

June 2008

Refugees and Internally Displaced: A Challenge to Nation-Building

Rebecca M.M. Wallace

Diego Quiroz

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Human Rights Law Commons](#), [Immigration Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Rebecca M. Wallace & Diego Quiroz, *Refugees and Internally Displaced: A Challenge to Nation-Building*, 60 Me. L. Rev. 409 (2008).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol60/iss2/9>

This Article and Essay is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

REFUGEES AND INTERNALLY DISPLACED: A CHALLENGE TO NATION-BUILDING

Rebecca M. M. Wallace & Diego Quiroz

- I. INTRODUCTION
- II. THE LEGAL FRAMEWORK GOVERNING REFUGEES AND IDPS
 - A. The UNHCR: Statute, Definitions, Mandate, and Approach*
 - B. The 1951 Convention and the 1967 Protocol*
 - C. Non-refoulement*
 - D. Consequences of IDP Status*
- III. THE IMPORTANCE OF REFUGEES AND IDPS TO THE NATION-BUILDING ENTERPRISE
 - A. The Principal Benefits of Repatriation and Reintegration*
 - B. Preferred Methods of Realizing the Benefits*
 - C. Particular Challenges of Repatriation and Reintegration*
- IV. CONCLUSION

REFUGEES AND INTERNALLY DISPLACED: A CHALLENGE TO NATION-BUILDING

*Rebecca M. M. Wallace** & *Diego Quiroz***

I. INTRODUCTION

Recent statistics published by the United Nations High Commissioner for Refugees (UNHCR) indicate that there are at least 32.9 million people who are “persons of concern to UNHCR.”¹ This growing population includes “refugees, returnees, [and] stateless and internally displaced persons (IDPs).”² Furthermore, it is estimated that there are some “[thirty] states in the world . . . that are at some stage or another along the road to possible failure.”³ These are weak states beset by invasion, civil war, ethnic rivalry and tribal warfare, or struggling in the wake of any of these catastrophes. Given that 2006 saw a fifty-six percent increase in the population of concern to UNHCR,⁴ and that failed states and states on the path to failure contribute to increases in this population,⁵ it is apparent that increases in refugee and IDP populations are indicators not only of inter- and intrastate conflict, but arguably also of failed nation-building efforts.⁶

The purpose of this Article is to explore the interdependent relationship between post-conflict nation-building on the one hand, and refugee repatriation and intrastate

* M.A., LL.B., Ph.D. Professor of International Human Rights Law, The Robert Gordon University, Aberdeen, Scotland. Professor Wallace is also a part-time Immigration Judge with the Asylum and Immigration Tribunal, however any views expressed are those of the author and not those of the Tribunal. Professor Wallace is also a Member of the Honourable Society of Lincoln’s Inn and a non-practicing barrister.

** LL.B., LL.M. Lecturer in the Department of Law at Aberdeen Business School in the United Kingdom, where he teaches Public International Law, International Human Rights Law, EU Law and the Law of Business Associations. Mr. Quiroz is also teaching a course in Human Rights and Development for the M.A. Program in Peace Development Studies at The Universitat Jaume I in Spain. Currently he is writing his Ph.D. dissertation on evaluation of corporate social responsibility according to international standards. Diego has also worked as a researcher with the United Nations Secretary-General’s Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises.

1. UNITED NATIONS HIGH COMM’R FOR REFUGEES, STATISTICAL YEARBOOK—2006: TRENDS IN DISPLACEMENT, PROTECTION AND SOLUTIONS 23 (2007) [hereinafter UNHCR, 2006 STATISTICS], available at <http://www.unhcr.org/statistics/STATISTICS/478cda572.html>.

2. *Id.* Because roughly seventy percent of persons of concern to UNHCR are refugees (9.9 million) and IDPs (12.8 million), those status categories are the principal subjects of the present analysis. *See id.*

3. Delia K. Cabe, *Nation Building*, KENNEDY SCH. BULL., Spring 2002, at 3 (quoting Robert Rotberg, Program Director, Program on Intrastate Conflict, Conflict Prevention and Conflict Resolution, Kennedy School of Government), available at http://www.ksg.harvard.edu/ksgpress/bulletin/spring2002/features/nation_building.html.

4. UNHCR, 2006 STATISTICS, *supra* note 1, at 7.

5. *Id.* at 41.

6. “Failing States are invariably the product of a collapse of the power structures providing political support for law and order, a process generally triggered and accompanied by ‘anarchic’ forms of internal violence.” Daniel Thürer, *The “Failed State” and International Law*, 836 INT’L REV. RED CROSS 731, 731 (1999). However, this term should be used carefully as it is overly broad and does not describe a clear and specific situation. Furthermore, it lacks legal conceptualization.

reintegration of IDPs on the other. In Part II, the governing legal framework will be outlined with an emphasis on the consequences to refugees and IDPs of nation-building efforts. Part III will demonstrate that repatriation and reintegration are critical to the success of any nation-building enterprise. As will be described in more detail, although the motivations of post-conflict countries of origin and neighboring host states may differ with respect to repatriation and reintegration, the common goal of regional stability serves to align these stakeholders' otherwise divergent interests. Finally, Part IV will conclude that nation-building actors must take seriously their responsibility to implement the policies of repatriation and reintegration by (1) understanding and abiding well-established international law norms; (2) establishing the rule of law and stabilizing governmental structures; (3) providing for the return of property and legal status to repatriated refugees; and (4) planning for reintegration and repatriation on the local level to leverage existing family and social networks.

