

CHAPTER 3

HUMANITARIAN GLOBALISM: A THEORETICAL FRAMEWORK¹

Eventually, the West, in particular, the United States, entered the Yugoslav fray to forge a peace. The West, and certainly the international agencies and the NGOs dominated by the West, despised the ethnic nationalism expressed by the seceding units of a disintegrated Yugoslavia. These ideologies were anathema to both economic and humanitarian globalism. But economic globalism disliked ethnic nationalism only intellectually; its ideology was a misfit and distraction from instrumental rationalism and realpolitik. Thus, it followed the path pioneered by John Stuart Mill (and Lenin under the Marxist imperial umbrella) of working with nationalism and enfolding it within its larger discipline. Humanitarian globalism, however, saw itself in purer terms. Further, it was an affect-based ideology as much as ethnic nationalism, only it viewed itself as expressing a universal as opposed to a particularistic spirit. Unlike the imperial embrace of global economic rationality that could tolerate and accommodate anything it regarded as irrational, a global universalist ideology of the heart was repulsed by gut nationalism. The globalists of humanitarianism bought into the approach of Lord Acton (or Rosa Luxembourg who took up the same perspective for the Marxist camp in opposition to Lenin) - have no truck or trade with the devil. Nationalism was not something which should be accommodated. It was to overcome with an individualistic universalism.

The two forms of globalism would war against each other as a fight between practicality and morality in the postwar aid given to reconstruct a devastated Bosnia and Herzegovina. This new fight between two forms of globalism all grew up in the shadow of the dying embers of an old fight between two imperial powers. The complicated relations of distrust and dependency that had historically characterized Russian/American relations reemerged. After all, Americans were ideologically committed to spreading its way of life to other parts of the globe - as Wilson did after the Russian revolution when America provided the anti-Bolshevik forces not only with economic aid but with the dispatch of troops to Archangel and Vladivostok. When Truman pressured the Soviets to withdraw from Iran and provided economic aid to Turkey and Greece after WWII, to contain Soviet expansionism, Russian paranoia increased just at the same time as its need for American investment and know-how increased. When Russian imperialism married Marxism, when a power ideology married a universalist humanitarian one where each would get according to his needs in the utopian dream of a future paradise, the new Eastern orthodox materialist religion seemed initially to have the upper hand for, in America, only hippies and religious deviants who were unable to forge a dialectical unity of fear and hope, of personal ambition and a moral vision, evinced the utopianism of the Founding Fathers. But it was the globalist capitalist ideology of the West that emerged victorious.

One of the reasons for the American victory was that the United States did not run its empire autocratically, but tended to follow the medieval pattern of the Medicis of Florence by using diplomacy, economic influence, the power of ideas and the ultimate use of military power as a combination set of instruments to forge alliances with members of its own league. Consequently, those members were allowed

a great deal of freedom for political maneuver in their own regions.

It also meant that Western ideology would be characterized by internal conflicts and debates, by a system tending as much to anarchy as to coherence when it brought both its economic ideology and helping hand to the war-torn devastation of Bosnia and Herzegovina. Against this background of both the shadow of an older power equation in which the rival power in the East was defeated and the new moral versus amoral econometrics of the conflict between a global humanitarian ideology and a global economic one which have **not** been forged into a unified belief system, the efforts of postwar reconstruction in Bosnia and Herzegovina must be viewed.

In some accounts, in light of the Yugoslav experience, there is an acceptance that the new global humanitarianism based on human rights should be the foundation stone for Western policy. "If during the cold war human rights had never had much more than a decorative part in American foreign policy - they were the 'idealist' concern par excellence - the prolonged killing in Bosnia, and the powerlessness of the 'international community' to stop it, had shown how, in the post-cold war world, highly visible and widespread violations of human rights could threaten the prestige and thus the power of both the United States and international institutions."²

Some are convinced, mistakenly, that the new global humanitarianism has already emerged supreme in the international field, dictating to the power brokers the responsibilities and the actions that must be taken in such disaster areas as Bosnia and Herzegovina. "A new approach to intervention had incrementally appeared in the last two decades - the view that the international community has the right, indeed the responsibility, to concern itself with human rights *within* states. With the growing acceptance of this concept in international law and politics, no tyrant guilty of human rights violations against its citizens, no ethnic civil war with its inevitable atrocities, was any longer entirely outside the scope of the world's scrutiny or action...We are now in a new global situation, where ethnic warfare dwarfs most other problems, where conflict within states is as important as conflicts between them, where states are themselves crumbling or collapsing with appalling human consequences, where cold war restraints on action by UN members have been lifted, where the Security Council is no longer immobilized but is expected to act, and where the UN's capacity for peacekeeping and humanitarian intervention limps behind the accelerating challenges."³ In Zimmerman's interpretation, it is the global humanitarians who are in the lead morally, ideologically, and, surprisingly, historically as well.

Further, some governments, perhaps referring to my own (Canada) or the Dutch and Scandinavian ones, seem to have recognized the leading edge of globalist humanitarianism, but they lack the foundations to give that ideology a coherent policy framework. So they advocate a new coherence in international globalism led by the humanitarians. "But some governments are finally beginning to recognize that more comprehensive, intrusive, and coordinated approaches are required." (Zimmerman 1998, 42)

According to this mistaken analysis in a second sense, that is, mistaken about its leadership as well as its doctrine of the victory of human rights moralism, that coherence and leadership has been forged by the UNHCR under the able leadership of its High Commissioner, Mrs. Ogata, not only ideologically but

historically. “Mrs. Ogata’s revolution meant that the unarmed relief workers from UNHCR and the organizations which followed its lead had to be protected and assisted in their delivery missions. Such protection was the original and primary function of the UN peacekeepers in Bosnia. In fact, the humanitarian element - though not the other elements - of the Western approach in Bosnia was an unacknowledged success. Few Bosnians died of hunger or exposure.” (Zimmerman 1998, 41)

However, it was a flawed success. For the intervention saved lives but it was not able to prevent the abuse of its aid by the local warlords. More importantly, it did not prevent the tragedy in the first place. The reason is that the ideology of the new humanitarian globalism is not yet supreme. “Didn’t the very success of the humanitarian operations keep the war going by saving lives that might ultimately have been lost in the fighting and in the massacres that accompanied it? Yes, probably, but this should be seen as a criticism of the West’s failure to intervene earlier in Bosnia with military force, not of its support for humanitarian efforts. If there had been no humanitarian relief - if Mrs. Ogata had stuck to the traditional approach - the Serbs would probably have overrun Bosnia quickly, ‘cleansed’ and killed at will, and staked out a territory far larger than what they got at Dayton.” (Zimmerman 1998, 41)

Thus does Zimmerman in succinct prose capture the ideology of the new global humanitarianism. It is rooted in several principles. The first is the preeminence of human rights in determining international policy; since refugees and displaced persons are the shock humanitarian troops which awaken western consciences, the treatment accorded refugees is to be subsumed under the ideological mantle of human rights protection. Secondly, it is the abuse of such human rights that justify humanitarian intervention. Third, since humanitarian intervention always enters the fray after the fact, what is required is a more activist pre-emptive political intervention to prevent the catastrophe in the first place. Fourthly, in order for humanitarian ideology to take the lead, the current anarchy in foreign affairs must be replaced by a new coherent globalist ideology led by the global humanitarians rooted in the ideology of human rights.

