian Zone following the withdrawal of Operation Turquoise forces on 21st

⁴¹⁸ Ibid., pp.44.

⁴¹⁹ See The United Nations, The United Nations and Rwanda, 1993-1996, (1996), p.58.

⁴²⁰ Ibid. .

⁴²¹ See S/1994/923, 3 August 1994. Cited in The United Nations, The United Nations and Rwanda, 1993-1996, (1996), pp.323-325.

August 1994. The UN troops quickly established their presence in the area, and continued to facilitate the relief work within the zone, an element that resulted in curbing another refugee flow into neighboring Zaire. Out of the 1.5 million IDPs present in southwest Rwanda, it was estimated that 100,000 went to Zaire seeking refuge following the withdrawal of Operation Turquoise troops. By October, the number of UNAMIR troops was estimated to be 4,270 with 320 military observers present.⁴²²

Following the withdrawal of Operation Turquoise forces, much effort was put by UNAMIR II forces and by the international organizations and NGOs for distributing food and relief supplies to the camps of the internally displaced within Rwanda. Among the important organizations to be involved in this was the WFP. In addition to food supplies, assistance in the health sector, water supplies, and even educational and agricultural programmers were also set up.

2. Insecurity Problems Inside the IDP and Refugee Camps

Among the major problems from which the IDP and refugee camps suffered was the problem of insecurity. This problem posed many challenges to the international community, particularly when discussing the "voluntary" repatriation option for the internally displaced and for the refugees.

a. Internally Displaced Camps

There was a gradual return of the internally displaced, which occurred over the months following the deployment of UNAMIR II. Most of the IDPs returned to their places of habitual residence by the beginning of 1995. There remained, however, an estimated number of 300,000 people still in 20 camps in the southwestern part of Rwanda. Their return was impeded by their fear of reprisal upon their return and by the fear of insecurity. Despite the fact that the Rwandan government was taking steps

⁴²² Ibid., p. 58-59.

to normalize the situation within the country and to work seriously to emphasis national reconciliation, there were still concerns regarding the security situation within Rwanda. There were continuous reports about "summary executions, secret detention and torture" occurring in Rwanda until February 1995. The fear of reprisals was among the main reasons impeding the repatriation of the refugees and the internally displaced people.⁴²³

Among the other factors that led to the delay in the repatriation process was the control of the military men of the previous regime in the camps who were intimidating the refugees who wanted to return. The presence of these armed militiamen also led to the increased insecurity within the camps. The insecurity within IDP camps, mainly the Kibeho camp, led the Rwandan government to ask continuously for its closure, even by force.

The presence of the IDP camps inside the country was seen by the Rwandan government and by the international community as an impediment for national reconciliation, and national unity. Many complaints were made by the Rwandan government seeking the closure of these camps. The efforts of the international community, at that point, were gradually shifting from relief to rehabilitation.

Following these complaints, efforts were made by UNAMIR II troops to stabilize the situation in the camps, particularly in the Kibeho camp, which seemed to have the highest degree of tension among the IDP camps in Rwanda. An operation was launched by UNAMIR II troops in some camps between 13th and 15th December 1994. In this operation, which witnessed the presence of human rights officers and members of the ICRC, a screening process was conducted and 47 persons alleged to be involved in criminal activities were arrested and handed over to the Rwandan government after being registered by the ICRC. In addition, UNAMIR II troops seized 1,000 weapons that were present in the camps among the IDPs.⁴²⁴

⁴²³ See S/1995/107, 6 February 1995, and addendum:S/1995/107/add.1, 16 February 1995. Cited in The United Nations, The United Nations and Rwanda, 1993-1996, (1996), pp. 450-451.

⁴²⁴ See The United Nations, The United Nations and Rwanda, 1993-1996, (1996), p.85-86.

Parallel efforts by the international community to facilitate the repatriation of refugees and the internally displaced were taking place. Operation Retour was launched on 29 December 1994. According to this operation, UNAMIR troops would accompany those who are willing to return home to provide them with protection and security, and also to provide them with assistance, protection and relief once they were back to their homes. The operation gave assistance to 40,000 people who were transported back. However, due to the security situation, and the fear of reprisals less people were willing to go back. The number of people estimated to be present in the camps by March 1995 was 250,000 IDPs.

Following continuous urging from the Rwandan government to close these camps, discussions with the United Nations took place aiming at a voluntary closure of the camps in April 1995. However, on the night of 17/18 of April the Rwandan government launched an operation aimed at closing the camps. This happened without any notification to the United Nations. The operation succeeded without any casualties in eight of the IDP camps. This was not the case though in the Kihebo camp, where on 22nd and 23rd of April, a large number of casualties resulted from the exchange of gunfire between the government's forces and the armed hard liners present among the refugees. The international community reacted by sending more relief work and UNAMIR officials to assess the situation. In addition, an Independent International Commission of Inquiry including representatives of different European countries to was established to investigate the incident.⁴²⁵

Different figures were given on the number of casualties resulting from the Kihebo incident. According to the Rwandan government the number of casualties was 300 persons. Australian UNAMIR soldiers estimated the number to be 8,000 and final estimation by the United Nations was 2,000.⁴²⁶

A report submitted by the Commission concluded that: "The tragedy of Kihebo neither resulted from a planned action by the Rwandan authorities to kill a

⁴²⁵ Ibid., p.86-87.

⁴²⁶ See the Steering Committee of the Joint Evaluation of Emergency Assistant to Rwanda,

certain group of people, nor was it an accident that could not have been prevented.” The commission recognized in its report the need to close the camps of the internally displaced, both by the international community and the Rwandan government. It stated this was because “of national security and in order to remove an important obstacle to the country’s efforts to recover from the devastating effects of last year’s genocide”⁴²⁷

The Kihebo camp incident did not thus result from a planned action by the Rwandan government. It was, however, a direct consequence of the action undertaken by the government. Many parties could be held responsible for this action. The troops of the Operation Turquoise did not demilitarize the zone while they were in control of the Safe Humanitarian Zone; UNAMIR II troops did not prevent the attack when it happened even though they had the mandate to protect the civilians; Furthermore, the military men of the previous regime used the IDPs as human shields against the RPF army and tried to stop those willing to return from returning; Finally, the Rwandan army acted without notifying the UN about the initiation of the operation. It is true that there were discussions going on with the United Nations to shift from relief work towards more rehabilitation and reintegration, but the Rwandan government did not give prior notice to the UN about its action. Moreover, the international community seemed too quick to solve the refugee and the IDP problem without seeing whether the situation in Rwanda was really ready for a quick repatriation.

Analysis of the Operation

It could be assumed from studying the crisis in Rwanda, that the international community’s response towards a crisis of such a magnitude was not adequate and late. The reaction came only following the genocide and nearly at the end of the conflict. Many Western powers were reluctant to be involved militarily in an area in spite of the severe humanitarian crisis. Strategically, involvement in Rwanda did not seem as interesting as in other countries. Faced with this reluctance from the international

‘The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management’, (1996), p. 63-64.

community in reacting to genocide of such a magnitude, Operation Turquoise became a humanitarian escape from a political impasse.

The French political motivations behind this operation were a source of concern for many actors in the international arena. The traditional link that existed between the French and the previous regime was viewed by many as a crucial factor behind the French suggestion concerning Operation Turquoise to the Secretary-General. The scepticism was not seen only on international level, the RPF, for instance, was also very doubtful of the intervention in Rwanda. They saw it as a form of protection for the members of the previous regime. The controversial proposal, according to many, came when France felt that its protégé in Rwanda was being threatened and that there was an expansion of the Anglo-Saxon influence and that it had to intervene. The RPF was not the only side that had reservations concerning the French role in Rwanda; The OAU Secretary-General expressed his denunciation for the intervention while UNAMIR General Dallaire spoke about the intervention with little eagerness.⁴²⁸

All evidence seemed to suggest that France was aiming at preserving its influence in Rwanda long before operation Turquoise. Many believe that France exerted pressure on the Habyarimana regime to start the negotiations in Arusha in an attempt to maintain its influence in Rwanda. The sequence of events seems to confirm this opinion. The Habyarimana regime was at a disadvantaged military position vis-à-vis the RPF, that was showing clear signs of military superiority and better organization than the Rwandan government forces. France knew that the Habyarimana regime will not win militarily this war in spite of the military training and support that its forces were getting from the French. At the same time, France was unprepared to engage in fighting and risking the life of its soldiers in Rwanda. Fighting in Rwanda, at least openly, was not on the French agenda. Against this background, Arusha suggested a good platform for finding a way out of the war in Rwanda whereby both

⁴²⁷ See S/1995/411, 23 May 1995. Cited in the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p. 490.

⁴²⁸ See Punier, G. , (1995), pp.286-287.

sides would find some kind of representation. The French influence will be thus maintained.

Despite all the indicators from the field, a genocide of such a magnitude surprised international community and even the French. The events were seen as a manifestation of tribal and ethnic conflicts and no expectation of such horrendous acts was foreseen. Rwanda did not attract much attention among the politicians in the West. Even the media coverage of that period did not focus much on the growing violence in Rwanda. Thus the situation remained out of focus for the international community.

Faced with the genocide in April 1994, the French had two options. First either to fight the RPF forces and expose French soldiers to considerable risks and loosing lives or fighting their former allies whom they had trained for years. The French could not adhere to either action. The French government and public opinion could not have accepted French soldiers being killed in Africa and also the French military would not have accepted to fight the FAR forces that it had been training in Africa throughout the previous years. Further more, any similar involvement for the French troops in Rwanda would have brought to light the previous links for the French government with the FAR and expose them to strong criticism. The French decided to wait and see the results. With the quick collapse of the FAR and the media coverage of the genocide and the public outcry for action, French intervention was more easily sold to the public. Turquoise was promoted as an humanitarian operation. Internationally, Operation Turquoise was also viewed by many as an attempt to stop the RPF advance. Even within the Council a lot of criticism was witnessed.⁴²⁹

Operation Turquoise thus followed the gist of the French Proposals.⁴³⁰ Many believe that the humanitarian influence of the operation was very much exaggerated

⁴²⁹ Ibid., pp. 302-303.

⁴³⁰ Following the proposal, the Security Council authorised under Chapter VII of the Charter a unilateral "humanitarian intervention" to protect civilians within Rwanda, pending the deployment of UNAMIR II troops. Subsequently, a Safe Humanitarian Zone was established in the south-western part of Rwanda, where a large number of population went to seek refuge, pending the end of the crisis. It is important to note that unlike safe havens in north Iraq created

for propaganda purposes. Yet Turquoise had undeniable humanitarian results. Reasonable estimates for the lives that were saved is equivalent to 10.000-13.000 lives.⁴³¹ Operation Turquoise also had immediate humanitarian implications vis-à-vis IDP populations. Hundreds of thousands IDPs found temporary refuge within their country of origin. This saved lives and helped to curb, at least for a while, the tremendous outflow of refugees to neighboring countries.

In addition, the involvement of French Turquoise troops in assisting the victims of the epidemic in Goma boosted the humanitarian image portrayed by the French. Taking pictures of French soldiers burying the dead, assisting the sick and the vulnerable enhanced the humanitarian image of the operation. Gradually, the presence of the perpetrators of the genocide was blurred with the suffering that the outbreak of the epidemic brought to the refugees in Goma. The epidemic in Goma, shifted France's previous allies from the status of being murderers to the status of victims.⁴³²

The presence of the troops also facilitated the relief work of the international NGOs and organizations despite the scepticism with which some of these NGOs viewed the French action. The political implications behind the Operation made many NGOs reluctant to start working in the beginning in the Safe Zone, thus explaining the slow start of many of the NGOs that refused to be involved in distributing relief supplies to people involved in the genocide⁴³³.

When analyzing the international action in Rwanda, the issue of timing is important. The deployment of Operation Turquoise troops and UNAMIR II troops seemed late. If such an international action has been undertaken at the beginning of

by the Allied groups, Operation Turquoise had the legal authorisation of the Security Council. Indeed, unlike the unilateral intervention in northern Iraq, Operation Turquoise had a clear mandate to be working under Chapter VII of the Charter. The troops were thus heavily armed to be able to protect the safe zone. After a two-month period, which had already been established by the relevant Security Council resolutions, United Nations troops took over.

⁴³¹ See Prunier, G., in Adelman, H. and Suhrke, A. (eds.), (1999), p. 303.

⁴³² Ibid. .

⁴³³ This point created a moral dilemma for many NGOs operating at a later point in Zaire and resulted to the withdrawal of some of them.

the genocide rather than in June, it would be reasonable to assume that hundreds of thousands of people might have been saved.

The long-term consequences of the creation of the Safe Humanitarian Zone, seem more controversial. Some critics claim that the establishment of the Safe Havens in southwest Rwanda drew attention from what was going on in other parts in the country. Others claim that the establishment of such a zone to protect many of the retreating government forces prepared the ground for the events that followed.