II. THE LEGAL FRAMEWORK GOVERNING REFUGEES AND IDPS

A consequence of conflict is the movement of populations both out of the country (refugees) and within the country (IDPs). As a result, the international community—particularly those states that are hosts to refugees—obviously have an interest in nation-building that incorporates sustainable answers to the particular questions associated with these populations. Nation-building actors need not craft these solutions out of whole cloth, however, nor must they implement them independently. On the contrary, an existing framework of international protection provides considerable theoretical and practical guidance.

A. *The UNHCR: Statute, Definitions, Mandate, and Approach*

As will be discussed in more detail in Part III, “[t]he purpose of international protection is not . . . that a refugee remain a refugee forever, but to ensure the individual’s renewed membership of a community and the restoration of national protection, either in their homeland or through integration elsewhere.”⁷ In other words, refugee issues relate not only to international protection, but also to the provision of durable solutions to their plight, which include the return of refugee populations to their countries of origin. As indicated earlier, in addition to refugees, the second area of concern is that conflicts have the propensity to create IDPs—persons who have been forced to migrate but who remain within the borders of their own state, or state of habitual residence. Both issues represent continuous, if different, challenges that confront the UNHCR.

The United Nations General Assembly established the UNHCR in 1950 to provide international protection and to seek a permanent solution, by assisting affected governments, to the problems of refugees. The High Commissioner for Refugees is elected by the General Assembly. The work of the High Commissioner is described in the Statute of the UNHCR as being “of an entirely non-political character” as well

7. Dennis McNamara, *Preface to UNITED NATIONS HIGH COMM’R FOR REFUGEES, HANDBOOK ON VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION* (1996) [hereinafter UNHCR, *HANDBOOK ON VOLUNTARY REPATRIATION*], available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3510>.

as “humanitarian and social.”⁸ The UNHCR seeks durable solutions by facilitating the voluntary repatriation of refugees and their reintegration into their country of origin, or by assisting their integration into their countries of asylum or their resettlement in third countries. The original UNHCR competence extended to:

Any . . . person who is outside the country of his nationality . . . because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality⁹

This definition, which is “of universal application, containing neither temporal nor geographical limitations,”¹⁰ is critical to recognition of refugee status and determination of who is entitled to UNHCR protection. Importantly, the UNHCR Statute contains another definition that not only requires that a refugee’s claim be based on events occurring prior to 1951, but also is subject to cessation upon the occurrence of certain other events.¹¹ The operation of this temporal definition in the nation-building context is significant: where (1) a refugee’s claim is based on events occurring prior to 1951, and (2) the circumstances in her country of origin on which her claim was based have changed materially, then (3) she is no longer a refugee falling within the High Commissioner’s competence. Accordingly, were a nation-building enterprise to succeed in ameliorating the prevailing circumstances in the post-conflict state of origin, refugees who did not avail themselves of that state’s protection would cease to be refugees under the Statute. However, because the cessation clause does not apply to refugees falling under the non-temporal definition quoted above, this clause has little significance to UNHCR’s involvement in contemporary nation-building efforts.

The UNHCR’s mandate is essentially to facilitate and promote the protection and settlement of refugees that fall within its competence.¹² Although the Statute contemplates three alternative approaches to settlement,¹³ voluntary repatriation has become the preferred approach.¹⁴ There are three fundamental elements to the notion of repatriation: (1) “the need for [repatriation] to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin,”¹⁵ (2) the requirement that these safety guarantees are “fully respected and

8. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), Annex, ¶ 2, U.N. Doc. A/RES/U28(V) (Dec. 14, 1950) [hereinafter UNHCR Statute].

9. *Id.* ¶ 6.B.

10. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 6 (1983).

11. *See, e.g.*, UNHCR Statute, *supra* note 8, ¶ 6.A.(ii)(e) (stating that a refugee whose claim is based on events occurring before 1951 ceases to be within the High Commissioner’s competence if “[h]e can no longer, because the circumstances in connexion [sic] with which he has been recognized as a refugee have ceased to exist, claim grounds other than those of personal convenience for continuing to refuse to avail himself of the protection of the country of his nationality”).

12. *See generally id.*

13. *Id.* (identifying the three possibilities of voluntary repatriation, assimilation into host countries, and admission to third countries).

14. *See infra* Part III.B. for a discussion of the primary approach to sustainable refugee return: the “Four Rs” of repatriation, reintegration, rehabilitation, and reconstruction.