One of the larger thrusts of this book is to prove that this ideology is both descriptively and ethically flawed. One of the great merits of Michael Ignatieff’s book, which Zimmerman was reviewing as the opportunity to articulate the new ideology, is that Ignatieff was not as sanguine about the emerging preeminence of global humanitarianism. As Zimmerman himself noticed, Ignatieff recognized that humanitarianism was but an international soap opera for the global consumer culture of global capitalism. For television “makes us voyeurs of the suffering of others, tourists amid their landscapes of anguish...(television’s) gaze is brief, intense and promiscuous” and its product is artificial, banal and uninformative, “a market in images of horror.” Further, humanitarian globalism is unlikely to take the lead as we lack the stamina necessary for intervention, and we don’t follow through on the interventions we do undertake. Why? Because “We intervene not so much to save others as to save our own image as defenders of human decencies.”

Humanitarianism, in the end, is as much a matter of identity politics as ethnic nationalism. What is being fought out in Bosnia and Herzegovina is as much a war of good against evil. The evil is ethnic nationalism. The minds and hearts of individual men and women must be changed to eradicate that evil.

While Ignatieff sympathizes with the new ideology, he is less confident than Zimmerman that it will emerge victorious.

Thus, in order to understand the conflict between humanitarian globalism versus economic globalism under the hegemony of the United States which is being fought as we debate how refugees and displaced persons should be repatriated to Bosnia and Herzegovina, it is necessary to put the development of that humanitarian globalism in a historical context just as the far better known victory of capitalist globalism has been sketched at the beginning of this chapter and with which most people are far more familiar.

This dream of a global realm for the protection of human rights entails both a state of perpetual peace protected by the united will of all the states on earth, and a universalization of the ethos of rights which was to be embedded in the conscience of every human being. But globalization also meant the weakening of the nation state on the shoulders of which the protection of human rights had been built, for the basic ideology of the human rights doctrine begins with the relationship between the individual and the state. Individual rights protect individuals from threats from the state. The protection for such civil liberties demands non-intervention by the state in the rights of the individual, rights which are considered natural and given.⁴ For individual or civil rights to count, that is the right of the individual to be free from unwarranted interference by the state of which s/he is a citizen, the individual must first be a citizen of that state.

However, for some this sense of individual rights merely articulates what Isaiah Berlin called negative freedom. For positive freedom to exist, that is, for 'freedom to' as well 'as freedom from' to exist, equality as well as freedom must be introduced into the equation. When inequalities are gross, when groups are structurally disadvantaged by the society to limit their equalities of opportunity, for such groups as the physically disabled, women, blacks, gays - that same state, from which we must guard against in order to ensure non-interference in our civil liberties, must intervene to ensure that no disadvantaged group is excluded from the opportunity for individuals within that group to achieve their full potential.⁵ Members of that minority (or even majority in the case of women), who must also be members of the state, should have access to financial, or, at the very least, special legal benefits by the state so that the state can ensure that equal opportunities exist for disadvantaged minorities suffering from structural exclusion.⁶

What about a very different type of group within the state, minorities which belong to distinct societies and claim they are peoples but lack a state to protect their language, culture and traditions? What about the members of minority nations? On the one hand, they must be members of the state from which they are demanding recognition of their aboriginal, historic or national rights. On the other hand, unlike other minority groups, they are not just asking for equality of opportunity as individual citizens in the name of this or that minority group, but for special rights for their group to be provided by the state different than the rights demanded by other citizens.⁷ In this way group rights became an extension of community rights, an extension which appeared to undercut the original doctrine of civil rights under which all citizens were equal before the law.⁸

Into this intellectual civil warfare, of individual versus group versus community rights, the refugee

issue was now lodged. Refugees differ from all the other rights claimants in not being a member of state which is in a position to guarantee the most basic rights, let alone group or community rights. Refugees, if they are genuine, are outside their home states precisely because that state was unable to protect their rights and might even have been the main perpetrator of the abuse of such rights. But if the refugee is not a member of a state, on which institution can that individual make the demand that his/her rights be protected? And how do such demands for protection of rights fit in with the nation-state system within which the doctrine of human rights emerged?⁹

Civil liberties, in western political theory, were grounded on rights said to inhere in the individual prior to his/her entry into the state and to be retained by that individual as a condition of such membership. Thus, basic rights were said to precede the existence of the state, something that could not be said of group rights and community rights which even conflicted with the ideology of a state forged as a contract among individuals for self protection and self enhancement. These utopian¹⁰ modernist¹¹ liberals divided the human community into a world of autonomous individuals each responsible for their own personal lives and destinies and obligated to treat every other individual as a morally responsible agent whose dignity was worthy of respect, and into political states in which those rights were to be protected. These utopian modernist thinkers were responsible for "deconstructing" the medieval organic community into an aggregate of individuals, into a realm where religion was separated from the state, where the civil society was separated from government, where individuals were viewed as citizens rather members of tribes. The public realm was separated from the private one, day was separated from night so that residents who pursued the goal that 'greed was good' in the global capitalist daylight to celebrate the victory of the economic right, had the right of quiet enjoyment as the night life of a city was separated off into a different domain and individuals celebrated the victory of the cultural and moral left in the sexual and moral revolution of the sixties.¹²

Rights entails a policing function in which one realm is prevented from intruding on the other. Rights entail the policing by the state and its bureaucracies to prevent intrusions on those rights. In the Modernist idiom, church and state, commerce and families, production and government must each be assigned its proper place within which it may function, as may individuals in general in the civil society, with the greatest freedom possible within each realm.¹³

There are three important boundaries to maintain: between our guts, which must be driven by acquisitiveness and the strictures of global capitalism, and our hearts, which must be governed by the sentiment of suffering, both stimulated by the marketplace of imagery that continually assaults our senses; between the political state and the state of nature; and, finally, between one political state and another. The creation of the conception of human rights as the soul of the Modernist enterprise was the first commitment to both sustain the individual and allow his or her individual development secure from the intrusions that threaten human life, threatened not because we all operate according to biological clocks, threatened not because we are all subject to the contingent destructiveness of hurricanes and volcanoes, but because the works of humans pose the greatest danger to human life. Why? "Because many use their fellow humans as just another resource, either for their own benefit or to realize peculiar visions of the absolute good."¹⁴

The most fundamental human boundary Modernism drew was first to separate within one's own body and its correlative mental and imaginative life the quest to survive and accumulate wealth from the quest for defining ourselves as moral human beings.¹⁵ Built on that foundation was the attempt to differentiate between the human realm, where every individual was to be regarded as an end and not a means only, as distinct from the natural realm which could be regarded as a resource for human purposes, even as nature was redefined into a "sustainable" resource. Humans, however, were not to be treated as natural resources at all. To be human is sufficient cause to be treated as an autonomous being with dignity.