Among the important gaps and shortcomings of operation Turquoise was the fact that Turquoise was not mandated to detain those who organized the genocide or to disarm those present within the Safe Areas or those crossing international borders. In fact, it is reported that France and Zaire facilitated the movement of the political, military and administrative leadership that had initiated and carried out the genocide. Not only were very little efforts made to disarm the fighters, but also Zaire was accused of rearming them.⁴³⁴ In the context of the camps in Zaire in particular, many believe that once the immediate humanitarian needs were met (food, shelter, ...) the international community should have taken the immediate step to exclude those who took part in the genocide from the rest of the refugee population. This task should not have left this responsibility solely to Zaire. They argue that the Security Council should have applied and authorized a necessary military force to carry out this activity within the refugee camps. If such action would have proved difficult to achieve by the international community, assistance to the refugee camps should have been stopped.⁴³⁵

By providing refuge for the perpetrators of genocide and military men of the previous regime, the operation lost some of its credibility. The lack of serious efforts to disarm and arrest the perpetrators of the genocide contributed to the instability within the camps. The camps should have been turned in to demilitarized camps from the very beginning.

⁴³⁴ See Martin, I., in Moore, J. (ed.), (1998), p.171.

It would be exaggerated to claim that the creation of a Safe Zone resulted in the events that followed. It would be more reasonable to assume that the steps that followed, mainly by the United Nations and the French were insufficient. An element, for instance, that was critical regarding the turn of events at a later point was the reaction of the United Nations troops to the RPF attack on the IDP camps. The UNAMIR II troops were well armed and authorized to work under Chapter VII of the Charter to provide protection to the civilians. Despite this UNAMIR II troops did not use that force to protect the civilians when they were attacked by the RPF forces. UNAMIR troops made no attempt to intervene.

A final element which could be essential when studying the concept of establishing Safe Havens should be the duration of such an action. Safe Havens in general and in the case of Rwanda in particular were not considered as a solution to the displacement problem, but rather as an interim solution. The steps that followed by the international community and the UN, which aimed at encouraging national reconciliation and involved monitoring the human rights situation, were promising steps. However, the decision to move from the relief phase to the rehabilitation phase seem to have been a quick decision. The security situation in Rwanda in 1995 was still unstable, and deciding that it was time to close the IDP camps already in April 1995 was questionable.

b. Refugee camps

The outflow of Rwandan refugees to neighboring countries created a series of problems, the most serious of which was the security problem. The problem was most acute in Zaire and became a source of great concern to the international community. The security issue within the camps became so severe that it affected in some instances the relief programmers.⁴³⁶ It was known to many of the international organizations dealing with refugee influxes to the neighboring countries of Rwanda,

⁴³⁵ Ibid., p. 172.

that the refugee population not only included civilian population. Military personnel and people who had been involved in the genocide were also present among the refugee population in neighboring countries.

The refugee population present in neighboring countries included in addition to the ordinary refugees, refugee leaders, soldiers and militia men who were either involved in the human rights violations prior to the genocide or were directly implicated in the organization and execution of the genocide. This in fact created a security problem of many dimensions.⁴³⁷ On one hand, relief workers and refugees themselves were harassed by the local Zairian population. Of a more serious nature was the control exerted by the militiamen on the refugee population in the camps and their attempt to prevent them from returning to Rwanda. On the other hand, the close location of the camps to the Rwandan boarder facilitated the military activity and increased the security problems generated from these camps.

As mentioned earlier, the problem was most acute in the refugee camps in Zaire. The local authorities in Zaire were an ally of the Habyarimana regime. This was translated into actual political support for the refugee leadership present in the camps. This also meant that no efforts or at least serious efforts were made to address the issue of militant elements among the refugee population. This official support by the Zairian authorities did not reflect the popular image on the ground from the local population that felt that the refugee community was imposing on the country's resources and benefiting more from the international support and aid. This in turn resulted in increased tension between the refugee population and the local population and resulted in security incidents against international workers who were sometimes taken as hostages⁴³⁸.

The large influx of refugees impeded the application of the exclusion clause on those involved in the genocide. This was due to the fact that applying the exclusion clause required first registration and then eligibility interviews. This procedure could

⁴³⁶ See Prunier, G., in Adelman, H. and Suhrke, A. (eds.), (1999), p. 307.

⁴³⁷ Ibid., pp.310-311.

⁴³⁸ Ibid., pp.311-312.

not be applied in this particular case due to the huge influx. The application of the exclusion clause proved also to be a controversial issue from a legal perspective. According to the OAU Convention on Refugees, all individuals in mass influxes from war situations are considered prima facie refugees. The 1951 Convention, on the other hand, excluded from the scope of protection persons believed to be implicated in war crimes or crimes against humanity. Applying thus the exclusion clause for refugees proved to be extremely difficult in the context of the refugees from Rwanda. It was a known fact that the perpetrators of the genocide were present among the refugees. But identifying them, gathering evidence against them and isolating them proved to be a Herculean task.⁴³⁹

These camps became gradually a source of military offensives against Kigali. The Secretary-General of the UN reported on 18 November 1994 that there was indication that preparations for unarmed invasion of Rwanda were underway.⁴⁴⁰ Security incidents were repeatedly witnessed in the camps especially against refugees who were considering repatriating to Rwanda. Aid workers within the camps were repeatedly reporting such security incidents against refugees by the militiamen and their leaders. Furthermore, the aid support that was distributed by the international community to the refugees was in many instances diverted for other use⁴⁴¹.

The reaction of the international organizations and NGOs differed regarding this problem. Whereas some NGOs refused to work in the camps due to this problem, others decided to remain operational in the camps due to the severe humanitarian crisis. These former military and political officials were gaining control in the camps, particularly with regards to the distribution of food and relief supplies. This factor led in some cases to clashes with members of the international organizations operating in these camps. Among the known incidents in this regard was the 'Gatete incident' in which UNHCR tried to remove one of the known criminals in the Ngara camp. This attempt resulted in riots within the camps that involved several thousand people, and which had an influence on the refugees and the aid workers alike.

⁴³⁹ Ibid., p.315.

⁴⁴⁰ UNSG 1994. Cited in *ibid.*, p. 312.

⁴⁴¹ Ibid., p. 313.

The situation in the refugee camps in Zaire was even worse. The number of refugees was higher, and the number of armed soldiers among them was also greater. The refugee community established themselves in areas close to the border and away from government authority. They thus tried to create a state within a state, and they managed to keep their arms with them in the refugee camps. Among the worst camps in Zaire was the Goma camp, which witnessed recurring incidents of violence in August 1994. The previous political leaders and the military men who established their power in the camps, tried to intimidate the refugees and prohibit them from returning to Rwanda. They viewed any attempt at repatriation as an acceptance of the new regime. They also tried to gain support for their fight against the new regime in Rwanda. Any attempts by international organizations, such as UNHCR, to facilitate repatriation was faced with resistance from these groups within the camps. Members of many of the organizations were subjected to intimidation and harassment within the camps.⁴⁴²

International organizations and NGOs operating in the field repeatedly highlighted the precarious security situation in the camps. UNHCR suggested on many occasions the removal of those implicated in the genocide to separate camps. Some NGOs went further by threatening to suspend their activities and withdraw from the Goma refugee Camp in Zaire. In November 1994, a group of fifteen NGOs stated that in view of the existing situation in the camp, UNHCR was not able to fulfill its mandate; the humanitarian work of these organization was hampered by the existing power structure; and relief operations could not be upheld as refugees were denied the possibility to return to their country of origin, equal access to humanitarian assistance and protection.⁴⁴³

⁴⁴² See the Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, 'The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Early Warning and Conflict Management', (1996), p. 58,59.

⁴⁴³ By late 1994, Medecins sans Frontieres (MSF) France and the International Rescue Committee withdrew from the camp as the humanitarian assistance continued to be diverted by the same leaders who had planned and executed the Genocide. See Martin, I. , in Moore, J. (ed), (1998), pp. 160-161.

In an attempt to improve the security situation within the camps, UNHCR discussed with the Zairian government different possibilities for improving the situation. Among the first proposals to be discussed was that to separate the militiamen from the rest of the refugee population. This proposal was far reaching due to the force that was needed and the difficulties involved. Another proposal was to deploy members of the Zairian elite forces to monitor the security situation within the camps. The proposal did not seem appealing to the Secretary-General and to the Secretariat in New York who seemed to prefer deploying peacekeeping troops for this purpose.⁴⁴⁴

In November, the Secretary-General proposed the deployment of peacekeeping troops to the camps to “provide security for international relief workers, protection for the storage and delivery of humanitarian assistance and safe passage to the Rwandan border for those refugees who wish to return. From the border, UNAMIR troops would then provide assistance in returning the refugees to their home communities.”⁴⁴⁵ A Peacekeeping force of 10,000-12,000 was seen as necessary if the separation between the military and civilian population was to be implemented. While a force of 3,000-5,000 troops was seen to be needed to maintain security without aiming at separating the various elements.⁴⁴⁶

The proposal to deploy peacekeeping troops to monitor the situation in the camps did not seem feasible. The Secretary-General reached this conclusion himself following consultation with the countries contributing troops and after sending a team to Zaire, the United Republic of Tanzania, and Rwanda. Following his consultations the Secretary-General decided that the “UNHCR would follow up with the Government of Zaire on the discussions held by my Special Representative, with a view to concluding appropriate arrangements, under UNHCR’s refugee protection and humanitarian assistance mandate, to enhance security in the camps.”⁴⁴⁷

⁴⁴⁴ Ibid., pp.59-60.

⁴⁴⁵ See S/1994/1308, 18 November 1994. Cited in the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p.395.

⁴⁴⁶ See Martin, I., in Moore, J. (ed), (1998), p. 161.

⁴⁴⁷ See S/1995/65, 25 January 1995. Cited in the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p.447.

In January 1995, UNHCR and the Zairian government agreed to the deployment of Zairian troops in the refugee camps to maintain security. In accordance with this agreement, 1,500 Zairian soldiers would be deployed in the camps to maintain the safety and security of relief workers in the camp, to maintain the security of refugees and to prevent acts of intimidation and harassment against them. The force would also facilitate the repatriation of those refugees who wished to do so. They would assist the refugees until they reached the borders beyond which the UNAMIR forces would take over. One month after the agreement, the troops started arriving in the camps, and by June 1995, this number reached 1,500. With the deployment of these troops, the security situation in the camps changed considerably.⁴⁴⁸

Despite this positive development, there were alarming reports about the supply of arms to refugees in some camps in Zaire. In a report by the Secretary-General⁴⁴⁹ about the security situation in the refugee camps in Zaire, he stated that the Government of Rwanda and the international community “are seriously concerned by persistent reports about arms shipments into Goma airport, allegedly for arming the former Rwandan government forces, as well as the training of these forces on Zairian territory”. The government of Zaire for its part denied any involvement of such a kind. Despite this denial, reports from the area continued to indicate that an arms supply to the camps had been occurring, and training for the military on the Zairian territory continued. It was indicated also that crossing into Rwanda by some of these groups was occurring. As a result tension increased at the border areas.⁴⁵⁰

Repatriation of Refugees

When discussing the refugee population from Rwanda, two groups of refugees had to be studied: the old caseload and the new one. Rwanda had an unstable history from 1959 and a considerable number of refugees had fled to neighboring countries from that time. The old case load were mostly Tutsis who started leaving after 1959.

⁴⁴⁸ Ibid., p. 83.

⁴⁴⁹ S/1995/304, 14 April 1995, cited in the United Nations, The United Nations and Rwanda, 1993-1996, (1996), pp. 485-487.

The new caseload was constituted from mainly Hutu refugees who fled to neighboring countries or IDPs who took refuge in southwest Rwanda in 1994.

As for the old caseload refugees, they were mainly present in neighboring countries such as Tanzania, Zaire, Burundi and Uganda. The old caseload refugees started returning to Rwanda following the collapse of the old regime in 1994. There were several factors that pushed them from their places of refuge: population pressures in these countries, policies, which marginalized them, and competition for scarce resources, were among them. Moreover, the influx of the new caseload refugees, mostly Hutus and among them many hostile elements constituted another push factor for them. The number that was estimated to have returned one year following the end of the war was estimated to be 700,000 refugees.⁴⁵¹

Among the main difficulties that faced the repatriation and reintegration of the old caseload refugees were the scarce resources for their reintegration. They, however, benefited greatly from the assistance that the international community was providing to help in the repatriation and the integration of the refugees.⁴⁵²

Following the war in Rwanda, the infrastructure, the economic system, the health system, and the educational system were severely damaged or even paralyzed. In addition to all this, the presence of 50,000 to 60,000 land mines constituted a further difficulty against repatriation, rehabilitation and the reintegration of refugees in general. As mentioned earlier, the old caseload refugees started the repatriation process to Rwanda, despite the difficulties and were benefiting from international assistance that was provided to them. The international community and the international organizations concentrated very much on the repatriation and the rehabilitation of refugees.

⁴⁵⁰ See the United Nations, *The United Nations and Rwanda, 1993-1996*, (1996), pp.88-89.

⁴⁵¹ See the Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Rebuilding Post -War Rwanda'*, (1996), pp.87.

⁴⁵² *Ibid.*, p.88.