15. UNHCR, *Executive Committee Conclusions: Voluntary Repatriation*, No. 40 (XXXVI), ¶¶ (a) & (b) (1985).

[that] returning refugees are not . . . penalized for having left their country of origin for reasons giving rise to refugee situations,”¹⁶ and (3) that repatriation is voluntary.¹⁷ Both the first and third elements focus on the country of asylum, whereas the second focuses on the country of origin. In general, repatriation is possible only if conditions exist that are conducive to voluntary return in safety and with dignity. Thus repatriation has an imminent human rights dimension, which is often couched in political terms and serves the objectives of both the country of origin and the country of refuge.¹⁸

Gregor Noll argues that there are a number of competing interests involved in the return of refugees.¹⁹ Specifically, he identifies the four interests as those of the returning state, the individual returnee, the country of origin, and UNHCR.²⁰ In light of this, the return of refugees to post-conflict states is a subject that has generated considerable debate, especially over the timing of returns. It is no surprise that the continuing nature of the conflict that created the refugee crisis frustrates the effort to promote conditions for voluntary repatriation. In practice, a substantial number of individual refugees decide to return, regardless of the conditions of the country of origin, as has happened in Afghanistan and Sri Lanka.²¹ In such situations, it may be argued that unprompted returns help encourage the process of national reconciliation and reconstruction. However, if the right conditions are not in place, tensions can be exacerbated.²² The UNHCR has described its role under these circumstances:

It is important that UNHCR finds out why a particular refugee/group is choosing to return to a situation which appears insecure and unstable. This may bring to light military or political motives behind a proposed return. Conditions of asylum may be so severe as to border on coercion, or refugees may be faced with unjustifiable restrictions on access to other durable solutions. In such situations UNHCR should intervene to ameliorate such conditions and eliminate coercive factors.²³

The role of UNHCR is thus to ensure adequate information flow to enable not only UNHCR, but also the refugees themselves, to make informed choices regarding

16. UNHCR, *Executive Committee Conclusions: Voluntary Repatriation*, No. 18 (XXXI), ¶ (f) (1980).

17. UNHCR Statute, *supra* note 8, ¶ 1.

18. See generally Richard Black & Saskia Gent, *Sustainable Return in Post-conflict Contexts*, INT’L MIGRATION, Aug. 2006, at 15, 15-38.

19. Gregor Noll, *Rejected Asylum Seekers: The Problem of Return* 4 (Ctr. for Documentation & Research, New Issues in Refugee Research, Working Paper No. 4, May 1999), available at <http://www.unhcr.org/research/RESEARCH/3ae6a0cd0.pdf>.

20. *Id.*

21. Notwithstanding Afghanistan’s uncertain security situation from March 2002 through 2006, UNHCR assisted 3.6 million of the 4.7 million Afghans who decided to return from Pakistan and Iran during that period. UNHCR, AFGHANISTAN SITUATION: OPERATIONAL UPDATE 1 (2006) [hereinafter UNHCR, AFGHANISTAN SITUATION], available at http://www.unhcr.se/Pdf/Position_countryinfo_2007/ExCom_Afghan%202006.pdf.

22. But see Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 2d Sess., at 71, U.N. Doc. A/810, art. 13(2) (Dec. 10, 1948) (“Everyone has the right to leave any country, including his own, and to return to his country.”).

23. UNHCR, HANDBOOK ON VOLUNTARY REPATRIATION, *supra* note 7, § 5.1.

the timing of return.²⁴ UNHCR has accordingly assumed a leading role in promoting, facilitating, and coordinating voluntary repatriation.²⁵

B. The 1951 Convention and the 1967 Protocol

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees are the primary instruments regulating the practices of contracting states towards refugees. Unlike the UNHCR Statute, which imposes only soft obligations on U.N. member states to cooperate with High Commissioner,²⁶ these instruments contain affirmative obligations regarding refugee protection.²⁷ The definition of "refugee" in the Convention is very similar to the UNHCR Statute.²⁸ Like one of the Statute's definitions of refugee, the Convention definition contains the temporal requirement that refugee claims are based on events occurring prior to 1951.²⁹ In addition, the cessation clause of the Statute is operational in the Convention.³⁰ However, the 1967 Protocol essentially rendered the temporal requirement optional, resulting in a definition of refugee very close to that in the Statute, with the important ideological difference that a Convention refugee can make a group membership claim.³¹

Given the differences in definition, an individual may be recognized as both a [UNHCR Statute refugee] and a Convention refugee; or as a [UNHCR Statute] refugee but not as a Convention refugee. The latter can arise, for example, where an individual is in a non-contracting state or a state which adheres to the temporal or geographical limitations permitted under the Convention.³²

The implications of the latter status are of course significant only when a refugee is seeking treatment from the host nation that she would be accorded under the Convention. Although UNHCR protection would presumably be in place, because the UNHCR is only a facilitating body, the differential in treatment can be consequential.