Modernism stands for the separation of the daylight of acquisitiveness from the night life of sexual freedom and universal compassion, the resource realm which is to be available for human mastery and use and is without dignity (though it need not be treated with indignity) and the human realm of rights and dignity. In addition to the internal bodily boundary between the gut and the heart, and the external boundary in the body politic between the political and the natural state, the third most important boundary to maintain human realm of rights and dignity and was the one between states and the right of the nation-state to admit strangers and select new members.¹⁶ Individual rights are premised on the creation of nation-states to protect those rights, and, therefore, the right of the state to control who has access to that protection. This third set of walls were drawn up when human rights were introduced as the foundation stone of the ethical way people were to be treated. The nation-state was to have a monopoly on coercion and, in return, was given the responsibility for protecting its citizens. If in the classical world, the individual soul was regarded as the mirror of the polis, in the modern world, the polis was constricted by the same principles as the autonomous individual. Thus, the sovereignty of nation states was to be as sacrosanct as the autonomy of individuals. Just as the private and public realms were separated in the desire to protect the private space of the individual, so too was the internal space of the state separated from the alien territory outside the state.

To the state belonged the realm of law and the mechanisms for enforcing the protection of human rights. In the twentieth century we witnessed an attempt to strengthen and extend the human rights field by expanding it to the international realm with covenants, rights and sometimes, but rarely, sanctions for violation. But the current conception of state sovereignty imposed severe restrictions on the obligations that governments assumed and on the forms of intervention available to international agencies for investigating and punishing human- rights violations. (Cf. Nino 1991, 3)

The fact is, the international realm was no more capable of being put in order by conscience than was the national realm. The lawful order among states was to be solved by a league of nations wherein, even the smallest state could expect security and justice, not from its own power and by its own decrees, but "only from this great league of nations, from a united power acting under the laws of their united will." (Immanuel Kant, *Idea for a Universal History*) Thus, international law was to regulate the relations between states, including the way to deal with citizens who were outside their own state and could not call on that state to provide protection.

Within this historical and conceptual framework, the international refugee regime emerged and

developed. Refugees have often been used to characterize our era. In this century, we witnessed the complete division of the globe into a nation state system. Since the 1920s and 30s, someone fleeing the repressiveness of one state could no longer flee to an open land that had not yet become a state or a new nation looking for settlers. The frontiers of civilization have disappeared. If you are a refugee now, you have to depend on the good will of another state to admit you and provide protection. It is precisely because of the universality of the nation-state system that we have so many refugees and that we needed to develop an international regime to ensure their protection.

How has the refugee regime emerged and how does it relate in the present to the human rights regime? During the twentieth century, the refugee regime has completed three full phases of its development and has now entered a fourth. The phases can be characterized by the development of different theses about the root causes of refugee flows, different corresponding solutions, different visions of the obligations that western states were required to assume given this humanitarian problem and the development of different international instruments to deal with the problem.

The first phase, characteristic of the nineteenth century and the period up to the beginning of World War I, viewed refugees as a product of the persecution of individuals because of what they believed. Those beliefs, as the feudal period began to self destruct, could be religious and effect whole communities, such as the Huguenots, the original refugees of the modern world. Or the beliefs could be those held by radical leaders challenging the political beliefs and orthodoxies of the current regimes, thus forcing thinkers such as Karl Marx to seek refuge in Britain. When refugees were seen to be a product of a set a beliefs in conflict with those permitted by the ruling regime, refugees were given protection by regimes which either shared the beliefs of the dissident or, at the very least, upheld an ideology of tolerating dissident beliefs as long as they were not translated into threatening actions. Thus, obligations were assumed by states based entirely on the state's dominant ideology and its compatibility with the beliefs of those individuals or small groups that were persecuted. No international instruments were required. The system was effectively a bilateral system governing the relations between states considered to be rooted in the standard contractarian relationship to each other and the citizens of that state.

A state, in sum, had only obligations to its own members. Assisting individuals who were expelled members of other states was merely an aspect of an international polity built on the premise that states vis a vis one another remained in a state of nature even if individuals no longer did because they had taken up membership in a state in return for protection by that state. International relations remained in a state of nature because there had been no development of a superstate government with juridical powers over any state. And the only way normative obligations could be assumed was by contract, as when an individual assumed obligations towards the state in return for the obligations the state assumed to provide protection to the individual. The state assumed those obligations because of an action taken by the individual to transfer some of his powers to the state. No parallel action had been undertaken on the international level.

In the second phase of the development of an international refugee regime, which began just after the first world war and lasted to just after the end of the second world war, the root cause of refugee flows

was no longer viewed as a matter of individuals with beliefs at war with the state where the individual had been a citizen, but was considered to be a product of the conflict between the national identity of the individual and the political entity that represented that collective identity. In other words, the root cause of refugees was considered to be nationalism and the failure to develop a state system congruent with that nationalism that could civilize and give direction to that nationalism. To make the liberal nation-state system work, there was a need for a national glue to hold the members of the state together that went beyond the contractarian commitments of the individual members. At the same time, the state, governed by the rule of law and an obligation to all citizens, would control the inherent irrationality of nationalism.

During the roughly forty year period of the development of Phase II of an international refugee regime, the root cause of refugee flows was attributed to the rise of nationalism and the impending death of the old imperial, multinational empires. Thus, as one of the aftereffects of the end of World War I, the solution to the demise of the Ottoman Empire, and the resultant war between the Greeks and Turks, was to shift both borders and populations to create nation-states in which large scale transfers of populations took place and borders were realigned to include members of that national group within a state regime which assumed obligations not only to protect individuals but to protect the nation. States assumed obligations to their own nationals wherever they lived and accepted a responsibility to protect minorities within their own regime as a *quid pro quo* for the protection given their own nationals by other states. It was a system designed to protect nationals who had states. But it was a system that did nothing for the Armenians, Jews and Kurds, as examples of nations which lacked states. To redress that problem, in the progress and aftermath of World War I, these nations were frequently promised that they would have their own states.

In the second phase, the international obligations assumed never went beyond the old contractarian premises of the international system except in assuming that the state had collective as well as individual obligations. This was an important difference however. It meant that individuals were given the protection of a state which represented that nationality without a presumed act of will by that individual. It meant that states had obligations to their nationals who did not live within the borders of the state. Further, states had even assumed international obligations which subsumed or qualified the absolute sovereign authority of the state with respect to other nationals.