Many UN organizations were involved in the repatriation, rehabilitation, and reintegration of refugees. UNHCR, the main organization dealing with refugee issues, was very much involved in working on returning refugees in conditions of safety and security to Rwanda. It co-coordinated its efforts with UNAMIR II forces and also there was close co-ordination with the Organization of African Unity (OAU). UNDP was also involved in matters related to development and rehabilitation activities. The United Nations Centre for Human Settlements (Habitat) and the United Nations Environment Programme (UNEP) were very much involved following the war in addressing the relevant problems.⁴⁵³

As for the new caseload of refugees, the size of the influx into the neighboring countries constituted a major problem in dealing with them. When trying to organize their situation in countries of refuge, UNHCR was using the same administrative system in organizing the camps that they had used in their home country. In the distribution of food and relief supplies, UNHCR and NGOs were relying on the community leaders and local authorities to help in the distribution of aid and relief supplies. The international organizations and NGOs indicated that such a policy was necessitated by the huge number of refugees. Such a policy had negative implications for the refugee community, since it consolidated the authority of the traditional authorities, previous government and its military people over the refugee community. Despite their acknowledgement of the dangers of such a policy, the relief agencies said that this was no alternative in this specific context.

The authority that the previous regime people and its military exercised in the camps had a further negative impact on the refugee community. The refugee camps, particularly in Zaire became places for recruiting people for starting the struggle against the new regime in Rwanda. Many of the new recruits were trained by the military of the previous regime and by those who participated in the genocide. A lot of the relief work that was distributed, was used by the authorities in the camps as support for this struggle for which they had started planning. Furthermore, people from the refugee community that were working with international NGOs or

⁴⁵³ See the United Nations, The United Nations and Rwanda, 1993-1996, (1996), pp.77-78.

international organizations were asked to contribute part of their salaries to this struggle.

The repatriation process of some of the new caseload refugees started between the end of July and August 1994. Several factors prompted this repatriation process. The first was the breakout of diseases in the camps, which resulted in a high degree of mortality, mainly among children. This motivated some of the refugees to start returning. This was coupled with the cessation of the fighting in Rwanda. The repatriation process, however, started slowing down following the month of August. By the end of August, with the decrease in the number of death rates in the camps, and with increased reports of retaliation activities against returning refugees, the number started decreasing. UNHCR, on its part, stopped all repatriation activities following a fact-finding mission report on the situation in Rwanda by the end of August.

Three main reasons hampered the quick return of refugees to Rwanda. The first being the fear that the returning refugees might be easily carrying back the cholera inside Rwanda. The second and very important reason was the security consideration. Rumors of execution undertaken in Rwanda were mounting and some claimed that a second genocide was taking place. The RPF had a lenient reactions vis-à-vis soldiers committing these crimes. This attitude suggested a sense of “calculated tolerance of crime designed to keep the Hutu refugee mass scared and out”.⁴⁵⁴ The third factor that hindered the quick return of the Rwandan refugees was the economic situation. The policy of the Interim government leaving Kigali was to leave only the wasteland to the RPF. Accordingly, all the Central Bank foreign currency was taken in addition to substantial amounts of Rwandan Francs.⁴⁵⁵

Many discrepancies were found between the figures given by the Rwandan government regarding the repatriation process, and between those given by the International Organizations and NGOs. Whereas, the Rwandan government estimated

⁴⁵⁴ See Prunier, G., (1995), pp. 305-306.

⁴⁵⁵ Ibid., pp.306-307.

the return of 800,000 refugees from the old and the new caseload, UNHCR estimated that the number had not exceed 200,000 in 1994.⁴⁵⁶

By the beginning of 1995, the international community started to intensify the efforts for voluntary repatriation. This was very much motivated, as mentioned earlier, by the insecure situation within the camps, and the security threats that the refugee problem was posing to the entire area. UNHCR, being the lead agency dealing with the refugee issues, developed a repatriation plan which recommended some basic measures including the preparation of areas to repatriate the refugees following the assurance of minimal rehabilitation, co-ordination with the local authorities, and monitoring the safety and security of returnees by relying on human rights monitors, and UNAMIR II forces. A third measure in UNHCR suggested calling for international support for reintegration programmers within Rwanda.

Among the other suggestions that the UNHCR plan included were the creation of new settlements for the old caseload refugees in an attempt to solve the property rights issues, providing further information on the situation within Rwanda to refugees in neighboring countries and undertaking other promotional activities.⁴⁵⁷

Despite the above-mentioned plan, the repatriation to Rwanda continued to decrease in 1995. Several factors could explain this decrease in the number of the returning refugees. The first could be attributed to the alarming reports regarding the security situation in Rwanda, which was posing difficulties for the repatriation process. Alleged claims of violence against returning refugees, disappearances, and arbitrary detentions all contributed to the exaggeration of the fears of the refugees to return. Another factor was the direct or the indirect involvement of many of the refugee community with the genocide that occurred in Rwanda, an element which contributed to their inhibition from returning to Rwanda. A further factor was the intimidation of the military of the previous regime for those refugees who wished to repatriate. A study conducted by a multi-donor evaluation team in the refugee camps

⁴⁵⁶ See the Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, The International Response to Conflict and Genocide: Lessons from the Rwanda Experience. Rebuilding Post -War Rwanda, (1996), pp.88-89.

rated this factor as the most important constraining factor against repatriation. The intimidation practiced by the traditional authorities, inhibited many of the refugees willing to repatriate from returning to Rwanda. Moreover, the moral pressure inflicted upon those who were willing to return by the rest of the refugee community also played an important role. Those refugees who were planning or wishing to return were in many cases stigmatized as traitors. Many of the previous regime people were hoping to regain power in Rwanda, and they expected the refugees to support them in their struggle. The Hutu identity was thus defined among the exile community as support for the previous regime. The control of the new government by RPF people was another reason that was also creating the fear of persecution by those wishing to repatriate. Another contributing factor that explains the hesitation from the new caseload refugees from returning was the conflict over property rights between the old caseload refugees and the new ones. Many of the refugees received reports about the occupation of their property by other returning refugees. This element was rated as the third factor leading to the delay in repatriation by the above-mentioned study.⁴⁵⁸

At the same time, the security situation was deteriorating within the camps and the relief organizations, the host country and the generating country began to realize that the camps posed a major security risk. The Rwandan government was continuously asking for the closure of these camps across its borders and forever complaining that attacks inside Rwanda were being prepared and launched from these camps. The Zairian government also started pushing for a solution to the refugee problem on its territory.⁴⁵⁹

⁴⁵⁷ Ibid., p. 90.

⁴⁵⁸ Ibid., p. 92.

⁴⁵⁹ The Zairians started pushing for the repatriation of the refugees to Rwanda, and threatened that it will carry out the repatriation process after the international community lifted the embargo from Rwanda. The Zairian government carried out its threats when on 19th August 1995 it started forcibly to repatriate the refugees from the Goma camp back to Rwanda. It was estimated that 14,000 Rwandan refugees had already been forcibly repatriated by 25th August 1995. This was in addition to 2,000 Burundian refugees. An estimated number of 84,000 refugees had also escaped from these camps to neighbouring places in an attempt to evade being returned by force to Rwanda. See the United Nations, The United Nations and Rwanda, 1993-1996, (1996), pp. 88-89.

The refugee problem continued thus to pose serious challenges to the international community and the host countries. Despite all the efforts, the number of Rwandan refugees that were still present in the region by July 1995 was estimated to be 1.75 million refugees. Zaire hosted more than one million; the United Republic of Tanzania hosted 566,000, and Burundi 180,000. Due to internal reasons within Rwanda, mainly the limited ability of the country to absorb the returning refugees, the number of people who returned that year was limited. UNHCR estimated a number of 500,000 to 600,000 in 1995. The organization carried on its policy to encourage and organize the voluntary repatriation of refugees throughout the year, in an attempt to solve the refugee problem in the region, to reduce the pressures on the receiving countries and thus to avoid forced repatriation by these countries.⁴⁶⁰

Co-ordination Between the Humanitarian and the Political Aspects in the Operation in Rwanda.

The situation on the ground in Rwanda revealed the lack of co-ordination between the political and the humanitarian approach, and showed the difficult situation in which many of the humanitarian organizations had to work due to the political approach of some of the main countries involved. Three main problems seemed to emerge:

“A lack of coherence in policy and strategy formulation within the political, diplomatic and military domain, principally within the Security Council, as to how best to “manage” the crisis; inadequate consideration of the humanitarian consequences resulting from such a lack of coherence; and erroneous belief that humanitarian action can somehow substitute for inaction in the political, diplomatic and military domain”.⁴⁶¹

⁴⁶⁰ Ibid., 98.

⁴⁶¹ See The Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, 'The International Response to Conflict and Genocide: Lessons from the Rwanda Experience, Humanitarian Aid and Effects', (1996), p. 135.

This lack of coherence in the political approach by the main countries and between the key donors countries regarding the Rwandan crisis was among the reasons that contributed to the elongation of the crisis. Reports from the field indicated clearly that the humanitarian work done by the international humanitarian organizations and NGOs could not be a substitute for or replace a political and diplomatic solution for the problem. It was further reported that many of the key donor countries tried to manipulate their funding to the field in an attempt to achieve partial solutions to the problem, and no real political or diplomatic efforts were seen. Humanitarian organizations in the field, on the other hand, cannot jeopardize their neutrality when functioning on the terrain; otherwise it would affect their work within these countries.

Among the issues that indicate this lack of co-ordination in approach towards the Rwandan crisis, was the issue of the repatriation of refugees. Many major donor countries were pushing towards an early repatriation for refugees to Rwanda, since it was no longer feasible to sustain this large number of refugees in exile, and efforts to shift from emergency to the rehabilitation phase started quite early. It is true that the situation, particularly the security situation within the camps was quite dramatic, but at the same time many concerns could be raised at that time regarding the repatriation, particularly when continuous worrying reports were made regarding the security situation within Rwanda. Many humanitarian organizations voiced their concern regarding the early repatriation of refugees. The UNHCR position was not sure whether the situation in Rwanda was conducive for a safe return. The personnel of Oxfam also indicated their concern regarding the subject of early repatriation.⁴⁶²

⁴⁶² Ibid., pp. 134-135.

C. International Community and its Continuing Role in Rwanda

International Community and the Human Rights Situation in Rwanda

The seriousness of the human rights situation in Rwanda was known to the international community long before the genocide.⁴⁶³ Credible reports by human rights bodies and NGOs operating in the field during the Habyarimana regime, prompted a visit to Rwanda in April 1993 by the UN special rapporteur on extra judicial, summary, or arbitrary executions. The report that followed depicted the poor human rights record in the country.⁴⁶⁴

The Arusha agreement and deployment of the UNAMIR troops did not take the information of the report into account. UNAMIR was not mandated to follow up on the human rights situation in the country. Despite the growing violence in early 1994 and the plans given by government officials on killing of politicians, no action was taken by the international community to address the issue. A request made by the UNAMIR force commander, General Romeo Dallaire, to carry on a search for arms was turned down by New York. Analysts believe that if proper force, mandated under Chapter VII of the Charter had been available in Rwanda during the genocide, the course of the events would have been different. "what was lacking was in part a failure to interpret the situation correctly", the situation was mainly portrayed through the media as part of mutual ethnic killing or violence.⁴⁶⁵ The early response of the international community to the acts of violence preceding the genocide also represented the lack of political will by the international community to address the deteriorating human rights situation in Rwanda.

The genocide in Rwanda did not spare any age group within Rwandan society, the international community became involved in different ways within the crisis. The response of the international community included humanitarian involvement that

⁴⁶³ See Martin, I., in Moore, J. (ed), (1998), p.169.

⁴⁶⁴ The report spoke of the massacres that targeted the civilian population and that constituted genocide. He further spoke about the militiamen who are taking part in the ethnic killings and the role of the Rwanda Radio in inciting many massacres. Ibid., p.169.

aimed at addressing the Refugee or IDP issues in addition to attempts to nourish a political settlement to the crisis that would accompany humanitarian involvement. National reconciliation attempts were thus encouraged by the UN. Moreover, monitoring the human rights situation was among the main concerns of the United Nations and the international community. For this reason, several United Nations organizations and bodies were involved in this process. The human rights situation was continuously monitored and reviewed by reports that were presented by the Special Rapporteur on Rwanda to the General Assembly and the Commission on Human Rights. Furthermore, an International Tribunal For Rwanda was established by the Security Council. In addition to this the High Commissioner for Human Rights was also intensively involved in the situation on the ground.⁴⁶⁶

In a report submitted by the High Commissioner for Human Rights following his mission to Rwanda on 11-12 May 1994, he indicated that “hundreds of civilians, including large numbers of children and women, have been killed, often after being subjected to torture, and thousands have disappeared. Millions were forced to leave their places of residence, seeking refuge in other areas of Rwanda or abroad. Others are trapped between the lines of fighting or are forcibly detained, and many are in hiding, fearing for their lives. Disease and famine threatened those who, so far, have escaped death”. He underlined the major concerns regarding the human rights violations in Rwanda where “serious violations of human rights have taken place”, and recommended that “effective international action to prevent further escalation of human rights violations is urgently required.” In this report the High Commissioner for Human Rights called for the respect of all the international human rights instruments to which Rwanda is a party, including “the Convention on the Prevention and Punishment of the Crime of Genocide, as well as International humanitarian law”. In addition, the High Commissioner called the Commission on Human Rights “to consider the appointment of a Special Rapporteur who would examine all human rights aspects of the situation, including root causes and responsibilities for the recent atrocities, and report thereon as early as possible, and periodically thereafter.” The

⁴⁶⁵ Ibid., p.170.