24. *Id.*

25. See UNHCR, *Executive Committee Conclusions: General Conclusion on International Protection*, No. 74 (XLV), ¶ (y) (Oct. 7, 1994). The UNHCR's leading role has been acknowledged in numerous requests from the Secretary General to the UNHCR to act as his Special Representative as a means of coordinating and monitoring returnee programs. See UNHCR, *HANDBOOK ON VOLUNTARY REPATRIATION*, *supra* note 7, § 1.5 (noting Secretary General requests to participate in repatriation efforts in Vietnam, Iraq, Cambodia, and the former Yugoslavia); see also UNHCR Statute, *supra* note 8, ¶ 9.

26. See generally UNHCR Statute, *supra* note 8.

27. See Convention Relating to the Status of Refugees, art. 1A, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 (entered into force Nov. 1967) [hereinafter Refugee Protocol].

28. See Refugee Convention, *supra* note 27, art. 1 (including in list of bases for refugee claim a "well-founded fear of being persecuted for . . . membership of a particular social group").

29. *Id.*

30. *Id.* art. 1(c)(5).

31. Refugee Protocol, *supra* note 27, art. 1.

32. GOODWIN-GILL, *supra* note 10, at 20-21.

C. Non-refoulement

For present purposes, the single most significant provision of the Convention is the codification of the principle that “[n]o 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 group or political opinion.”³³ The principle of non-refoulement is important to the issue of refugees and IDPs in the nation-building context for three principal reasons. First, it accords with the UNHCR’s mandate to facilitate the voluntary repatriation of refugees. By proscribing coercive return by host nations, non-refoulement provides an essential safeguard that protects refugees from being forcibly thrust into the midst of post-conflict turmoil. Second, contracting states have a concrete incentive to participate in the nation-building effort to the extent they are either unwilling or unable to permanently absorb refugee populations. This Convention-based incentive, when combined with a generalized desire for stability that inures to the region following successful post-conflict reconstruction, will facilitate information sharing with UNHCR, Non-Governmental Organizations (NGOs) and other nation-building actors, and the post-conflict state. Finally, it is of great importance that the principle of non-refoulement has been understood to be “independent of any formal determination of refugee status by a state or an international organization.”³⁴ This expansion of the principle beyond the commands of the Convention is a result of the incorporation into customary international law the general prohibition against “return[ing] foreign nationals to a country known to produce refugees, or to have a consistently poor human rights record, or to be in a civil war or a situation of disorder.”³⁵

This is not to say, however, that where the conditions in the nation of origin have become hospitable to return the prohibition still obtains. Moreover, a change in circumstances will also amount to a loss of refugee status under the Convention’s cessation clause.³⁶ Indeed, “[i]nvolvement by UNHCR in repatriation operations may well confirm the fundamental nature of any change of circumstances.”³⁷ Accordingly, contracting states’ obligations under the principle of non-refoulement are not static, and are subject to change depending on the fortunes of nation-building processes.

D. Consequences of IDP Status

In contrast to refugees, who have all crossed an international border, IDPs include those persons who have been forced to leave their habitual residence as a consequence of armed conflict, generalized violence, human rights abuses, or natural or man-made disasters. These individuals do not become refugees, as they do not flee across an international border but remain within the country of origin. The responsibility for the

33. Refugee Convention, *supra* note 27, art. 33(1).

34. Guy S. Goodwin-Gill, *Nonrefoulement and the New Asylum Seekers*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S*, at 103, 105 (David A. Martin ed., 1988).

35. *Id.*

36. Refugee Convention, *supra* note 27, art. 1(c).

37. GOODWIN-GILL, *supra* note 10, at 52.

protection of IDPs lies primarily with the government of the state within which they are displaced.

UNHCR has been involved in the protection of IDPs since the early 1970s in Sudan, Guinea-Bissau, Angola, and Mozambique. In 1972 the Economic and Social Council of the U.N. (ECOSOC) called on UNHCR to extend assistance both to refugees then returning to Southern Sudan and to “persons displaced within the country.”³⁸ Protection and assistance for IDPs have been subsumed within UNHCR’s work for returning refugees in situations where it was operationally complex to discriminate between the two.

In the 1990s the UNHCR Executive Committee recognized “that the involuntary displacement of persons within their own countries is a problem of global dimensions, and that the plight of such internally displaced persons, whose numbers may exceed those of refugees, is a matter of grave humanitarian concern” and that “the many and varied underlying causes of involuntary internal displacement and of refugee movements are often similar, and that the problems of both refugees and the internally displaced often call for similar measures with respect to prevention, protection, humanitarian assistance, and solutions.”³⁹

Furthermore, the 1994 Conclusions call upon the international community “in appropriate circumstances, to provide timely and speedy humanitarian assistance and support to countries affected by internal displacement to help them fulfill their responsibility towards the displaced”⁴⁰ and acknowledge “the essential role of the International Committee of the Red Cross in disseminating international humanitarian law and in providing protection and humanitarian assistance to those displaced by armed conflict.”⁴¹ Pursuant to these Executive Committee statements, UNHCR is encouraged to continue its efforts, under the leadership of the Emergency Relief Coordinator, and in cooperation with other agencies concerned, to reinforce and structure coordination through existing interagency mechanisms, notably the Inter-agency Standing Committee, in order to improve the response by the international community to the plight of the internally displaced.