This qualified sovereignty not only applied to minorities within the boundaries of a nation-state, but it applied to minority nationals outside the nation-state system altogether and who had been promised at least a national homeland where one state would accept such obligations, or even a state dedicated to protecting that national group. Thus, the Balfour Declaration, subsequently assumed as an obligation of the League of Nations, was an effort to carve out a territorial base for the Jews in their historic homeland as part of the general pattern of redrawing borders and shifting populations that had been part of the envisioned solution to conflicts in the aftermath of the Great War. That obligation was delegated to a powerful state, Great Britain, the most powerful one at the time, in an area where a nation-state system had not yet developed. Great Britain was not free to act as its power allowed and its self interests dictated, but was obligated to live up to a commitment made by the international community even if that commitment

originated in an act of the British government. It meant that the commitment could not simply be changed by a change in mind of a subsequent government.

Although obligations were assumed to one's own nationals who were not citizens of one's own state, to minorities in other states and to nationals who had no state of their own, the limits to the obligations assumed can be noted if one examines the international agreements and instruments developed: the League of Nations itself, the Nansen Passport, the obligations assumed towards the Jews at the Evian Conference, and the obligations assumed towards the Palestinians at the expiry of this phase when UNRWA, the United Nations relief and Works agency for Palestine Refugees in the Near East, was created in the aftermath of the Jewish-Arab war of 1948.

Any study of the League of Nations documents would agree that the League was intended to be an instrument to enforce collective security among member states. Woodrow Wilson had succeeded in incorporating a charter for a League of Nations in the Treaty of Versailles ending the war with Germany. Article 10 of the League Covenant was intended to create an international instrument to guarantee peace through collective security against aggression. This was the central issue when Woodrow Wilson introduced the League of Nations plan on February 14, 1919 at the Paris Peace Conference. Article 10 read, "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."¹⁷ Though there was a great deal of controversy, particularly in the Senate of the United States which failed to ratify the Treaty¹⁸, over the meaning of the *undertaking* of each of the Members and the power of the Council *advice*, the debate was over the degree the United States was committing itself in advance to involving itself in European politics and not over any surrender of sovereign authority to an international body. Article 11 did not commit the members to involve themselves in forceful action. Articles 12 to 15 provided instruments to settle international disputes through arbitration, the good offices of the Council, arbitration through a Permanent Court of International Justice, all of which were designed to *urge* states to eschew war, but did not prevent them from going to war. However, subsequent articles provided for sanctions, ranging up to the use of military force, if war was adopted in contravention of the terms of the Covenant.

The League was not intended as an instrument to protect human rights nor as an instrument to protect refugees in any way, except insofar as the inhibitions against war limited one possible source for their creation. It was an agreement between sovereign states to protect, not limit, their sovereignty by providing instruments to inhibit the war making powers of states. However, other clauses dealt with the Mandate system, international labour standards and means for arranging future territorial changes. The provision for a Mandate system created international obligations for all member states, not simply towards a state's own nationals born elsewhere, or to minorities within another state, but to developing a state to protect nationals who had not had a state to provide that protection. However, the League of Nations was not a superstate system to enforce such obligations. The problems of enforcement and administration were assumed by the Mandatory Power so that Great Britain freely abandoned its commitments towards the Jewish nation in its White Paper just prior to World War II.

Similarly, the Nansen Passports, created in the twenties to allow refugees to move with a passport provided by an international body rather than a state body, was not intended to set up a superstate body which could provide individuals with documents of identity, but rather to allow states to get rid of unwanted refugees by providing those refugees with documents now needed to travel to seek refuge in a country which might welcome them. The states recognized Nansen passports as a matter of self interest.

Even at the Evian Conference in 1938, when the international community, under the leadership of the United States and President Franklin D. Roosevelt, explicitly assumed an *international obligation* to the Jewish refugees being driven out of Nazi Germany, the obligation was a matter of empty rhetoric, both in intent and substance. It was a public relations exercise with no real aim to provide any substantive assistance and, in fact, provided for no means to help the Jews. Thus, though the international obligations assumed by individual members of the international community extended beyond its own nationals, and beyond the obligation to protect minorities within a state's own boundaries, and even beyond the obligation to provide a state in an area where none previously existed to protect a national group, as in the League assuming the obligations of the Balfour Declaration, there was no real obligation to protect individual refugees forced to flee because of persecution.

UNRWA, created in 1949 to deal with the refugees from the Arab-Jewish conflict over Palestine, followed the precedents going back to the arrangements focussed on particular classes of refugees, such as Greeks and Turks, rather than the generic case. UNRWA fell into the pattern set after the first world war. The only difference was that the transfer of populations and border arrangements had largely already taken place. The Jews in Arab lands had moved en masse to the newly created Jewish state; a large number of Arabs had fled or been driven out of Palestine by the Zionist victory. UNRWA was intended to be an instrument to integrate the refugees economically into their new states, though ostensibly it was only a relief and works agency which awaited a peace agreement in which the refugees would be repatriated **or** compensated.¹⁹

In sum, there is no evidence of any supernational obligation being assumed towards refugees in Phase II of the development of an international regime, even though specific international institutional arrangements to help refugees began to develop in this period.

Phase III in the development of an international refugee regime can be said to have begun with the establishment of the United Nations High Commission for Refugees in 1950 and the commitments and obligations states assumed which had signed the Covenant. UNHCR was a by-product of the cold war. The contrast in its assumptions can be understood if we compare UNHCR to UNRWA.

In the definition of a refugee under UNHCR, the root cause is seen to be persecution, or a well founded fear of persecution, because of the beliefs of the individual claiming to be a refugee. Hence, the causal situation seemed to hark back to the period prior to World War I. The difference, however, between the third phase and the first was that a state which was a signatory to the Covenant, now *obligated* itself not to send back a refugee to a country in which the individual could be persecuted. States

for the first time assumed direct obligations to individuals who were citizens of other states who were not their own nationals (as distinct from citizens). The obligations were admittedly minimal at first, but they were real obligations. Thus, refugees had *some* rights.²⁰

Unlike the solutions to the refugee problems between the wars which were premised on shifting borders and the massive and forced transfer of populations between different national groups, the post World War II solution to international refugees was premised on sacrosanct borders. This was a central premise of the United Nations in contrast to the League of Nations. Whereas the pre World War II regime had presumed shifting borders, at least until states became members of the League, transfers of populations and creating new states to protect persecuted nationals who did not have a state, the post World War II regime was directed at persecuted *individuals* not nationalities.

That is why the three "ideal" solutions were considered to be repatriation, settlement in countries of first asylum and, where the first two solutions were not available, resettlement abroad in countries welcoming immigrants. Individuals would be moved among a fixed nation-state system. The UNHCR was designed, not just to provide relief and assist in economic integration, but to assume a prime responsibility towards individuals that previously had only been assumed by states - the protection of the individual. The UNHCR was given a quasi-state power, admittedly with initially very little scope and no effective powers to back up its mandate other than the good offices of the UN. But UNHCR was mandated to ensure that individual refugees, who lacked a state to provide protection, were given that protection. This obligation extended to intervening on behalf of the refugee with the sovereign power in which the individual had found refuge, even if initially this obligation only extended to ensure that the refugee was not refouled to the country from which s/he had fled.