⁴⁶⁶ See E/CN.4/S-3/3, 19 May 1994, cited in the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p.285.

Special Rapporteur, in accordance with the recommendations of the High Commissioner for Human Rights, should also be aided by a team of “human rights field officers acting in close co-operation with UNAMIR and other United Nations agencies and Programmers from within Rwanda, as well as from neighboring countries where Rwandan Refugees are located”.⁴⁶⁷

Following this report, the Commission on Human Rights held a special session on 24 and 25 May 1994 in which it condemned the severe violations of human rights in Rwanda. Based on the recommendations from the High Commissioner, it appointed a Special Rapporteur on Rwanda who was helped by a team of human rights officers to be deployed for collecting relevant information on the atrocities that were committed in Rwanda.⁴⁶⁸

The Special Rapporteur went on two missions to Rwanda in June and July 1994. In his report that covered these missions, he referred to the different forms of violations of human rights that occurred during the conflict in Rwanda. When writing on the massacres that occurred he stated they were “without precedent in the history of the country. They are in fact unique in their extent, their planning and their horrific nature.” After indicating that he had little doubt that these massacres were planned, he stated that the “horrific nature of the massacres is apparent from the way in which the Tutsi were killed: in most cases they were attacked with machetes, axes, cudgels, iron bars, etc...”. He further indicated that the massacres were “systematic and spared nobody, not even babies. The victims were hunted down even in their final refuge: orphanages, hospitals and churches”. He further spoke about the violations that occurred during the war and those that followed the hostilities. The violations committed during the war included the genocide against the Tutsis, the assassination of the Hutus and other forms of violation. He considered that the violation that occurred against the Tutsis matched the definition of genocide in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948(E/CN.4/1995/7,para 44). He also stated that the Tutsis were not the

⁴⁶⁷ Ibid. .

⁴⁶⁸ See the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p. 62.

only victims of human rights violations in Rwanda during the crisis, but also moderate Hutus suffered. He then mentioned other forms of human rights violations that occurred in Rwanda at that time, among those which “amount to crimes against humanity because of the assassinations and other inhuman acts committed against the civilian population”.

The Special Rapporteur then mentioned other forms of human rights violations that occurred in Rwanda following the hostilities. These included violations of property rights, violations of the right to personal safety, and the violations of the right to life. The violation of property rights included the unlawful occupation of deserted property. The violations of personal safety included “arbitrary arrest and detention, Rwandan prisons are full of people who are awaiting trial for genocide. No arrest warrant or detention order is issued and the persons concerned are kept in places of detention for much longer than the lawful period of police custody”. As for the violations of the right to life, these were resulted from “disappearances of persons and summary executions, not to say massacres of Hutu”.⁴⁶⁹

The concern of the international community in the human rights situation in Rwanda continued, and so did the efforts on behalf of the community to address and improve the situation there. In the Security Council resolution 935(1994) on July 1st 1994, the Secretary General was requested to establish urgently, “an impartial Commission of Experts to examine and analyze information submitted pursuant to the present resolution”, in addition to information obtained from the Special Rapporteur on the human rights situation in Rwanda. The resolution further called upon states and

⁴⁶⁹ Among his recommendations, the Special Rapporteur recommended that the United Nations should

“(a)Initiate the International Court for Rwanda...and also the local courts that are to be established in order to try persons charged with genocide, so as to stop, or at least reduce, acts of reprisals

(b)Establish, first, an international force responsible for ensuring security in the camps for refugees and displaced persons, and secondly arrangements for the repatriation of refugees and displaced in appropriate conditions of security and dignity.”

international humanitarian organizations “to collate substantiated information in their possession or submitted to them relating to grave violations of international humanitarian law, including breaches of the Convention on the Prevention and Punishment of the Crime of Genocide committed in Rwanda during the conflict, and requests states, relevant United Nations bodies and relevant organizations to make this information available within thirty days of the adoption of the present resolution and as appropriate thereafter and to provide appropriate assistance to the Commission of Experts”.⁴⁷⁰

Following this resolution, the Secretary-General appointed towards the end of July the members of this impartial Commission of Experts, which visited Rwanda and the surrounding countries in the region from 29 August until 17 September 1994. During the visit, information and investigations were gathered and conducted with government officials as well as the refugee population in Zaire and the United Republic of Tanzania. In addition to the information gathered in the field, the Commission received information from the Special Rapporteur on persons suspected to be involved in massive violations of human rights. Similar and relevant information was transmitted to the Commission of Experts by other agencies present in the field, such as the UNHCR and the OAU as well as international NGOs and individuals.

Findings from the Commission of Experts confirmed what the Special Rapporteur stated in his report regarding the previous planning for the genocide.⁴⁷¹ Finally the Commission of Experts urged the Security Council to bring

See A/50/709-S/ 1995/915, 2 November 1995. Cited in the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p.569.

⁴⁷⁰ See S/RES/935(1994), 1 July 1994.

⁴⁷¹ The report stated that:

“Overwhelming evidence indicates that the extermination of Tutsi by Hutu had been planned months in advance of its actual execution. The mass extermination of Tutsis was carried out primarily by Hutu elements in a concerted, planned, systematic and methodical way and was motivated out of ethnic hatred. These mass exterminations were clearly “committed with intent to destroy, in whole or in part, a national ethnic, racial, or religious group as such” within the meaning of article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.”

the persons involved with the above-mentioned violations of human rights to justice in front of an independent international criminal tribunal.

The decision to establish the International Tribunal for Rwanda was taken in resolution 955 (1994), on 8 November 1994 by the Security Council, acting under Chapter VII of the Charter.⁴⁷²In accordance with the resolution, the statute of the Tribunal was almost the same as the statute of the Tribunal for Former Yugoslavia. It was established as a “subsidiary organ of the Security Council”.⁴⁷³Creation of the Tribunal under Chapter VII of the Charter was made with the intention to ensure the co-operation of the Government of Rwanda and the other neighboring countries in which the Tribunal is working. Moreover, a “similar legal approach” was adopted for the Rwanda Tribunal as for that of former Yugoslavia. In addition “certain

The report further indicated that both sides were involved and accused of breaches of international humanitarian law and human rights law:

“While the massacres perpetrated by the RPF were less systematic than those of the Rwandese armed forces and Hutu militia, certain crimes against humanity are alleged to have been carried out by RPF.....The Commission of Experts has concluded that there exists substantial grounds to conclude that mass assassinations, summary executions, breaches of international humanitarian law and crimes against humanity were also perpetrated by Tutsi elements against Hutu individuals and that allegations concerning these acts should be investigated further.”

See S/1994/1125, 4 October 1994. Letter dated 1 October 1994 from the Secretary-General to the President of the Security Council transmitting the interim report of the Commission of Experts on the evidence of grave violations of international Humanitarian Law in Rwanda, including possible acts of genocide. Cited in the United Nations, The United Nations and Rwanda, 1993-1996, (1996), pp. 345-361.

⁴⁷² The Council decided:

“to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and the Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, and to this end to adopt the statute of the International Tribunal for Rwanda annexed hereto.”

See S/RES/955(1994), 8 November 1994.(para.1).Cited the United Nations, The United Nations and Rwanda, 1993-1996, (1996), pp.387-394.

⁴⁷³ See the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p.65.

organizational and institutional links be established between the two tribunals to ensure a unity of legal approach, as well as economy and efficiency of resources".⁴⁷⁴

The Council considered that the establishment of the Tribunal and the prosecution of the persons involved in the genocide would contribute and consolidate national reconciliation in Rwanda. Accordingly, it requested the Secretary-General to implement resolution 955(1994) as urgently as possible.⁴⁷⁵

In recommending the seat for the Tribunal, the Secretary-General believed in the need to choose an "African seat". Following the sending of a technical mission to the region to assess the place to choose, and following the willingness expressed by the United Republic of Tanzania to host this seat, the recommendation was made by the Secretary-General to choose Arusha for the Tribunal's seat. Resolution 977(1995) was adopted by the Security Council on 22 February 1995 in which it accepted the Recommendations submitted by the Secretary-General. A further Resolution 978(1995) was adopted on 27 February 1995.⁴⁷⁶

⁴⁷⁴ See S/1995/134, 13 February 1995. Ibid., pp. 460-466.

⁴⁷⁵ Subsequently, the Secretary-General submitted a report on 13 February 1995 suggesting:

"The establishment of the Tribunal in two phases. The first phase envisaged the establishment of an investigation/prosecutor unit, the appointment of the Deputy Prosecutor and a core unit of investigators, prosecutors and interpreters, the retention of office premises for the Investigative/prosecutorial unit, the establishment of an Administrative unit and a secretariat, and the preparation of a request for initial funding. In the second phase, judges will be elected, practical arrangements for the establishment of the seat will be put in place, the staffing will be completed and the Tribunal, as a whole, will be fully operational".

See S/1995/134, 13 February 1995. Comprehensive Report of the Secretary-General on practical arrangements for the effective functioning of the International Tribunal for Rwanda, recommending Arusha the seat of the Tribunal. Cited in the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p. 461.

⁴⁷⁶ The resolution

" 1. Urges States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda;

The human rights violations and investigations relevant to the Tribunal started in May 1995. Six judges were later elected by the General Assembly on May 25 for the Tribunal's Trial Chambers.⁴⁷⁷ The implication of suspected persons in the genocide was examined by the Tribunal. Some of these cases had already been held and prosecuted in other European countries, such as Belgium, and the Tribunal requested Belgium to submit these cases to be considered by the Tribunal. Persons accused of being involved in the genocide and crimes against humanity started appearing before the Tribunal as from May 1996. Many of the accused of being the perpetrators of the

2. Urges States who detain persons referred to in paragraph 1 above to inform the Secretary-General and the Secretary-General and the Persecutor of the International Tribunal for Rwanda of the identity of the persons detained, the nature of the crimes believed to have been committed, the evidence providing probable cause for the detentions, the date when the persons were detained and the place of detention;

3. Urges States who detain such persons to co-operate with representatives of the International Committee of the Red Cross, as well as investigators for the International Tribunal For Rwanda, in order to secure unimpeded access to those persons;

4. Condemns all attacks against persons in the refugee camps near the borders of Rwanda, demand that such attacks immediately cease, and calls upon States to take appropriate steps to prevent such attacks;

5. Urges States, on whose territory serious acts of violence in the refugee camps have taken place, to arrest and detain, in accordance with their national law, and submit to the appropriate authorities for the purpose of prosecution persons against whom there is sufficient evidence that they have incited or participated in such acts and further urges the States concerned to keep the Secretary-General informed of the measures they have taken to this effect;

6. Decides to remain actively seized of the matter.”

See the Security Council resolution urging states to arrest and detain persons within their territory against whom there is sufficient evidence of responsibility for acts of violence within the jurisdiction of the International Tribunal for Rwanda, S/RES/978(1995), 27 February 1995. Cited in the United Nations, The United Nations and Rwanda, 1993-1996, (1996), p.471.

⁴⁷⁷ See the United Nations, The United Nations and Rwanda, 1993-1996, (1996), pp. 65-66.

genocide were already held in countries like Zambia, Canada, Switzerland, Kenya, Zaire and Cameroon.⁴⁷⁸

In addition to the work of the Tribunal, other human rights bodies were operating in Rwanda. Among these was the Human Rights Field Operation in Rwanda, which was primarily a suggestion presented by the United Nations High Commissioner for Human Rights. The idea behind creating such a Field Operation was to enhance and encourage the return of refugees and internally displaced to their hometowns through improving the human rights situation, and also to aid the Special Rapporteur in his investigations in the field. An agreement in this regard was reached in August 1994 between the United Nations High Commissioner for Human Rights and the Government of Rwanda regarding the work of the Human Rights Field Operation. The deployment of human rights field officers started in September 1994.⁴⁷⁹

The main functions of the Operation involved the investigation of the genocide, the monitoring and confidence-building process, and the promotion of human rights and efforts to rehabilitate the Rwandan justice system. The first main function of the Operation involved the investigation of the Genocide. This assignment necessitated the deployment of proper experts, who would conduct their job in full confidentiality. The work of the investigation team has proved to be helpful, particularly at a later point when the International Tribunal for Rwanda was created. The investigation teams then started co-coordinating their work with the tribunal. A number of governments have responded to the creation of these teams by providing specialized personnel to enable teams to function efficiently and properly. The information gathered by the Operation was transferred to the High Commissioner for Human Rights that transferred it in turn to the Special Rapporteur and the Commission of Experts. The second function of the Operation involved the monitoring and the confidence building process. This process involved the deployment of field officers who would make sure to bring to the attention of the Rwandan authorities any human rights violation observed within the country. Further efforts involved taking part in the repatriation and the resettlement of refugees, and

⁴⁷⁸ Ibid., pp.103-104.

thus a lot of co-ordination with the UNHCR was involved. Further concern of the operation involved the situation in the prisons and the conditions of detention. By the end of October 1995, the number of detained people in Rwanda reached 58,000 persons. In many situations the prison conditions were very bad, and deaths and illness were recorded. Among the tasks of the Operation was to promote better legal procedures that governs the arrest and detention of these people.⁴⁸⁰

The third function of the Human Rights Field Operation involved efforts ranging from the promotion of human rights to the rehabilitation of the Rwandan Judicial System. The involvement in the rehabilitation of the judicial system was thus among the main priorities of the Operation. Seminars addressed to local officials and aimed at promoting human rights practices were conducted by the operation. In addition other kinds of seminars concentrating on the rights of women and children as well as seminars talking of the role of the journalist and government officials were held.