For the purposes of nation-building, returning refugees and IDPs would in many contexts be treated similarly,⁴² notwithstanding a clear legal distinction between the two.⁴³ In this context, a major concern is the real risk of returned refugees becoming

38. U.N. Econ. and Soc. Council [ECOSOC] Res. 1705 (LIII), ¶ 2, 53rd Sess., Supp. No. 1, U.N. Doc. E/RES/1705 (LIII) (July 27, 1972); *see also* U.N. Econ. & Soc. Council [ECOSOC] Res. 1655 (LII), ¶ 3, 52nd Sess., Supp. No. 1, U.N. Doc. E/RES/1655 (LII) (June 1, 1972).

39. UNHCR, *Executive Committee Conclusions: Internally Displaced Persons*, No. 75 (XLV) ¶¶ (a)-(b) (1994). In 2000, UNHCR reiterated its commitment to the plight of IDPs: “UNHCR has an interest in the protection and welfare of persons who have been displaced by persecution, situations of general violence, conflict or massive violations of human rights, because of their similarity to refugees in terms of the causes and consequences of their displacement and their humanitarian needs.” UNHCR, INTERNALLY DISPLACED PERSONS: THE ROLE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES I (Mar. 6, 2000), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b33a0>.

40. *Id.* ¶ (f).

41. *Id.* ¶ (p).

42. For a more detailed treatment of IDPs, see U.N. Econ & Soc. Council [ECOSOC], Comm’n on Human Rights, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles*].

43. *See supra* Part II.B.

IDPs. Therefore, the situation of IDPs poses an additional challenge to the international regime of protection.

During armed conflicts, IDPs are protected by humanitarian law. It can be stated that human rights and humanitarian law run parallel in situations of armed conflict. A minority of nations—including the United States and Israel—argue that in situations of armed conflict, humanitarian law serves as a *lex specialis* to human rights law (*lex generalis*). This restrictive approach is based on *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, issued by the International Court of Justice (ICJ) in 1996,⁴⁴ which resorted to the principle of *lex specialis derogate lex generali*.⁴⁵ However, the soundness of this argument is questionable, particularly with regard to internal armed conflicts, given the congruence of “special” Common Article 3 of the Geneva Conventions and the “general” human rights provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR);⁴⁶ the International Covenant on Civil and Political Rights;⁴⁷ the American Convention of Human Rights;⁴⁸ and the African Charter.⁴⁹ In fact, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, an Advisory Opinion of the ICJ issued in 2004, the court clarified that human rights law is not entirely banished by humanitarian law and can at times be directly applied in situations of armed conflict.⁵⁰

In a similar manner, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights;⁵¹ the European Court of Human Rights (ECtHR); and the Inter-American System of Human Rights have taken a new approach which is more protective of the victims, particularly where their deprivation of liberty and judicial

44. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

45. *Id.* The maxim *lex specialis derogat lex generali* is usually dealt with as a conflict rule; a narrowly-tailored rule will trump a general rule. See, e.g., Vienna Convention on the Law of Treaties, arts. 31-33, May 23, 1969, 8 I.L.M. 679, 691-93, 1155 U.N.T.S. 331 (discussing general guidelines of treaty interpretation).

46. Convention for the Protection of Human Rights and Fundamental Freedoms, art. VI, Nov. 4, 1950, 213 U.N.T.S. 221.

47. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. XIV, U.N. Doc. A/6316/Annex (Dec. 16, 1966).

48. American Convention on Human Rights, art. VIII, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

49. Banjul Charter on Human and Peoples' Rights, art. 7, June 27, 1981, 21 I.L.M. 58, 60.

50. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 173-74 (July 9). The Court therein made the comment that certain human rights instruments, such as the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child, are applicable in the occupied Palestinian territory. *Id.* at 179.

51. See generally Human Rights Committee, International Covenant on Civil and Political Rights, *General Comment 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, U.N. Doc. E/C.12/1/Add.69 (Aug. 31, 2001); see also Isayeva, Yusupova & Bazayeva v. Russia, 41 Eur. Ct. H.R. 39 (2005) (consolidated cases).

guarantees are concerned.⁵² During war-time, IDPs are particularly protected by international humanitarian law⁵³ and are regarded as part of the civilian population.⁵⁴ The need for international standards for the protection of IDPs became apparent during the 1990s when the number of people displaced by armed conflict, ethnic strife, and human rights abuses began to soar. In 1992, the Commission on Human Rights requested that the U.N. Secretary-General appoint a Representative on Internally Displaced Persons to review the issue.⁵⁵ The review yielded the *Guiding Principles on Internal Displacement*.⁵⁶ Although not a legally binding document, in the words of the introduction, “[t]hese Principles reflect and are consistent with international human rights law and international humanitarian law.”⁵⁷ The Guiding Principles perform three important functions: (1) they offer an authoritative framework for the identification of the rights and standards relevant to the protection of IDPs;⁵⁸ (2) provide a working definition of IDPs;⁵⁹ and (3) they set out standards of treatment and the protection to be afforded to IDPs.⁶⁰