However, although an international agency assumed powers previously only assumed by sovereign states, and although states qualified their sovereign power to deal with individuals who were not their own citizens but were within their jurisdiction, that limitation on sovereign power was accepted by contract, by a covenant entered into by the state. An international system was developing based on the same premises as the state system, that powers accrued to a higher body by the individual, or, in this case, the state, surrendering its power to a higher body by an overt act of will.

Gradually, the powers of the international body were extended by interpretation not only to ensure that an individual refugee was not refouled, but to ensure that proper procedural safeguards were in place to ensure that states which signed the Covenant also provided procedural safeguards to ensure that a refugee claim was properly adjudicated. Individuals within the state system were now being given protection not only by the state where they were living, not only by a state of which they were nationals, but by an international body.

The fourth phase in the development of a system of protections for refugees began to develop in 1991 with the demise of the Cold War, with the end of the international rivalry based on a war between countries which guaranteed individual rights and countries which ostensibly pursued collective equality. The

three "permanent" solutions were premised on this conflict because they overtly endorsed the postulate of an obligation of a state to protect the individual rights of its own citizens. In fact, the very system was designed to protect refugees fleeing communist states even if it eventually extended to provide protection to individuals fleeing other authoritarian states.

The main cause of refugee flows that dominated the inter-World War period, nationalism, reemerged as the new major cause of refugee flows rather than ideological rivalry. But it emerged as a conflict *within* rather than between states. The flight of Kurds following the end of the Gulf War was a case in point. Unlike the UNHCR regime, which obligated states to provide protection to refugees who fled another state, Turkey did not allow the Kurds to enter their territory to find protection. Even more important, other states, notably Britain, France and the USA, intervened, ostensibly with the sanction of the UN, *within* Iraq, to protect the Kurds.²¹

While the taboo about sacrosanct powers of states vis a vis their own citizens was being broken in the Middle East, while the taboo against crossing the borders of another state to intervene to prevent a state from abusing its own citizens had been broken, the very premises of the nation state system since World War II, a system of sovereign states with sacrosanct borders, was being destroyed as the Soviet Empire began to self destruct and new states came into being.

As we enter this fourth phase in the development of an international regime to protect refugees, those states, that were signatories to the international refugee convention, have begun to develop multilateral mechanisms to limit their obligations to individuals who arrive at their borders or within their territorial boundaries and claim refugee status. The Dublin and Schengen Agreements are but the adumbration of this new development. The obligations to individual refugees who claim they have been persecuted are being transferred from the sovereign state level to bilateral and multilateral systems for adjudicating such claims.

At the same time as restrictions are beginning to develop to provide boundaries to a refugee claims system, states are also assuming obligations to protect whole nationalities being persecuted by the states of which they are members. This sets a precedent for direct intervention in the sovereign affairs of other states²² at the same time as states are entering into international and multilateral agreements to limit their sovereign powers with respect to the admission of non-citizens to membership in their own states. The whole international refugee system has developed in parallel with increasing limitations placed on the sovereignty of individual states. Can the same be said of the human rights regime?

After all, it has also been a century in which human rights gradually emerged as the defining character of international politics. The human rights regime has developed a global reach in the twentieth century. The Helsinki Accords, as much as the inability of the Leninist-Stalinist command system of economics to compete, helped lead to the demise of the Soviet Union. Glasnost worked even when perestroika did not. And in China, glasnost was a rallying cry of Tienanmen Square, a movement which has been and will remain uncontainable with the economic perestroika unleashed in China. Modernist civilized society, as described above, requires a civil society independent of the state in which the right of individuals

to pursue their economic self interests within a known set of rules and a fair playing field coexists with the right of individuals to speak freely, join organizations of their choice, and generally enjoy the rights and freedoms that have become benchmarks of a civilized regime.

There are two basic theories about the relationship between refugees and the international human rights regime which have coexisted in the same work, a descriptive divergence thesis and a prescriptive convergence one. The divergence thesis is very simple. More and more states adopted human rights as a defining character of the state to ensure the protection of the rights of their own citizens; states with a long history rooted in human rights protections have institutionalized those rights in an elaborate system of procedural and institutional protections for those rights. At the same time, the development of a protection regime for refugees has not corresponded with the developments in the human rights regime. Quite the reverse. While civil rights protections have been extensively developed to protect blacks, minorities and women, the protections provided to refugees have continued to be dictated initially by anti-communist politics rather than human rights, and, subsequently, by economic and political self interest rather than human rights. The door for refugees to find protection has been closing rather than opening.

This vision of the restricted state vis a vis refugees has been developed in a series of books dealing with refugee policy of various countries.²³ The descriptive divergent thesis argues that states normally associated with a human rights regime have increasingly devised techniques to exclude refugees from the protections of the state. Whatever the explanation - anti-communism, immorality, stupidity, incompetence - the thesis was the same. The gates of freedom and the opportunities for protection for refugees were closing at the same time as rights for the citizens of these states were being expanded and institutionalized. Ever present in this moral thesis was the metaphor of the closing door that harked back to the biblical image of Adam and Eve cast out of the Garden of Eden with their return blocked by the Cherubim and the Flaming Sword guarding the way to the Tree of Life. On the one side was salvation, on the other, suffering. The image of The Holocaust and the Martyrology of the Jews were also evoked "When the Gates Begin to Close"

Implicit in this descriptive thesis and moral castigation was a normative prescriptive case that refugee and human rights policies ought to converge rather than diverge. Such a thesis was stated explicitly in a volume that has now become a classic, *Escape from Violence* (Ari Zolberg, Astri Suhrke and Sergio Aguayo). "A liberal policy must rest on a combination of an open door policy and a discriminating hearing process." (p. 281) That is, the door for refugees must be open, but a quasi judicial system of protections must be developed within the state system to ensure that genuine refugees are protected while those who use or abuse the refugee protection system and cannot establish that they are genuine convention refugees are rejected.

Zimmerman's convergence descriptive thesis stands in opposition to the descriptive divergence and prescriptive convergence one. He belongs to a group of policymakers and scholars who have challenged the historical and political science scholars who have contended that refugee human rights policies and refugee policy have diverged and that western states have developed more restrictive regimes vis a vis

refugee protection. The scholarship and evidence for the convergence thesis has largely come from legal scholars²⁴ and journalists rather than from social scientists. Though states may have *tried* to increase the restrictions on refugee protections and to infuse refugee policy with ideological and foreign policy concerns, a series of court challenges to refugee policy have succeeded in providing *increased* protections for refugees in the domestic field. Further, under the impetus of humanitarian international actors, the protection available overseas for refugees has also increased.