Analysis of Human Rights Activities in Rwanda: Achievements and Dilemmas:

The international community's activities in the field of human rights in Rwanda has no doubt contributed to the investigations that took place following the genocide in Rwanda and to the repatriation and the rehabilitation process of refugees.⁴⁸¹ Yet the application of the human rights machinery in Rwanda was also associated with moral dilemmas. Hard choices needed to be made from the very beginning.

The involvement of the international community in the human rights field in Rwanda, in spite of the interesting steps highlighted above, came late. Appropriate measures should have been applied by the international community at an earlier point and particularly before the genocide. What was lacking though was a sense of

⁴⁷⁹ Ibid., pp. 66-67.

⁴⁸⁰ Ibid., pp. 594-595.

⁴⁸¹ Ibid., p. 598.

commitment by the international community to apply human rights machinery in Rwanda at an earlier stage. Such commitment required first and foremost the political will to do so. Events revealed that Rwanda was not a priority for the international community that was showing growing signs of reluctance vis-à-vis political engagement following the Cold War. Humanitarian action was gradually replacing political action in some parts of the world. This is particularly so, when the strategic interest was minimal. Rwanda was obviously not high on the political agenda of major Western powers.

Involvement in the field of human rights proved to be more difficult in view of its link to the issue of sovereignty. Enforcement action by the international community has been seen mostly in situation where severe human rights violations lead to mass displacement. Less frequently is such action witnessed when human rights violations are not associated with mass movement. In the case of Iraq for instance, and in the aftermath of the Gulf War, the Iraqi regime crushed brutally the uprising in the South. Severe human rights violations were committed then. Yet international action in the form of Safe Haven was only created in the north where mass exodus to the borders with Turkey was taking place. This exodus was considered to be a threat to international peace and security, while human rights violations in the south were not.

In the case of Rwanda, the international community and the French in particular failed to draw the line between ethnic conflict on one hand and severe human rights violations planned for and committed by the Rwandan regime on the other hand. The international community interpreted the reports in Rwanda as an extension of old ethnic conflict. Such conflict that the developed world got used to it occurring in Africa. The urgency of the situation was not thus felt. The severity of the situation in Rwanda was not clear to many observers. Obviously, such a horrendous outcome was not anticipated.⁴⁸²

⁴⁸² Many questions were raised concerning the knowledge of the French gendarmerie and army of the human rights violations committed by the Habyarimana regime. Human rights activist operating in the field indicated that they brought to the attention of the French on many occasions situations where detainees or civilians were being subjected to human rights violations by the Rwandan gendarmerie. In many instances, the French managed to have control of the situation and stop such acts. Taking into account the degree of influence that the French

Human rights involvement also meant holding people accountable and subsequently bringing those involved in human rights violations to justice. Yet people mostly implicated in the genocide were within the close circles of the President. A regime that held strong ties, even at the personal level, with the French President. France had trained for years the people who at a later stage carried on these atrocities. It is very likely to assume that such moves would not have been welcomed by the French prior to the genocide. It is worth noting that the late Rwandan President's wife, whose role and responsibility in the events leading to the genocide had been questioned, was among the first people to be evacuated by the French from Rwanda. Even after the genocide, the French allowed many of the perpetrators of the genocide to seek protection in the Safe Areas. Their escape to neighboring countries was in some times even facilitated.

Involvement in the field of human implied as well a lengthy commitment and especially in financial terms. The UN was struggling to convince member states to commit themselves to UNAMIR forces. Thus the prospects of additional financially commitments seemed minimal. The international community's later involvement in Rwanda proved to be more expensive. Instead of serious commitment, the international community again seemed to have hoped that the peace talks that were going on in Arusha would lead to a peaceful settlement and eventual democratization. Wishful thinking that led to disastrous results.

The broad application of the human rights principles proved to be difficult in the Rwandan context following the genocide as well and was associated with moral dilemmas. Full application of human rights principles had several prerequisite that were not fully met. Perpetrators of the genocide needed to be arrested and brought to trail. Detainees should have however been kept in decent prison conditions. Rwandan prisons following the genocide were crammed with detainees in conditions far away

had on the Habyarimana regime, it is very unlikely to assume that the French armed forces, first were not aware of the severe human rights violations committed, and second could do nothing to stop these acts. See Callamard, A., in Adelman, H and Suhrke, A.(eds.), (1999), pp.166-167.

from humanity. Many detainees were suffocated to death and passed away while in detention.

Full application for human rights principles also stipulated that those involved in severe human rights violations be excluded from refugee protection. Two problems do arise in this regard. The first is a legal one. The OAU Convention considers every person fleeing civil war to be a refugee. A definition that applies thus to all refugees fleeing the war in Rwanda. The 1951 Convention on the other hand excludes from the scope of protection those who have committed war crimes or crimes against humanity. This would apply ultimately to a large number of the Rwandan refugees involved in the genocide. In addition to the legal aspect, two related practical problems were present. Applying the exclusion clause on refugees implies that individual status determination should be conducted to establish the claim and subsequently to determine whether the person is excludable. Taking into account the massive number of refugee population, this element proved extremely difficult. In the case of mass influxes refugees are usually accepted on *prima facie* basis.

In addition, excluding persons or separating the armed elements from the rest of the refugee population needed a large number of resources and entailed a large degree of risk. An estimated force of 10,000- 12,000 peace keepers were needed to be deployed in the camps in order to separate the armed groups and isolate them in accordance with the Secretary-General's estimations. Yet not much commitment was seen by the international community. Only Bangladesh was ready to commit some troops to the operation. Consequently, Zairian government in coordination with UNHCR presented an elite force to police the camp. Yet the will to disarm the camps was not seen among the Zairians. The camps became a place to launch attacks at Rwanda.

Applying strictly human rights principles should have also entailed that refugees were given full freedom to make choices regarding their return to Rwanda without any form of intimidation or pressure.⁴⁸³ Yet again the neighboring countries

⁴⁸³ See Martin, I., in Moore, J. (ed.), (1998), p. 171.

were having their own internal problems. The presence of a large refugee population further exacerbated these problems and imposed greatly on the limited resources of these countries. Refugees as well were taking the jobs of the local population that started getting aggravated with this privileged treatment. The Rwandan refugees, many of whom were armed, were also posing a security and risk factor to the receiving communities. Many incidents were reported to be taking place whereby armed refugees were involved in. This further complicated the situation for the receiving countries.

Refugee movements towards Rwanda were taking place at different intervals in the years following the genocide. In 1996, the Tanzanian government has put a deadline for people to return, not giving many chances for those who feared returning. This operation qualifies to be called a voluntary repatriation, but UNHCR had to take part in it. UNHCR decision not to abandon refugees half way promoted the organization's decision to intervene. The lack of proper political action and will from the international community in this field left the organization in a difficult situation. Western powers were getting tired from problems arising from refugee camps in neighboring countries and wanted to put an end to this problem. Economically, sustaining this number of refugee population proved to be very costly. Supporting the refugees' return was more and more welcomed.

There were other reasons as well that prohibited many of the refugees from returning. The propaganda activity that many Hutu were being killed upon their return, played on the minds of the refugees in neighboring countries, many of whom feared returning to avoid being caught or persecuted back in Rwanda. Many of the refugees also did not opt for returning as they were prohibited from doing so by the armed militias within these camps. These militias who started using these camps to recruit refugees and launch military campaigns across the borders. Many refugees who returned to Rwanda at a later stage claimed that upon returning, they were relieved from the pressure of the militiamen.

From a human rights perspective, Operation Turquoise should have been mandated to arrest those who carried on the genocide. Yet, was this the intention of the French in the first place? The same perpetrators were instead able, to say the least,

to smuggle themselves to neighboring Zaire where they were rearmed again implicitly by Zaire. It seems that the political will was not there. It would not be exaggerated to say that the French were more concerned about protecting their “clients” than with the application of human principles in the case of Rwanda. Again, the timing of the operation seems to confirm this view.

In view of the deteriorating human rights situation in the refugee camps, military action separating the armed elements, as in the Secrete ray-General observations should have been carried out, or humanitarian assistance should have been gradually cut off from camps hosting military elements and then reprovod to camps hosting civilian refugees who chose to remain abroad.⁴⁸⁴ This was not obviously carried out. Again, separating the armed factions from within the camps entailed a risk factor. Was the international community ready to embark on a similar action and risk facing more lives in such an operation. Obviously, the images from Somalia were still too strong.

As for the Justice system created to deal with the genocide in Rwanda, concerns were raised as well regarding its the impartiality. The new justice system must have included equal and proportional ethnic representation for both Hutu and Tutsi judges. An adequate justice system, at the time, necessitated the presence of some external, non-Rwandan, representation. Many observers seem to support the view that the international community was more willing to condemn certain situations, such as the detention situation, rather than doing anything to improve them. They also believed that the international community failed to play an adequate role for implementing impartial justice in Rwanda.⁴⁸⁵

The Rwandan genocide and the inaction of the international community in the field of human rights made it difficult to apply human rights principles in full at a later stage. The situation also posed moral dilemmas. Morality required:

⁴⁸⁴ Ibid., pp. 172-173.

⁴⁸⁵ Ibid., pp. 172-173.

“That no part of the truth is evaded and no principle unacknowledged. The Hutu leadership that was truly implicated in the genocide has no claim to a future political role, but Rwanda’s government at all levels must become representative of and accountable to all its people...Those guilty of crimes against humanity must be arrested and prosecuted, but their conditions of detention must meet minimum standards of humanity, and trials must conform to basic standards of fairness. Each of these principles is extraordinary difficult to respect in practice in the circumstances of Rwanda.”⁴⁸⁶

Morality above all required the international community to take action prior to the genocide. Failure to do so in a timely manner weakened any moral authority and role-played by the international community afterwards. The whole world was watching while innocent men, women and children were being killed and those countries that took action towards the end of the genocide were not neutral. Among the international actors, France was the country mostly involved in the Rwandan context. At the same time, it was the country mostly implicated in what happened. It would follow then that the neutrality of any action undertaken is questioned.

The issue of neutrality and impartiality was very much brought up in the Rwandan context and particularly in relation to human rights issues. Many NGOs operating in Rwanda were faced with this dilemma. Impartiality and neutrally stipulated that aid should be provided to all people in need. Yet in the case of Rwandan refugees, aid was also being distributed to those involved in the genocide. Many NGOs were very vocal about the distribution of aid to Rwandan refugees, knowing that the same people who were involved in human rights violations will use a lot of this aid. This created a dilemma for those involved in this field. The experience of Rwanda clearly showed that humanitarian action and human rights couldn’t go totally in different directions.

⁴⁸⁶ Ibid., p. 174.

Events also showed that any enforcement action in the field of human rights in Rwanda would be literary impossible following the genocide. Such an action should have been undertaken at an earlier point. Again any enforcement action needed resources and commitment. The international community was getting tired of Rwanda. Following the genocide, human rights involvement in the form of monitoring and giving technical assistance was taking place but not with the level of commitment needed. Despite the genocide, Rwanda was still not viewed in the same level of urgency like Former Yugoslavia for instance.

The international action in Rwanda following the genocide lacked also a fundamental element. Linking human rights issues to the broader issue of development. Very limited resources were present in Rwanda following the genocide. Returning refugees and local population had to struggle for these resources. The previous government and regime left the country in an impoverished state. The struggle for the limited resources had also its effect on the human rights situation.

Morality also required that those who masterminded the genocide should have been brought to justice rather than being protected in refugee camps and being evacuated by Western powers. France, as mentioned earlier, facilitated the escape of many of the people in power in Rwanda to neighboring countries and protected them in safe areas. Among the first people who were evacuated by the French was the wife of the Rwandan President, whose role and responsibility in the genocide is questionable. Here again the political considerations by the French played a decisive factor. In addition to the French, the international community was very reluctant to provide the resources needed to isolate and subsequently arrest those heavily implicated in the genocide.

Lack of commitment, neutrality, and interest by the international community Rwanda led to horrendous results in Rwanda. The Rwanda experience showed that human rights violations are mostly put in focus when linked to regional peace and security and mostly when the regions concerned are of strategic interests. As long as these violations are contained within countries of origin and in far away and remote

corners of the world, the innocent are left to face their fate. When such violations take place in west or in close by areas, these acts have a different dimension.

Conclusion

The case study on Rwanda sheds further light on the issue of humanitarianism in the post Cold War period. It revealed the expanded role of humanitarian action in this era, which in many instances is becoming a substitute for political action. As clearly indicated in the case of Rwanda and the Great Lakes region, humanitarian action came to be a substitute for political action in this part of the world. Faced with severe humanitarian crisis resulting from genocide of such a magnitude, the international community had to react. This was particularly so when the genocide and the refugee flow that resulted from it was subjected to wide-scale media coverage and a public outcry for action. Humanitarian action in the form of Safe Havens became a substitute for political action and an easy way out.