III. THE IMPORTANCE OF REFUGEES AND IDPs TO THE NATION-BUILDING ENTERPRISE

Lord Ashdown, the United Nations High Representative for Bosnia and Herzegovina, recognizes that nation-building “has not traditionally been viewed as the

52. In recent rulings of the European Court of Human Rights on several cases from the Chechen Republic, the Court ruled that violations of human rights in non-international armed conflicts can occur; therefore the action of the military and security forces in responding to *domestic conflict* are subject to judicial scrutiny. *Isayeva*, 41 Eur. Ct. H.R. 39.

53. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 49 & 147, 6 U.S.T. 3517, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (prohibiting displacement of “protected persons” and characterizing such displacement as a “[g]rave breach” of the Convention); Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, arts. 51, 78 & 85, 1125 U.N.T.S. 25; Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, arts. 4 & 7, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

54. During internal armed conflicts, protection is provided by Common Articles 3 and 4 (on fundamental guarantees) of the 1949 Geneva Conventions, see Fourth Geneva Convention, *supra* note 53, arts. 3 & 4, and by Articles 13-18 of the Additional Protocol II, *supra* note 53.

55. The post was filled by Francis Deng.

56. Guiding Principles, *supra* note 42.

57. *Id.*, Introduction ¶ 3.

58. *Id.* ¶ 1. International agencies and national governments have endorsed the Guiding Principles, making them particularly relevant in international law. Endorsing agencies and governments include the U.N. Economic and Social Council, the Organization for Security and Co-operation in Europe, the Organization of American States, the United States, Colombia, Peru, Sri Lanka, and Uganda.

59. *Id.* ¶ 2. The Principles define IDPs as:

[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

Id.

60. See *id.*

proper responsibility of the [international community].⁶¹ However, because of the threat failed states pose to regional and international security, the international community can no longer maintain this perspective.⁶² Instead, the international community must understand that nation-building is increasingly “the only strategy . . . for addressing the problem of failed states.”⁶³ As stated by Dennis McNamara, Director of UNCHR Division of International Protection:

[T]he contemporary refugee problem is not, given its dimension and complexity, solely the problem of refugees themselves, but that of the entire community of nations. As such, there has been general agreement that the problem requires a comprehensive approach within a framework of increased state responsibility and international cooperation, solidarity and burden-sharing.⁶⁴

The use of force in humanitarian intervention followed by nation-building activity has rightly generated much criticism and debate,⁶⁵ and it is argued that intervention and post-conflict reconstruction can always be justified on the basis that “the suffering which failed states inflict upon their own citizens is an unacceptable stain on our global society.”⁶⁶

The values underlying this principle are expressed in several international human rights instruments,⁶⁷ and were recently reaffirmed by heads of states and governments, who celebrated the continuing vitality and importance of the goals of the United Nations Charter at the turn of the twenty-first century.⁶⁸ This underlying rationale is

61. Paddy Ashdown, *Paddy Ashdown's Blueprint for Change in Bosnia and Herzegovina*, DEVELOPMENTS, Dec. 12, 2002, available at <http://www.developments.org.uk/articles/paddy-ashdowns-blueprint-for-change-in-bosnia-and-herzegovina>.

62. Cf. James Dobbins, *Nation-Building: The Inescapable Responsibility of the World's Only Superpower*, RAND REV., Summer 2003, at 17, 17-22.

63. *Id.*; see generally Olaf Tataryn Juergensen, *The United Nations Comes to the Hinterland: Peacebuilding and Reconstruction in Mozambique* (The Peacebuilding and Reconstruction Initiative, Working Paper No. 2, 1998), available at http://www.idrc.ca/uploads/user-S/10994169401Working_Paper_No_2.doc.

64. Dennis McNamara, *Preface* to UNHCR, HANDBOOK ON VOLUNTARY REPATRIATION, *supra* note 7.

65. See generally STEPHEN A. GARRETT, DOING GOOD AND DOING WELL: AN EXAMINATION OF HUMANITARIAN INTERVENTION (1999) (discussing the pros and cons of humanitarian efforts in the international arena); see also U.N. SCOR, 54th Sess., 3988th mtg., U.N. Doc. S/PV.3988 (Mar. 23, 1999); Robin Cook, U.K. Sec'y State for Foreign & Commonwealth Affairs, Speech to the American Bar Association, London (July 19, 2000), in 71 BRIT. Y.B. INT'L L. 646, 646 (2000) (outlining Britain's framework to guide intervention).