There is, however, a great deal more evidence to demonstrate that state policy aims to restrict access to a refugee protection regime even if the regime itself has possibly become fairer. For example, western states have developed systems for interdicting potential refugee claimants before they can even make a claim. Americans have continually prevented Haitians from even reaching American shores to make a refugee claim, and organized the humanitarian intervention in Haiti to stop the flow. These governments send officers overseas to break up organized systems of assisting refugee claimants to get to western states to help airline companies identify bogus documents. Governments have used visa restrictions to prevent refugee claimants from travelling easily, and many countries fine airlines for allowing passengers to fly with false or inadequate documentation.²⁵

In this debate between a pure divergence thesis and a convergence thesis or a mixture of the two, there is one other development that needs to be mentioned. The Right as well as the Left has become a major proponent of overseas aid for refugees. Previously, advocacy of overseas aid for refugees has been virtually owned by 'bleeding heart liberals', except when designed to prevent disorder and the development of an authoritarian or totalitarian or unstable regime that might threaten international stability. Now, overseas aid for refugees is increasingly advocated by the right concerned with the primacy of state interests. For example, a typical policy position of the left has been that, "the richer states must accept a greater financial obligation to assist the countries of first asylum in the south." (Zolberg, et al, *Escape from Violence*, 282) But this postulate of the left has become a humanitarian call by the right to provide overseas aid for refugees as a cheaper and fairer way to provide assistance to those who need it than the very expensive quasi-legal system needed to provide a system for adjudicating refugee claimants within a country's domestic jurisdiction. In the belief or anticipation that refugee claimants have or will end up with the same elaborate (and expensive) systems of human rights protections now given to accused criminals and minorities who are citizens, the political right has increasingly taken up a humanitarian posture to argue that many more refugees, and refugees in much greater need, will be helped if the resources, utilized to develop a human rights based quasi-judicial system to protect refugee claimants who arrive on one's country's soil, were diverted to overseas aid.

It is in this context that the effort to repatriate the refugees from Bosnia and Herzegovina and to return displaced people to permanent homes must be viewed. The huge humanitarian and military involvement of the west in BiH is a complex manifestation of the development of the western dominated international regime which has arisen within the bosom of the globalized capitalist system and in the humanitarian efforts to assist refugees within a context of international humanitarianism based on human rights.

1. This theoretical chapter can be skipped if the reader's interest is simply focused on the debate between repatriating refugees and displaced persons to minority areas or relocating them. But if a greater in-depth understanding is desired for contextualizing that debate, and if the reader wishes to understand the intellectual perspective of the author, then this chapter should be helpful.

2. Mark Danner, "The US and the Yugoslav Catastrophe," *New York Review of Books*, XLIV:18, 20 November 1997, 58.

3. This quotation is taken from page 39 of Warren Zimmerman's review essay, "Bad Blood," in the *New York Review of Books*, XLV:9 28 May 1998, 39-42. Several other quotes from Zimmerman will follow for which I will only cite the page numbers within my own text. Warren Zimmerman was the US ambassador in Belgrade at the time the Yugoslavian crisis blew up (1989 to 1992). He, along with several other State Department Yugoslav, left the State Department, ostensibly because of America's inaction in response, or failure to respond, to the conflict in Yugoslavia. At the time of this writing, Warren Zimmerman holds the Kathryn and Shelby Cullom Davis Professorship in the Practice of International Diplomacy at Columbia University.

4. If natural rights are not rooted in human nature but in the conception of historical selves, groups and societies whose narrative transformations must be continually reconstituted from within without coercion, then human rights are fundamentally built on the basis of community rights, social rights and only ultimately individual rights. Community rights, the rights of a society to determine its own destiny through its own memory transformations is the foundation stone of any rights. We are not Aristotle's rational animals or political animals. Rather, we are political humans engaged in discourse with the world around, including other societies with their own histories of discourse which must be respected and understood. We all construct our worlds in terms of the history of our experiences. And if we are not to create a tower of babble, even one rooted in a misconception of human rights, we must attend to the different worlds constructed by different historical experiences.

5. The protection of group rights, the rights of the disadvantaged, such as women and children and blacks and the disabled, demands intervention by the state. To simply state that the protection of group rights depends upon and builds on the protection of civil liberties simply covers up the areas of conflict between these two sets of rights. Laws against hate literature directed at blacks, Jews and other minorities are infringements on the right of free speech by setting limits to those rights. And if group rights can limit civil liberties, then group rights rather than individual rights may be assumed to be more basic. The problem, however, is that this raises the possibility that Salmon Rushdie could be interpreted to have abused the rights of Muslims to worship Allah without "hate" literature or blasphemy being directed at the Supreme object of Muslim worship.

6. Human rights have been fragmented at the same time as they have globalized. This globalization, regionalization and fragmentation have proceeded apace - what Jim Rosneau has dubbed fragementation. They have been globalized in the sense that virtually the whole world pays lip service to human rights. They have also been globalized **within** the state as virtually anyone on the soil of a state - not just the citizens of the state - are protected by a state's human rights codes. Human rights have also fragmented. We not only have a broad gamut of individual rights - including such alleged economic rights as property rights, contract rights, creditor's rights, rights to a minimal standard of living, rights to work, disability rights, educational rights, etc. - but there are conflicts between individual rights and group rights. In other words, the protections and sensibilities of historically persecuted groups threaten the very rights of free expression which was the single most important basis for the construction of the realm of rights in the first place. In the name of the dignity of all human beings an attack has been launched on the most important instrument for guaranteeing the protection of that dignity. The reverse is also true. Communities and free association so central to the preservation of a civil society, are under threat. More importantly, "what threatens the possibility of meaningful community is not force external to the community, but those very *principles* of liberty and equality on which they are based, and which now are becoming so universal throughout the world." (Isaiah Berlin, "Return of the Volkgeist," *New Perspectives Quarterly* 8:4, Fall 1991, 7) Humans are guaranteed their rights but moral

obligations are all voluntary. Further, rights guarantee equality, but it is equality for all who are members. They provide no guidance for determining who can become a member.

7. The problem is that the protection of individual human rights and the rights of national self-determination have not always appeared to be compatible. Some would look merely to balance two types of rights seen to be going in opposite directions. "As we prepare to enter the millenium, a new equilibrium will have to be established between the resurgent cause of national self-determination and universal human rights as well as ecological rights." (Frederico Mayor, "From Berlin to Babel", *New Perspectives Quarterly*, 8:4 Fall 1991, 23) But the problem is not so easily resolved even by subsuming both types of rights within a Green ethic. Human rights theory says that it is universally applicable to all humans, but reveals itself to be about the rights of individuals, groups and subordinate nations in relation to the state. However, indivisible collective rights based on the new ecological ethics requires creation of a superstate authority to counteract the divisibility of the world into state regimes committed to serving their own self interests. Further, human rights theory is virtually silent about the rights of individuals, groups or nations who find themselves outside the states where they traditionally resided, except to insist that the states in which they find themselves have an obligation not to return those refugees back to the states from which they fled if they have a well-founded fear of persecution. Refugees have no *right* to become a member of a state which will guarantee them protection; they have only a right *not* to be persecuted.