The genocide and the events that followed highlighted again the growing link between humanitarianism and refugee issues and revealed that refugee problems are not solely the problem of the generating countries, or internal problems. The refugee flows from Rwanda led to a great extent to the destabilization in the Great Lakes region. Where the problems from the generating countries accompanied the refugees to their host countries, the ethnic conflicts among Rwandan refugees also threatened to intensify the ethnic divisions among the populations in the receiving countries.

The refugee population in host countries created several problems within the receiving countries. The main one is the security problem within the camps where propaganda activities among the new regime were done, and where planning, preparation, and training to overcome the regime were also conducted in some of these camps, mainly in Zaire. Furthermore the refugee population threatened to exaggerate the ethnic tensions present between different ethnic groups in the Great Lakes region. In addition to the security problems, the refugee flows to the neighboring countries created economic, environmental and social pressures in the receiving countries, which were already overburdened with their own problems and

economic, social, and environmental pressures. Finally, the international community and the major donor countries were themselves overburdened by the attempt to sustain a refugee population, exceeding two million, in exile.

The study was centred mainly on the humanitarian action in Rwanda in the form of creating Safe Havens for the internally displaced. Since the deployment of the UN troops proved to be very slow at the time, the French Government was authorized by the Security Council to create such a zone. A zone officially proclaimed to save civilians. Consequently, the troops were deployed and worked under the provisions of Chapter VII of the Charter. This action was thus authorized by the United Nations.

From an humanitarian perspective, the French action yielded some positive results through saving many lives and stemming, at least temporarily, additional refugee flows to neighboring countries. Further it facilitated the role of the humanitarian organization in these zones. This happened despite the reluctance shown by some of the NGOs in the beginning.

The action, however, was seen by some with skepticism in view of the previous links that France had with the previous regime. The political motivations of France were a source of scepticism for many observers. The creation of the Safe Humanitarian Zone would have gained much more legitimacy if it had been a United Nations action rather than French action, even if this action was authorized by the UN. The French Government seemed to be attempting to protect the people of the regime that it had supported earlier. This Further undermined an operation which without doubt had important humanitarian impact.

The scepticism regarding the French role and responsibility was not unfounded. France had been involved in Rwanda for a long time. The French maintained very close ties with a regime that later on planned and executed the genocide. The French army was involved in training the very people who carried on the genocide. What implicates the French further is their knowledge of the mounting human rights violations preceding he genocide. The large number of NGOs and the successive reports that were made concerning the systematic violations of human

rights occurring in Rwanda was made known to the French and also to other Western countries. Yet no timely action was undertaken.

The international community failed thus in undertaking timely preventive action. This failure can be attributed to several factors. The confusion to interpret the indicators coming from Rwanda could be one example. The growing tension and the increased violations of human rights were seen as a manifestation of ancient ethnic conflict rather than as a part of a plan to systematically persecute the Tutsis. The international community failed to have a clear assessment of the situation in light of the developments in Rwanda. According to the political development associated with Arusha peace process, an eventual transformation of power in favor of the RPF was taking place. This obviously was not welcomed by the people in power in Kigali who started planning to change the turn of events through the extermination of the Tutsi in Rwanda. The international community saw the developments in Arusha as promising step towards a peaceful solution to the conflict and failed to see the risks that surrounded it.

The international community was also hunted by the images of Somalia. The US in particular did not want a repetition of the Somalia experience, with all the human losses, among the peace keepers and the US soldiers, it entailed. Fear that similar experience would be repeated in Rwanda if forceful action is undertaken undermined the chances of any preventive action. This fear of another Somalia syndrome was coupled with growing indifference by the international community vis-à-vis conflicts erupting in Africa. After all, there were more urgent conflicts erupting in Europe that drew further attention. Western countries were not very keen on sending their sons to die in conflicts erupting in Africa.

Even during the genocide, the international community failed to provide the resources needed to reinforce UNAMIR. The creation of the zone came at a time when the genocide was almost over and hundreds of thousands had become refugees. Operation Turquoise came also at a time when the Rwandan government supported by France was losing dramatically on the ground. The idea that the French contributed to this operation in an attempt to maintain a power base for the Rwandan regime is very

likely. Should this operation had been prompted by purely humanitarian consideration, it would have occurred at an earlier point when the genocide was taking place. Had this action been undertaken earlier, a large number of lives would have been saved and refugee flows would have been curbed. The creation of a Safety Zone thus could be used as a preventive action rather than a reactive one in future emergencies.

The fact that the French kept the zone demilitarized and actually helped some of the armed elements who were involved in the genocide to move to neighboring countries sheds further doubts about the French motive for the operation. The claim that France came to protect the people of the previous regime is not unfounded. The fact that the Safe Zone was not demilitarized, and elements who had been involved in the genocide were given refuge in these zones contributed to instability within the zone. The issue of the timing of the Safe Humanitarian Zone is also related importantly to access, since it is clear that it was created too late and closed too early.

The decision to close the camps and the area already designated as a Safe Zone seemed to have been premature. It is true that the security considerations, mentioned earlier, played an important role in motivating the international community and the Rwandan government to close the IDP camps, but still the guarantees for a safe return of the IDP seemed questionable. The international community represented by the United Nations seemed aware of the human rights violations occurring in Rwanda, and acts of reprisals against some of the returnees. Despite this, the IDP camps were closed. The same could be said about the situation of the refugee camps in neighboring countries, where the issue of early repatriation for refugees seemed to be a source of concern for many organizations dealing with the matter.

Among the other conclusions that could be drawn from this study is that humanitarian action in the form of a Safe Zone is very important, but it is not a solution in itself, but rather an interim solution and should be part of general solution addressing the political aspects of the conflict, as well as the human rights situation. The action of the United Nations in Rwanda following the crisis aimed at rebuilding and strengthening the judicial system in addition to other involvement in the human rights field, rehabilitation and development within Rwanda, and the attempts to

strengthen national reconciliation within the country was a start but more concerted efforts were needed in this regard.

The Safe Havens showed once again the growing role of humanitarianism in the Post Cold War era. A role that challenged many of the prevailing concepts at an earlier period. The growing link between humanitarianism on one hand, human rights, military action and security issues were made clear in this period and the growing tension as well among these elements is highlighted. The Rwanda crisis also clearly revealed the link between humanitarian action on one hand and the possible prolongation of conflict on the other and revealed the different priorities in humanitarian action.

In earlier decades, the concept of humanitarian action was coupled with and associated with the issue of neutrality. Major conflicts erupting in the 1990s posed challenges to the issue the neutrality of humanitarian action. Many humanitarian work was gradually substituting political action by the international community. In the case of Rwanda the issue of neutrality and impartiality came very much under scrutiny. Humanitarian action needed to be conducted among population that had a large number of people heavily implicated in human rights violations and atrocities. The humanitarian aid was partly channeled by the refugee communities and their leaders to the belligerents and not many efforts were being done to separate the two. Many international organizations and NGO known of their impartiality and neutrality were being vocal about the conflict and particularly this aspect of the conflict. Maybe because they felt that no political solution is undertaken.

The link between humanitarianism and human rights was highlighted in the case of Rwanda, precisely because of the presence of the perpetrators of the genocide among the refugee population and benefiting from the humanitarian aid. A link, but also growing tension was seen between the two fields. Providing humanitarian assistance to all those in need implied assisting those who were implicated with atrocities. A fact that created a moral dilemma for many of the humanitarian actors in Rwanda.

Humanitarian action in conflict situations has been seen to prolong the duration of conflicts. An argument that has its validity especially when humanitarian action is not part of an overall political solution to the crisis. The Rwandan Safe Havens is one example. The Safe Haven was created in part of the country to provide protection for endangered civilians. There remained yet some major problems that required political solution from the international community, like the disarmament of militants within these zones. Creating a Safe Haven to provide humanitarian assistance without being coupled with a political solution prolonged the conflicts. The later attack on the refugee and displaced camps in Rwanda and Zaire further confirms this view. Parallel efforts aiming at addressing the broader political problem should have been undertaken.

Humanitarian involvement in the Post Cold War era showed the growing link as well between humanitarian action and the presence of armed forces to provide protection for the humanitarian operation. Humanitarian Zones created within any country experiencing a state of conflict could not be created without the presence of a strong force to protect them. The role of a strong French Force which was capable of protecting the internally displaced prohibited the RPF forces from attacking the areas despite the criticism of the operation. Within the same context, UNAMIR forces were helpless in providing protection to a desperate population because of the absence of sufficient force. It would not be an exaggeration to say that should UNAMIR forces were adequately equipped in Rwanda, the course of events would have been different.

Most importantly, situation in Rwanda, and earlier on in the case of Iraq, revealed that the growing role of humanitarianism was partly caused by the absence of a clear political vision in the aftermath of the Cold War. Many conflicts were erupting around the world and the international community lacked a clear vision on how best to respond to these conflicts. Among the lessons learned is that humanitarian work, despite its importance, cannot replace the diplomatic and the political work in emergencies of such a magnitude. Humanitarianism, in the case of Rwanda, represented a substitute for political involvement and political commitment. It further

represented minimal involvement by the international community that led to disastrous results that marked the region for decades to come.

Conclusion

The Post Cold War era witnessed an expanded notion of humanitarianism and a growing role for the United Nations, in particular within countries of origin. This was associated, and perhaps came as a direct result of a divided political vision following the end of the Cold War era. The new political situation was associated with the eruption of ethnic conflicts within newly emerging states coupled with an emphasis by the international community on two divergent trends, the issue of state sovereignty and territoriality on one hand and wider involvement of the United Nations within countries of origin on the other hand.

The centrality of humanitarian action was thus evident from the end of the Cold War. Humanitarianism became an alternative to a clear political vision in the post cold war era and was enhanced by several factors. The increased role of the United Nations coupled with wide media coverage for many of the humanitarian crises and the transformation of the refugee regime are factors that contributed to the centrality of humanitarianism.

The involvement of the United Nations in Iraq, Former Yugoslavia, and Rwanda in the 1990s is an indication of the centrality of humanitarianism in this era. Humanitarianism came to replace in many instances political action by the international community. In the case of Iraq and Rwanda, the two cases under study in this thesis, humanitarian action within the countries seemed to take place following severe humanitarian crises that led to mass movement. Such a movement was considered to be pose a threat to regional peace and security. Humanitarian action by individual states within the two countries was justified by these humanitarian considerations. Yet the real motives for intervention by the individual states who undertook this action is open to question.

Following the second Gulf War and the withdrawal of the Iraqi army from Kuwait, the Iraqi people were encouraged by the then American President to revolt against the Iraqi regime. Fifteen out of the eighteen governerates of Iraq revolted against the regime, hoping that they would receive aid and support from the very same country

that encouraged them to revolt. Yet the political calculations in Washington were different. The uprising so created also threatened the arrival of Islamic groups to power in Iraq that would be closely allied with the Islamic Republic of Iran. This was not welcomed by American political leaders. After all, the same countries who were fighting President Saddam in the second Gulf War was supporting and arming him in his fight against the Iranian regime in the first Gulf War.

Those who encouraged the Iraqi people to revolt against their President left them to face a terrible and horrendous fate. The uprising in the South was severely crushed. The worst attacks were in places like the holy cities of Karbala and Najaf, the same cities that coalition forces are attempting to 'liberate' now out of concern for 'human rights' that is, those very same human rights considerations that were totally ignored more than a decade ago. Such flagrant hypocrisy is breeding further violence in a turbulent and complicated region like the Middle East. No political involvement or military involvement was undertaken to help the Iraqis who revolted against their regime. This gives rise to speculations that perhaps in terms of Kuwait also the same coalition forces that launched the war against the Iraqi President wanted him to remain in power to continue to pose a threat to his neighbours. This would then subsequently justify their military presence in the region in an attempt to preserve the peace and security of the region, not to mention the oil fields.

Humanitarian involvement was a way out and action was undertaken by the US, the UK and France to create Safety Zones to provide protection for the Kurdish population in the North, the same population that was gassed by chemical weapons less than four years earlier when President Saddam was still an ally to the west. No reaction was evident then to defend the population from the fate that they faced. Human rights issues were not a priority then.

At the same time, a sanctions regime was imposed on the Iraqi people. Many moral and ethical questions can be raised about these sanctions, whose impact was only felt by the Iraqi people not the regime. The same people who had once the highest level of living standards in the region became impoverished. Thousands had to flee Iraq from Iraq for economic considerations seeking better living conditions in unwelcoming parts

of the world. The level of humiliation and suffering that the Iraqi people have gone through thanks to their President and his previous allies in the West is unforgivable. The same people are expected now to receive the same powers that contributed greatly to the application of the sanction's regime, with open welcoming arms.

The developments also revealed the growing role and impact of the media on public opinion and the pressure it exerts on the international community to take action. In the case of Iraq, the massive outflow of refugees to neighbouring countries was widely covered by the media and created an outcry for international action. Severe human rights violations were being committed at the same time in the southern part of the country yet these were not as widely covered as those in the north. Eventually, the Shia population in the south were left to face the crushing of the uprising without any help.