66. Ashdown, *supra* note 61.

67. See U.N. Charter art. 1; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966) 999 U.N.T.S. 171; International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (Mar. 7, 1966), 660 U.N.T.S. 195.

68. Former Secretary-General Kofi Annan, discussing the continuing relevance of the U.N. Charter in an age of globalization, stated:

The purposes and principles of the United Nations are set out clearly in the Charter, and in the Universal Declaration of Human Rights. Their relevance and capacity to inspire have in no way diminished. If anything they have increased, as peoples have become interconnected

based on international concerns for refugees and IDPs—populations vulnerable to failed state abuses—thus the legitimacy of post-conflict nation-building always requires that the special interests of these populations be protected and advanced.⁶⁹

By implementing protections for refugees and IDPs, nation-building actors can also respond, at least conditionally, to a widely-held criticism “that outsiders can never build nations, if that means creating or repairing all the cultural, social and historical ties that bind people together as a nation.”⁷⁰ Although nation builders conceivably could respond to this criticism by redefining their task as “state building,”⁷¹ and argue that “nation-building” only occurs after reconstruction by the intervening international community,⁷² such semantic differentiation fails to acknowledge that sustainability of the emergent state is the primary goal of post-conflict intervention. Whether or not the post-conflict enterprise should be bifurcated into two phases—state building by the international community followed by nation-building by the post-conflict state’s population—it is clear that absent facilitation of repatriation and reintegration of refugees and IDPs, respectively, during phase one, phase two will fail.⁷³

A. *The Principal Benefits of Repatriation and Reintegration*

Sarah Petrin articulates four benefits that accrue to the post-conflict state following repatriation of refugees from host nations:

First, the reintegration of returnee populations is one of the first national objectives of transitional states. The well-being of returnee populations serve as an indication of how transitional states manage development goals during the post-conflict period. Second, returnee populations are human resources for development. Third, the state cannot achieve legitimacy when a significant proportion of its population remains outside the territory it controls. Repatriation signifies that the population has confidence in the state’s ability to reconstruct order. Fourth, returnee populations constitute members of a war-torn society transitioning to a civil society. How the

in new ways, and the need for collective responsibility at the global level has come to be more widely felt. The following values, which reflect the spirit of the Charter, are—I believe—shared by all nations, and are of particular importance for the age we are now entering.

KOFI A. ANNAN, *WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY* 77 (2000).

69. See, e.g., The General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Coat.-Yugo., art. VII, Dec. 14, 1995, 33 I.L.M. 89 (1996) (incorporating into the Dayton Peace Agreement the parties’ respective responsibilities to protect refugees and IDPs).

70. Francis Fukuyama, *Nation-Building 101*, ATLANTIC MONTHLY, Jan.-Feb. 2004, available at <http://www.theatlantic.com/doc/200401/fukuyama>; see also DOMINIC THOMAS, *NATION-BUILDING, PROPAGANDA, AND LITERATURE IN FRANCOPHONE AFRICA* (2002).

71. Fukuyama, *supra* note 70 (defining state building as “creating or strengthening such government institutions as armies, police forces, judiciaries, central banks, tax-collection agencies, health and education systems, and the like”).

72. See, e.g., Leif John Fosse, *Negotiating the Nation: Ethnicity, Nationalism and Nation-Building in Independent Namibia*, 3 *NATIONS AND NATIONALISM* 427 (1997) (arguing that nation-building enterprises must be relevant to the emergent state populations not only through the creation of ever more effective and inclusive national symbols, but also through real economic and political reforms).

73. See UNHCR, *HANDBOOK ON VOLUNTARY REPATRIATION*, *supra* note 7, § 3.1.

state seeks to relate with them, and vice versa, is an indication of the extent to which civil-state relations will be repaired in the post-conflict period.⁷⁴

The return of refugees serves to create legitimacy for the state within an international context and suggests that its population has confidence in the new state.⁷⁵ Simultaneously, the returning refugee population represents the valuable source of human capital demanded by reconstruction work. Usually, however, post-conflict states depend on the aid of international donors in cooperation with non-governmental organizations to create conditions favorable to refugee return.⁷⁶

B. Preferred Methods of Realizing the Benefits

This challenge prompted the UNHCR's development in 2003 of a holistic approach to refugee repatriation known as the "Four Rs": repatriation, reintegration, rehabilitation, and reconstruction.⁷⁷ The "Four R" concept has been described as an "overarching framework for institutional collaboration in the implementation of reintegration operations allowing flexibility for country specific situations . . . [aiming to] address effectively the mainstreaming of reintegration into national development plans and programmes."⁷⁸ The "Four Rs" focus on improving the sustainability of repatriation and are premised on the notion that repatriation involves more than simply transferring refugees across a border. To put it another way, it is necessary to create an environment conducive to sustainable return. UNHCR maintains that for these goals to be achieved successfully partnerships must be forged and nurtured with a range of government and development actors. In sum, UNHCR argues that the "Four Rs" are the four key elements of any post-conflict recovery.⁷⁹

Liberia is one example of how the "Four Rs" can operate to improve the prospects for sustainable repatriation. At the conclusion of the fourteen-year civil war in 2003,

74. Sarah Petrin, *Refugee Return and State Reconstruction: A Comparative Analysis* (UNHCR New Issues in Refugee Research, Working Paper No. 66., 2002), available at http://www.reliefweb.int/library/RSC_Oxford/data/UNHCR%20Working%20Papers/66%20refugee%20return%20and%20state%20reconstruction.pdf.