8. If individual and social rights approach the issue of rights from different angles and sometimes come in conflict, what can be said about the relationship between individual and collective rights? Collective rights are not simply another species of group rights where the object is to remove the barriers of exclusion from the group's full participation in the dominant society without requiring individuals from that community to assimilate at the cost of preserving their language, culture and historical memories. Community rights reveal themselves to be fundamentally about collective self-determination, the right of a minority nation within the envelope of state to *fundamentally* determine its own destiny in order to protect its culture, history and language. The possession and control of land may be fundamental to that self-determination. And if the minority community not only has different interests in the land, but different concepts of land itself, then no underlying universal value system exists to mediate the conflict. We end up with a fundamental challenge to the state system which is the real basis of the human rights system in the first place. There may be an agreed upon process to mediate the conflict between the minority nation and the dominant nation in charge of the state, but one cannot refer to a universally acknowledged set of human rights as the basis for adjudicating interests. Community rights pose a fundamental challenge to the advocates of human rights because, in the end, the very premises of community rights, that rights arise out of the historical culture of a particular people and must protect the culture, language and customs of that people, challenges a fundamental assumption of human rights advocates - that the values they espouse are ahistorical and universal and independent of any particular culture. When the advocates of group or social rights reveal that the tradition of individual civil liberties as a universal norm is really an historical product of the theoretical foundations of the nation-state in the social contract theories of Hobbes and Locke, then the slide down the slippery slope away from the ahistorical, universal roots of natural rights has begun. But if the defence of community rights, the right of a nation to protect itself in order to preserve its history, language and culture and determine its own destiny, is itself an aspect of the same history which gave rise to the theories and conceptions of human rights, then a repressed side of western history reemerges. That it frequently reveals itself in the wrath and irrationality of some expressions of nationalism may have more to say about the repressive force of the rational order built on purportedly universal norms than about the true character of nationalism. Community rights may really be the secret force behind the universal rationalizations of the human rights tradition. How else could the modern world do battle with the universal claims of an all-encompassing system of salvation of the Christian church than through a "naturally" rooted universal basis of order. But what if it was all a ruse to assert nationalistic values through the instrumentalities of the state in combat with the universal claims and the institutional authority of the church?

9. Human rights seem to presume the existence of states, both in those protected by its theory and those excluded. But when human rights are made truly human, when attached to humans as an indivisible entity, human rights theory

challenges the system of sovereign states as the ultimate guarantor of human rights. The fact is, there is an inherent tension between a doctrine of universal human rights and a sovereign state system based on rights to national self-determination. And refugees are the ones caught between the two. Human rights law, in fact, is not about the rights of humans qua human. It is about setting an optimal norm in the relationship that has emerged between individuals and the states to which they belong in a world-wide system of states. With respect to the relationship between groups and the state, it is about setting a fairness norm to ensure an equitable opportunity for self-fulfilment for members of all groups in society, and, as an extension of the social rights doctrine, as an insistence on more equitable sharing among states of the wealth of the earth. Finally, it is about the search for norms for determining which nations should be represented by states which not only protect individual and group rights, but express the will of that nation on the world stage. Where we find individuals, groups or even whole nations (the Kurds, the Palestinians) who do not have membership in a state which will protect individual, group and national rights, we find refugees.

10. There are different kinds of Modernists. Let me suggest two types, Futurologists and Utopian Modernists. (There are other types, such as classical or nostalgic Modernists, those Modernists who operate within the Modernist idiom but cast themselves back to the modern version of the Medieval walled City, Jane Jacob's street life of variety, plurality and, most importantly, security of the streetscape made safe by a plethora of watchful eyes rather than a wall surrounding the urban perimeter, Bloom's university of great books, etc.) The utopian modernist upholds the idea of planning and development on as large a scale as possible according to a rational plan. In order to carry out such a plan, the human environment is separated according to functions to rationalize planning so that both equality of opportunity and social welfare, both economic growth and environmental protectionism, are enhanced. The utopian impulse is directed towards an ideal as distinct from interests. In rights theory, it is the categorical imperative to treat every human as an end and not a means only, to regard every human as a person of dignity. The Futurologists, in contrast, project interests and trends into the future and bracket any moral voice.

11. Modernists are distinguished from both pre-modernists, those who espouse traditional values and authority structures and the priority of the community over the individual. Modernists are also distinguished from post-modernists.. A Modernist accepts the idea of planning and development. Postmodernists disassociate themselves from planning altogether; they become concerned with designing buildings and places not planning the future. Modernists seek to find some order and extend that sense of order into the future. Postmodernists cultivate a sense of the human landscape as a highly urbanized fragmented collage. Modernists seek out patterns in history. Post-modernists are eclectics, satisfied if they are sensitive to vernacular traditions and local histories and allow themselves to be directed by the wants and needs and even fancies of what is immediately present rather than any sense of the requirements of a globe that may be on the brink of exhaustion. Finally, modernists use the global arena for social purposes. Postmodernists view each piece of space as an autonomous and independent entity having aesthetic but no overarching social purpose so that the Postmodernist focuses on differences, difficulties and complexities, on the nuances of interests, cultures and places, avoiding like the plague any overarching vision. A Postmodernist regards any talk of rights as a discursive set of assets *and liabilities* which may both empower *and disable*. Whereas a utopian Modernist may refer to rights as *natural*, a Postmodernist may treat that claim as part of an entrenched system of values which in the name of what is natural covers up what is really political - in this particular case the enhancement and celebration of the autonomous individual which may be the fundamental contradictory ideal which ensures the destruction of the globe as a natural balanced ecosystem. Whereas a utopian Modernist may envision a balance between development and sustainability, a Postmodernist might play the role of a critical dissident and try to unpack the underlying contradiction between development and sustainability, perhaps such utopian visions to a critical examination of the phrase as an exemplification of the pact between Faust, the granddaddy of developers, and Mephistopheles. (cf. David Harvey, *The Conditions of Postmodernity*, Cambridge: Blackwell, 1990, p. 66).

12. Cf. Michael Walzer's description of Utopian Modernist Individualism as a liberalism which exists as "a world of walls, and each creates a new liberty." ("Liberalism and the Art of Separation," *Political Theory* 12: Aug. 1984, 315)

13. Cf. Michael J. Shapiro, *Reading the Postmodern Polity: Political Theory as Textual Practice*, p 94, for a postmodernist critique of separation as a mode to institutionalize power and control. For a premodernist critique of this schizophrenia of the economic right and the cultural left, one that laments the loss of personal morals and family values rather than celebrates or even notices the new global humanitarian moralism, cf. Mark Lilla's essay, "A Tale of Two Reactions," *New York Review of Books* XLV:8, 14 May 1998, 4-7. There is another kind of Modernist who is neither a pre-modernist nor a post-modernist, neither a futurologist nor a utopian modernist, but an Historical Modernist. Instead of being assigned to FutureWatch, he asserts that the Owl of Minerva only flaps her wings on the dawning of a new day. The Historical Modernist looks backward from whence she came rather than forward into the future. The Historical Modernist tries to reconcile trends and morality. It is as an Historical Modernist that I examine human rights as the foundation theme for the new global humanitarianism.