In the case of Rwanda, a study of the international media and the coverage of the genocide in Rwanda reveal that the international coverage of the crisis witnessed went through different phases. The coverage of the crisis in its early stages was rather modest in some countries such as the US despite the genocide. The wide coverage for the crisis in Rwanda only took place in the US media, for example, following the outflow of refugees that happened at a later point. Despite the gravity of the situation in Rwanda in the early stages of the crisis, the US media coverage for the events was at its peak after the refugee crisis that erupted. This initially low media coverage was coupled with modest action.⁴⁸⁷

⁴⁸⁷ Media coverage occurred on three phases. The first phase included an open ended period that ended with the death of the Presidents of Burundi and Rwanda. This period witnessed severe human rights violations and modest media coverage, that encouraged, some argue, modest political responses by the US government at the time. An increase in the media coverage was evident during the time of the genocide covering the wide-scale murder and killing of thousands of civilians. Yet, compared to the scale of the genocide taking place, the coverage was considered to be of a relatively modest nature. Most of the media coverage to the news in Rwanda took place in July and August and concentrated mainly on refugee camps in neighbouring countries and mostly on the humanitarian crisis erupting in the camps. The impact of the media coverage in the US on foreign policy is worth assessing. Following its failed involvement in Somalia, the US administration at the time was following restricted policies regarding its involvement in Africa. The relatively modest media coverage for the genocide gave little incentive for the US administration to take action. It was later noted that the US administration was ready to take action and utilize the resources needed in response to the humanitarian crisis erupting in the refugee camps for Rwandan refugees.

In the case of Rwanda, humanitarianism came also as a way out. The International community was involved in different conflicts in the world. Many conflicts were erupting in strategic and closer areas like the Former Soviet Union and the Balkans. Rwanda was not high on the political agenda. There was also a political process going on and the West hoped that it would yield positive results. The results were not however as promising.

The international community was also haunted by recent images coming from Somalia, in which American soldiers and peacekeepers were killed. The dramatic images were viewed all over the world and affected on the foreign policies of major powers. Many Western countries had serious concerns in sending their sons to be killed in Africa. They also had little interest. The major country however that had an earlier interest was France, but it was a country that had strong ties with the same regime that carried out the genocide.

The genocide implicated France greatly. The same people whom France had trained and supported were carrying on the genocide. They were also the same people who were losing the war. It is not a surprise then that France's suggestion to undertake Operation Turquoise took place when the intensity of the genocide was decreasing and the refugee flow, mainly from the Hutu, was increasing. Again, humanitarian action proved to be a good way out.

It is clear thus that a changing notion of humanitarianism is seen, a notion that is increasingly linked to refugee issues and the threat that the outflow of refugee has on regional peace and security. Parallel changes are also influencing the refugee regime that was initially put in place during the Cold War era and designed to match the realities of that period. A parallel transformation was hence witnessed in the refugee regime and marked by an increased involvement of the international community in refugee issues. This involvement took place, in many instances within countries of origin and refugee issues became gradually linked to international peace and security.

Humanitarianism thus represented the easiest way out. See Adelman, H., and Suhrke, A., (eds.), (1999), p. 210.

Transformation in the refugee regime

A major part of this thesis focussed on the growing involvement of the international community represented by the United Nations in refugee issues. It started by studying the refugee problem since its institutionalisation, at the beginning of the Cold War period, and its evolution over the following decades. The broadened involvement of the international community within countries of origin and the link between refugee issues and international peace and security was also assessed. Case studies of humanitarian action within countries of origin were studied. Two cases in particular were the object of analysis in this thesis. The cases of Safe Havens created in Northern Iraq and Rwanda. Other Safe Havens were created throughout this period, like the controversial Safe Havens created in Former Yugoslavia. The latter are not the subject of study of this thesis. Unlike the Safe Havens in Former Yugoslavia, the cases studied in this thesis were areas initially proclaimed by individual states before the UN took over maintaining them and as such they provide a different experience from those in Former Yugoslavia. In both of these cases, the creation of safe havens was directly linked to refugee movements that were considered to be posing a threat to regional peace and security. These developments highlighted the links between refugee issues, security issues and humanitarianism.

The refugee system that emerged at the beginning of the Cold War was created to match the realities of that era. The limited number of refugees that sought refuge in the West was easily absorbed into these countries. Moreover, refugee issues were used by some governments to embarrass other countries from which the refugees were fleeing. The situation, however, started changing over the years, and the increase in the number of refugees made it impossible to handle the problem in the same way. An asylum crisis erupted in the West, and these asylum countries were unable to absorb this tremendous increase in the number of the refugees. The evolving nature of the refugee crisis, particularly following the end of the Cold War demanded different approaches to handle the refugee problem. The gaps in the refugee protection system started evolving over the decades and especially in the post Cold War period.

The gap in refugee protection became obvious, particularly in Western countries. The changing nature of the refugee flows accentuated this gap. The change in the scope, magnitude and particularly geographical locations of the refugee flows posed serious challenges to the system. The number of refugees increased dramatically over the years such that it posed serious challenges to Western receiving countries. This was coupled with the fact that the refugees arriving in large numbers in these countries were not only refugees in the traditional sense, i.e., victims of persecution, but also victims of civil wars and internal disturbances. The disintegration of the Former USSR and the wars that followed in some of the Former Soviet Republics, in addition to the conflicts in the Former Yugoslavia, threatened Europe with a large number of significant refugee flows. This was coupled with an asylum crisis in the West that resulted in restrictive approaches when dealing with the arriving refugees.

African and Latin American countries responded differently to the evolution of the refugee problem. Instead of the restrictive approach which was witnessed in Western Europe, African and Latin American countries adopted new laws to respond better to the changing nature of the refugee problem. These laws proved to be more progressive in nature and addressed a larger category of persons in need of protection. Victims of civil war were provided protection under the OAU Convention and the Cartagena Declaration.

Faced with the developments in Iraq, Former Yugoslavia, and the Great Lakes region, the international community started in the 1990's looking for new approaches to deal with the refugee problem, particularly in situations of mass exodus. Corridors of Tranquillity, and Safe Havens were some of the approaches created to find a solution, even a temporary one, to severe humanitarian crises. Many of these approaches addressed new categories that did not correspond to the traditional definition of the refugee, but involved rather victims of armed conflicts, and humanitarian emergencies. In addition to this, more involvement of the international community was witnessed within countries of origin, particularly when severe humanitarian crises erupted. Safe Havens and Corridors of Tranquillity are examples of this humanitarian action undertaken by international organisations and the international community as an attempt

to respond to refugee crises in the countries of origin. Humanitarian action in many cases came to replace political action.

The international community started focussing on responding to some refugee problems within countries of origin without jeopardizing the asylum-oriented approach. This, as mentioned earlier, was dictated by the enormous numbers of refugees that could not possibly be resettled abroad.

Why study the concept of Safe Havens?

The developments in the early 1990's, particularly with the eruption of the Gulf War and the problems in the Great Lakes Region, resulted in massive refugee flows to which the international community responded differently. A link was made between refugee flows and threats to peace and security at regional as well as international levels. This was seen in the case of Iraq, where the Security Council adopted, for the first time, a resolution relating refugee flows to international peace and security, an important development revealing the growing concern of the international community regarding this problem. International action following the adoption of this resolution resulted in the creation of enclaves, or of a Safe Haven for the Kurds who were either stranded in the mountains of Northern Iraq or who had fled to neighbouring Iran.

In the case of Rwanda, the severity of the situation affected not only the country of origin, but also had an impact on the whole region because of the massive number of refugees who fled to neighbouring countries and greatly affected the social, economic, security as well as political situation in those countries. The genocide in Rwanda and the refugee crisis that followed also had a significant international impact. The atrocities committed during the war in Rwanda were widely covered by the media and affected public opinion considerably. The international community, which was reluctant to be involved at an early stage was pushed, by public pressure, to take action aiming at putting an end to the genocide and at curbing refugee flows. Many countries which were reluctant to be involved politically in the region opted for humanitarian action following the crisis. This followed a Security Council authorisation for the French government

through a resolution to establish a Safe Humanitarian Zone for the internally displaced Rwandans.

A major section of this thesis was centred on the study of the Safe Havens that were established in north Iraq and Rwanda. The reason behind choosing the case study of northern Iraq is due to the fact that it represented a precedent first in linking refugee flows to international peace and security. Secondly due to the course of action that was taken by the United Nations in response to this threat, i.e., creating Safe Havens in countries of origin, it served as a mechanism to allow the return of displaced people and refugees, and also to protect civilians, who were victims of internal conflicts. An analysis of the legal grounds that led to the establishment and the administration of the Safe Havens was conducted, starting first with the relevant Security Council resolutions and secondly the Memorandum of Understanding that was signed between the United Nations and the Government of Iraq.

An analysis of the nature of the United Nations' action was undertaken, and the question was posed whether, from a legal perspective, this action could be considered as falling under Chapter VII of the Charter, i.e., enforcement action. The fact that Iraqi government signed the Memorandum of Understanding made this action not an enforcement action, but rather falling somewhere between enforcement action and peace keeping action.

The case of northern Iraq also provided a good ground for a comparative study between two complementary but also different operations revealing the divergent responses of the international community towards such situations. The first operation revealed the traditional responses by individual states. During this operation, known as Operation Provide Comfort, an enclave was formed on the territory of another state by third states without obtaining the permission of the country involved. This operation was criticised by the Iraqi government which considered this as an infringement of its sovereignty. This operation was also very controversial among many countries. However, the humanitarian crises that the Kurdish refugees were undergoing necessitated a quick and effective response from the international community, and public opinion in many of the Western countries was also in favour of such an action.

Furthermore, the political pressures that neighbouring countries, who had their own internal political problems, rendered difficult the influx of the large number of the Kurdish refugees to their territories. On the other hand, the establishment of these enclaves was seen by many countries, particularly in the Third World, as an infringement of Iraq's sovereignty. The operation gained legitimacy when the United Nations took over these enclaves, following an agreement with the government of Iraq, which showed a willingness to co-operate with the United Nations. These two separate parts of the operation revealed the two levels of the international response towards this crisis.

Whereas many studies on the issue of the Safe Haven in north Iraq treat the two operations as a whole, this study intended to draw the distinction between the two operations, which are complementary in this particular case but different in nature. Whereas Operation Provide Comfort remains another form of 'humanitarian intervention', which was witnessed in other parts of the world, and whose aim might not be solely humanitarian, the action that was followed by the United Nations could be considered as an important precedent that could be build upon.

The Rwanda case presents another interesting and yet controversial example. The creation of the Safe Humanitarian Zone was legally justified by a United Nations resolution that clearly mandated the forces to act under Chapter VII of the Charter to protect the internally displaced persons and to curb the flow of potential refugees to neighbouring countries. This action constitutes thus an important development as there was a clear authorisation from the United Nations to act under Chapter VII on behalf of refugees and IDPs. This does not apply to the Allied action in the north of Iraq which did not have the same legal basis as Operation Turquoise.

From a humanitarian perspective, the creation of the Safe Zone in Rwanda yielded some positive results by providing protection to the internally displaced persons within these zones and contributed to saving tens of thousands of lives stemming the outflow of refugees to neighbouring countries. On the other hand, Operation Turquoise has some controversial elements that need to be noted. The Operation was criticised for the political implications involved. The French were viewed to be providing protection

to their old political supporters rather than to all those in need of protection in different parts in Rwanda. Furthermore, the fact that the zones were not demilitarised and had elements that had participated in the genocide contributed to undermining the Operation.

The date of the creation of the safe humanitarian zone was also criticised, since it took place too late and followed the genocide rather than at an earlier stage. Credible reports indicated that there was a high risk of violence occurring in Rwanda, and yet the international community remained still until the genocide happened. If Safe Humanitarian Zones had been created earlier, the probability is very high that a large number of people might have been saved. The decision to close the zone was considered by some as being premature before the end of the conflict. Withdrawing at such an early stage and prior to reaching a political solution remained a very questionable decision.

The study of the creation of the Safe Zones in Iraq and Rwanda is linked in this to a wider discussion on the issue of humanitarianism and the central role it is playing in the New World Order. The end of the Cold War was accompanied by evolving conflicts and political vacuum. The international community was not ready to react to these conflicts. Humanitarianism presented a replacement for political action in many conflicts. The evolving role of the United Nations in emergencies further enhanced the central role of humanitarianism, with the growing involvements of its bodies in severe humanitarian crises with refugee flows.

The action undertaken by the international community through the United Nations was gradually replacing single state responses. Among the main points in this thesis is that international action within countries of origin on behalf of human rights and refugee issues should be a collective action undertaken by the United Nations. Such an action could be subject to great abuse and risks being used as an excuse for intervention if undertaken by individual states without international consent. International action within countries of origin in support of humanitarianism or human rights issues is a dangerous tool if it does not have international legitimacy and authorization.

What might be needed instead is a collective response by the international community, represented by the United Nations. The end of the Cold War gave an opportunity for the revival of the role of the United Nations and its Security Council. The paralysed role of the UN at earlier stages was used as an excuse for relying on humanitarian intervention by individual states. Nowadays, with the revival of the role of the UN, humanitarian action within countries of origin could be performed by the UN as a representative of the will of the international community, or following an authorisation of the United Nations.