14. Carlos Santiago Nino, *The Ethics of Human Rights*, Oxford, 1991, p. i.

15. For Nietzsche, this benevolence was the ultimate obstacle to self-affirmation, empowerment and Romantic expressivism, because nature and desire were both submerged within a repressive order. In another and very different interpretation of the emergence of this benevolent universalism, its roots lay not in repression but in sentiment rooted in preservation expressive of traditional communitarianism as upheld by Lord Shaftesbury in *The Great Transformation* of the nineteenth century in rebellion against the cold rational calculation of Whig thought. But both explanations seem flawed. For the sexual revolution of the sixties was accompanied by a universal moralism, and, if Nietzsche was right, one might have expected a new, repressive puritanism to accompany the new global moralism. Similarly, if the global moralism was a recapitulation of the squire's sense of responsibility for his charges against instrumental rationalism, why did it not honour family values, recognition of public authority and tradition in general, eschew serial sexuality and espouse decency in relation to sexual expression. Instead, the global moralists are heirs to the cultural revolution of the sixties. My own speculation is that the new moral globalism is neither an expression of repressed sexuality to overthrow a repressive order nor an acting out of the sentiment of traditional values to prove the emptiness of moralistic horatory. But whatever the explanation for its appearance, it is an expression of the moral vision of the West, one that has not been integrated within its economic globalism.

16. Cf Ch. 2, Michael Walzer, *Spheres of Justice*.

17. For the full text of the Covenant on the League of Nations, see Ray Stannard Baker, *Woodrow Wilson and World Settlement*, 3:163-173.

18. Cf. Herbert F. Marguiles, *The Mild Reservationists and the League of Nations Controversy in the Senate*, Columbia: University of Missouri Press, 1989.

19. Cf. Howard Adelman, "Palestine Refugees, Economic Integration and Durable Solutions," in *Refugees in the Age of Total War*, ed. Anna Bramwell, London: Unwin Hyman, 1988, 295-311. See also Howard, Adelman, "On UNRWA," Review Article of Milton Viorst, *Reaching for the Olive Branch: UNRWA and Peace in the Middle East* in *Middle East Focus*, 14:2, 1992, 11-15.

20. Refugee law, as it has emerged, was primarily about the rights of refugees not to be forcibly returned to states which do not protect the "human" rights of that individual. Refugee law has not yet recognized that refugees can only have rights in the present system if they also have the right to become a member of *some* state if their own state will not protect them.

21. Cf. Howard Adelman, "Humanitarian Intervention: The Case of the Kurds," *International Journal of Refugee Law*, 4:1, 1992, 4-38 and "The Ethics of Humanitarian Intervention: The Case of the Kurdish Refugees," *Public Affairs Quarterly*, "Special Issue on Refugees," 6:1, 61-88.

22. Cf. Brian Urquhart, "Territorial Integrity is Not Sacred," *New Perspectives Quarterly* 8:4 Fall 1991.

23. The most influential has probably been Gil Loescher and John Scanlan's *Calculated Kindness: Refugees and America's Half-Open Door*. But there have been others with the same theme: the volume edited by Mark Gibney, *Open Borders? Closed Societies? The Ethical and Political Issues*, Norman and Naomi Zucker's *The Guarded Gate: The Reality of American Refugee Policy* and Alan Dowty's book, *Closed Borders: The Contemporary Assault on Freedom of Movement* have all argued that American refugee policy was dictated by foreign policy concerns rather than the rights and plight of the refugees. This thesis has not been confined to books on the American refugee regime. Books on Canadian refugee policy have had the same theme covering the very period when Canada incorporated its Charter of Rights and Freedoms as part of its constitutional make-up. Thus, although Gerald Dirk's book on Canadian refugee policy suggested that anti-communism had replaced racism as the defining characteristic of the protections provided to refugees by Canada, more recent books, such as the volume by David Matas with Ilana Simon, *Closing the Doors: The Failure of Refugee Protection* and Victor Malarek's *Haven's Gate: Canada's Immigration Fiasco* offered a thesis of incompetence and narrowmindedness rather than ideology as the explanatory thesis for an increasingly restrictive refugee policy in Canada.

24. The Singh Case in Canada, which guaranteed refugee claimants the right to an oral hearing, and the case of the Salvadorans in the United States in which the court ruled that Salvadorean refugee claimants had not been given a fair hearing but their claims had been determined by American foreign policy concerns, are two landmark cases which have increasingly institutionalized protections for Convention refugee claimants within the domestic law of western states. The legal precedents have institutionalized independent tribunals for refugee hearings, the right to counsel by a refugee claimant, the right to an oral hearing, evidential rules which have increasingly favoured the refugee claimant, shifting the burden from the requirement that the refugee claimant provide evidence to prove that she or he had been persecuted to a norm of a balance of probabilities, or, as in Canada, giving the refugee the benefit of the doubt if there are no demonstrable contradictions in the testimony of the claimant or contrary evidence.

25. Further, such agreements as the Dublin and the Schengen Agreements have attempted either to make the country where the refugee claimant first enters a western state carry the prime responsibility for processing a claim, or have tried to create a refugee claims system on a multilateral level, or, at least, harmonize systems of refugee adjudication as an interim step. All these efforts have been taken, not ostensibly to limit the protections afforded genuine refugees, but to try to ensure that the protection system made available to refugees is not abused by those trying to use the refugee entry system as a back door to immigration. But there is always the suspicion as well as a great deal of evidence that these restrictions are not merely aimed at preventing abuse but are intended to limit the number of claimants entering the system, whether genuine or not. These attempts to restrict access to the system have been supplemented by attempts to control admissibility by restrictions on those eligible to make a claim, such as denying the right to make a claim to those who have been convicted of a serious criminal offence or to those who have made claims in other countries who have signed the convention. Within the system, there have been severe restrictions on the access to any right to appeal based on a concern to balance fairness with a speedy process lest the very delays in the system provide an incentive in itself for creating a pull factor for many to make refugee claims. The fact is, the more refugees are given the legal protections of a court based system of justice with its adversarial process, the more likelihood the system will become drawn out, thereby inviting abuse. Investigative non-adversarial hearings would seem preferable to adversarial hearings if efficacy is to balance fairness, but in the issues of process (the right of appeal, adversarial versus non-adversarial hearings, etc.) and the dilemmas of substance, such as defining persecution and determining the basis for assessing the evidence, such as being governed by a rule granting the benefit of the doubt to the refugee claimant, there is a tension between providing human rights protections to refugee claimants and the desire of states to control their own borders and restrict entry. In this tension, we have witnessed the legalization of the refugee regime in spite of state policy and, thus, provided some evidence for the convergence descriptive thesis even if it is belied by the larger trends.