Changing Notion of Sovereignty

Humanitarianism in the Post Cold War era is also associated with an evolving notion of sovereignty. When discussing the wider role of the international community in situations of severe humanitarian crises, the issues of sovereignty and legitimacy stand at the core of such a discussion, particularly when the humanitarian action is increasingly being undertaken within the countries of origin.⁴⁸⁸ Yet the issue of sovereignty is being increasingly linked to the issue of responsibility, both at the state level and the international level. Violations of human rights cannot be left unaccountable as a result of sovereignty considerations.

The issue of sovereignty should not thus be used as a barrier for international action, when severe human rights violations are committed. Having said this, involvement within countries on behalf of human rights and humanitarian issues should

⁴⁸⁸ It was noted that the way the UN became involved with the issue of Safe Havens in North Iraq does not constitute a breach of the sovereignty of Iraq. The UN action was based on the Memorandum of Understanding that was signed by the UN and the government of Iraq. Thus the action has been approved by the government concerned. UN humanitarian involvement within the north of Iraq resulted in an immediate relief of the severe humanitarian crises for the mass exodus occurring. What constitutes a breach of the sovereignty of Iraq is the action undertaken by other individual states without its approval. Many countries would rightly reject any state sponsored humanitarian action on their territory, since it might be abused for political purposes. At the same time, these same states might agree to a United Nations action since they associate it with more legitimacy. The authorisation that the Security Council gave to the French Government to carry on the Operation added more legitimacy to this action. The French troops were deployed following a Security Council Resolution allowing them to act under Chapter VII of the Charter. It would be reasonable to assume also that if the action was done by another state which had a more neutral profile, the Operation might have also been viewed less critically.

be determined collectively through the United Nations and not be left to the whims of individual states. The present situation and the current crisis in Iraq is a clear indication of the trend used by powerful individual states to abuse power and the United Nations system to justify and legitimise its action. International action within countries of origin could be greatly abused if individual states take the liberty to justify their action within countries of origin based on human rights concepts and refugee issues without international consent.

Humanitarian action within countries of origin, in the form of Safe Zones, revealed a growing link between humanitarian and military activities. Safe Havens in Iraq and Rwanda showed the need for the presence of a sufficient military force to provide protection for the enclaves whenever threatened. Increasingly, the importance of having sufficient military force in humanitarian emergencies is highly valued. The experience of UNAMIR Forces in Rwanda is an important example. Many believe that had UNAMIR Forces been properly equipped, the course of the genocide might have been averted.

The international community was very apprehensive about intervening in the area. Consequently, the United Nations had to rely on the French troops pending the creation of the necessary forces for deployment. However, if the proper means or mechanisms are to be created at the United Nations, such an action could also become efficient and quick. An expanded type of peace keeping operations might be needed to address the emerging kind of humanitarian crises in this era. Peace keeping operations which might have preventive as well as protective mandates.

The military and humanitarian assistance of the United States, Britain, and France was essential for the creation of the enclaves in north Iraq. Otherwise, the operation would have had serious difficulties in being launched. It should be noted however that if humanitarian action by the international community is to be expanded, sufficient support needs to be at the UN's disposal to avoid its dependency on individual states. Creating United Nations' military contingents to be under the direct command of the United Nations is an important element when discussing the growing role of the United Nations. Having available military forces to be immediately deployed in different

crises whenever needed saves the UN from having to depend and rely on individual states for this matter. It could be also argued that individual state's intervention is often quicker and more efficient than United Nations action.

The link between humanitarian action and military action is needed to ensure the demilitarisation of Safe Zones. Later developments within the Safe Havens in north Iraq, which this thesis did not cover, revealed that the safe areas became areas which were hosting different factions of Kurdish guerrillas, an element that contributed in the long run to the instability of these areas. Safe Havens in Former Yugoslavia also became a host for many fighting groups who used these areas for their own protection, an element, which made these areas further unsafe, and targets for adversary attacks.

The same applies to the Safe Zone in Rwanda, which was not demilitarised and many of the perpetrators of the genocide took refuge in these areas. This element contributed greatly to the instability within these areas and led the Rwandan government to push the closure of these camps. In an attempt to do so, many internally displaced persons were killed in the fighting that took place between the government troops and the militiamen. Thus, if the concept of Safe or Protected Areas is to be developed, special attention should be given to make these areas demilitarised areas. This will help the UN to preserve its credibility and neutrality.

Humanitarianism and the issue of neutrality:

The central role of humanitarianism is putting forth questions relating to neutrality and impartiality. This is particularly the case when humanitarian operations are taking place amidst ethnic conflicts. The earlier success of organisations like the ICRC, for example, depended to a great extent on its humanitarian and impartial role. Yet the issue of impartiality and neutrality came significant challenge, for instance in the Rwandan context. Impartiality implied providing humanitarian assistance to all those in need. Yet in the case of the Great Lakes region, providing humanitarian assistance to all those in need also implied assisting those implicated in the genocide. This element that created moral dilemmas for many of the humanitarian agencies operating in the field.

This also implied that tension existed between the humanitarian and human rights fields. The perpetrators of the genocide were benefiting from the humanitarian assistance provided to vulnerable refugees. Impartiality in humanitarian work implied that assistance is provided without any discrimination. Yet, human rights principles implied otherwise.

Creation of criteria for action by the United Nations:

When discussing the creation of criteria upon which the international community will decide to act to create Humanitarian Zones within countries of origin, the first question that comes to mind is what kind of principles, when violated, would the international community decide to act upon? Among the precedents that were accomplished in the Safe Havens in North Iraq was that one of these principles was set, i.e., refugee flows and their relation to international peace and security. Which other principles thus will the international community decide to protect? And furthermore, which body will decide on such principles, is it the Security Council with its limited representation, or would it be a broader body like the General Assembly? The identification of a set of such principles, by the General Assembly, to be acted upon by the United Nations could be an important step towards creating criteria for action. When the General Assembly agrees on such criteria, a wider acceptance at the international level, particularly among the Third World countries might occur.

Humanitarianism and difficulties entailed

The humanitarian action by the international community, represented by the UN, within countries of origin is associated with many difficulties and many questions as well. The first question to be asked is how will the international community identify which particular kinds of conflicts in which it is to be involved? There are different kinds of conflicts, which this thesis does not elaborate upon. It is important to check whether the international community will be capable of being involved without influencing the outcome of the conflict, or even without prolonging the conflict?

Among the other difficulties that the humanitarian action in the form of Safe Havens imposes is that it remains a short term solution. Creating Safe Havens in situations of conflict does not provide a long term solution. Instead it involves immediate relief for humanitarian crises caused by the refugee flows. Further involvement by the international community needs to be made in situations of conflicts to reach a long term solution. Questions about the duration of the Safe Havens should thus be addressed as well as measures to go parallel to the creation of Safe Havens to ensure a longer term solution.

The creation of Safe Havens is associated with a further difficulty, particularly the costs paid by the international community, especially when there are human casualties involved. Public opinion, which calls for humanitarian action to help in a certain crises, may quickly change following the first few casualties. The enthusiasm that accompanies the first calls for aid would in many cases be replaced by equal enthusiasm for withdrawal. All these represent difficulties that face any kind of humanitarian action by the international community and need to be taken into account when discussing this topic.

There remains a set of questions to be tackled in future research when this topic is studied. Among these questions is the kind of conflicts in which the international community would decide to intervene, with the purpose of creating Safe Havens or Corridors of Tranquillity in countries of origin. There exist different kinds of conflicts which require different kinds of approaches, how would thus the international community decide to be involved?

Humanitarian action by the international community is a very complicated topic which is related to a variety of different issues. Some forms of it, like the creation of Safe Havens is a new approach which is worth studying. Safe Havens in Northern Iraq, particularly, represented a very good response to a very urgent humanitarian crisis that occurred at the time, and the Safe Humanitarian Zone in Rwanda included further developments that are important to analyse when studying the concept of Safe Havens. There are many issues, some of which were highlighted above, that need to be studied to

be able to form a criterion for a similar successful involvement by the international community.

Among the key issues that arise when discussing humanitarian action is the possible prolongation of the conflicts. Many argue that humanitarian action could lead to a possible prolongation of the conflict. This is a valid argument especially when humanitarian action is not combined with concerted efforts to address the underlying political problem. In the case of Rwanda, for instance, the French role aimed at providing a Safe Enclave for endangered civilians but was not coupled with a parallel role aiming at addressing the political problem. The French relationship to the defeated regime and the lack of trust that the newly arriving regime held for the French might have been one of the reasons for limiting the French role after the genocide to humanitarian involvement. Yet, the humanitarian enclaves that were protected by the French were attacked at a later point by the RPF.

This could be mainly attributed to the fact that no political solution was found for the issue of armed elements within these enclaves, whether within Rwanda or at the borders. Refugee camps at the borders with Zaire were used as a recruiting place for the retreating elements of the defeated Rwandan regime. No action was undertaken by the international community to address seriously the underlying political causes. Humanitarian action without a political settlement in the context of the Great Lakes led to the prolongation of the conflict mainly within the Humanitarian Zones and the refugee camps.

Early Warning

The conflict in Rwanda in particular and in Iraq to a lesser extent showed the failure of the international community in applying early warning mechanisms and adhering to preventive action. In the case of Iraq, a strong message to President Saddam Hussein prior to his invasion of Kuwait could have played a key role in deterring him. There was mounting evidence prior to the invasion of Iraq's intentions, starting from the Iraqi President's messages to the Kuwaiti leadership and then to the Arab League. In this message he accused the Kuwaitis of stealing oil revenues and building military defences

on the borders with Iraq, followed by another threatening letter the following day. The Americans for their part indicated their support to the Gulf States, but no deterrent action was undertaken. On the contrary, the message that President Hussein got from the Americans during his meeting with Ambassador Glaspie, was quite the opposite. The Ambassador indicated that the United States had “no opinion on the Arab-Arab conflicts, like your border agreement with Kuwait”.⁴⁸⁹ Was the mixed message from the Americans during this meeting actually aiming at encouraging the Iraqi President to attack Kuwait? Such an attack would create a fear in the region that will justify a continued American presence close to the oil producing countries. The events that followed subsequently and the current events in Iraq tend to support this view.

In the case of Rwanda, credible reports were coming from the field depicting the severe human rights violations committed against the Tutsi in Rwanda. Similar reports spoke about plans for a wide scale attack being prepared against the civilian. Some of these reports came from the UN itself. Yet again no preventive action was undertaken. The international action lacked the commitment needed to embark on concerted preventive action in Rwanda. The results were horrendous. Hundreds of thousands of Rwandans lost their lives while the international community was watching.

Both in Iraq and in Rwanda, the application of preventive action on a timely manner could have changed the course of events and saved the lives of hundreds of thousands of innocent people. However, in both countries the strategic and political interests of the powers involved inhibited such action. In the Gulf, the strategic interests were too high while in Rwanda the interests were too low.⁴⁹⁰

The discussion on preventive action and humanitarianism is linked to a wider discussion on the role of the United Nations in the new world order. In order for it to be

⁴⁸⁹ Cited by Brown M.E., and Rosecrance, R., (1999), p. 117.

⁴⁹⁰ It is important to note that the study of the concept of Safe Havens in this thesis was not conducted as a study of a preventive approach to substitute for asylum. It is conducted instead as a study of an approach that would help in providing solutions to refugee problems. Solutions within countries of origin should by no means deny the right for people to seek asylum in Safer

capable of fulfilling its role in this era, some changes within the organisation might be very much needed. For such a wider role to be acceptable among all members of the international community, some restructuring, aiming at increasing the representation of Third World countries, mainly within the Security Council is required. Such a representation would give a sense of legitimacy for the United Nations Security Council.

The issue of humanitarianism is directly linked to that of legitimacy. It is essential for humanitarian action within countries of origin to be based on international consent. Here comes the vital role of the United Nations in providing legality for any such action. Intervention within countries of origin could run the risk of being used as a coercive tool if it does not have the consent of the international community.

Humanitarian action on behalf of refugees and vulnerable civilians will continue to be challenged by wars, conflicts, human rights violations and the political interests of individual states. However, a search for new approaches to deal with these challenges could only contribute to a strengthening of the United Nations system and the refugee system in particular which was starting showing signs of fatigue. Mass displacement and refugee problems will continue to affect not only producing countries but also safer countries in different continents. A continuous search for new approaches is needed, both inside and outside countries of origin. This requires a lot of openness, especially within countries of origin. Equally needed is a liberal approach and less restrictive asylum procedures in receiving countries. The more complicated the refugee problem becomes, the more openness and liberal approaches will be needed to tackle this problem, among Third World countries as well the Western countries. Gaps between southern and northern countries need to be bridged on issues relating to sovereignty and humanitarian action, and a common understanding for an advanced role for the United Nations in order to alleviate many of the suffering that refugees and other vulnerable groups undoubtedly face.

Areas. However, the creation of safe areas in countries of origin could serve as a means for those who do not wish to leave their countries and to become refugees somewhere else.

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