75. See Amal I. Khoury, *Beyond Humanitarianism: Repatriating Internally Displaced in Lebanon*, (paper delivered at the 45th Ann. Int'l Studies Convention, Montreal, Can., Mar. 17-20, 2004) (on file with author). Khoury argues that the main idea behind repatriation policy is that only after successful repatriation is achieved can the country embark on its path towards reconciliation, sustainable development, political stability, and peace. *Id.*

76. The United Kingdom's Stabilisation Unit, which "provides specialist, targeted assistance in countries emerging from violent conflict where the UK is helping to achieve a stable environment that will enable longer term development to take place," is a good example of the emerging set of international actors in this arena. Under the auspices of the Department for International Development, the Foreign and Commonwealth Office, and Ministry of Defence, the Stabilisation Unit manages the Ministry of Defence's £269 million Stabilisation Aid fund. Stabilisation Unit Home Page, <http://www.stabilisationunit.gov.uk> (last visited Mar. 5, 2008).

77. See Press Release, UNHCR, UNHCR Urges Solutions for Refugees to Combat Trafficking (Apr. 29, 2003), available at <http://www.unhcr.org/news/NEWS/3eae926a3.html>.

78. Robert Muggah, *The Death-Knell of '4R': Rethinking Durable Solutions for Displaced People*, HUMANITARIAN EXCHANGE, Dec. 2006, at 25, 25 (internal quotations omitted), available at <http://www.odihpn.org/documents/humanitarianexchange036.pdf>.

79. UNHCR Emergency Updates, UNHCR, Afghanistan Humanitarian Update No. 67 (Jan. 3, 2003), available at <http://www.unhcr.org/news/NEWS/3e15b2184.html>.

UNHCR organized the return of 320,000 refugees from neighbouring states. Crucial to this effort were tripartite agreements between UNHCR, the Liberian Transitional Government, and neighboring host states. Reintegration has been stimulated by community projects to re-establish local infrastructure, water supplies, schools, and sanitation. Importantly, the returning refugee population played a large role in the planning and implementation of the reconstruction programs. UNHCR maintains that the Liberian example reinforces that a wide range of partnerships among stakeholders, including NGOs, should be involved in the search for durable solutions to refugee repatriation.⁸⁰

A successful repatriation process has also been carried out in Afghanistan. Afghanistan has been heralded as witnessing a dramatic change in fortunes that “propelled one of the largest repatriation movements in modern history.”⁸¹ By the end of 2006, some 4.7 million Afghans returned to their homeland from Pakistan and Iran.⁸² However, during 2006 the return figures considerably decreased with approximately 290,000 Afghans repatriating, just under half of them assisted by UNHCR. Nevertheless, UNHCR attributes this success to growing confidence in the repatriation process, precipitated by increased international participation, cooperation, and investment.⁸³ Afghan refugee repatriation has not only helped to alleviate an enduring humanitarian crisis, but also facilitated political cooperation between Afghanistan and its neighbors, and helped dilute tensions in the region. Notwithstanding UNHCR’s apparent successes, “the slow pace at which responsibilities between humanitarians and development actors are handed over”⁸⁴ to the emergent state has generated some criticism. Robert Muggah characterizes the UNHCR as being reluctant to make significant investments in development activities that might have political consequences, and maintains that UNHCR has failed to learn from past experience.⁸⁵ However, these criticisms do nothing to disturb either the sound conceptual framework of the “Four Rs,” or the ultimate goals the approach is meant to achieve.⁸⁶

C. Particular Challenges of Repatriation and Reintegration

Notwithstanding that a returning population promises many benefits to the post-conflict state, it also poses challenges for the state in terms of security and land distribution, which tests the ability to create a just state. Petrin asserts that post-

80. See UNHCR, THE STATE OF THE WORLD’S REFUGEES—2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 133-35 (2006) [hereinafter UNHCR, STATE OF THE WORLD’S REFUGEES 2006], available at <http://www.unhcr.org/cgi-bin/texis/vtx/template?page=publ&src=static/sowr2006/toceng.htm>; Jeff Crisp, *The WHALE: Wisdom We Have Acquired from the Liberia Experience* (UNHCR Evaluation and Policy Analysis Unit, Paper No. EPAU/2001/06), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/pendoc.pdf?tbl=RESEARCH&id=3b30a9ee4&page=research>.

81. UNHCR, STATE OF THE WORLD’S REFUGEES 2006, *supra* note 80, at 144.

82. UNHCR, AFGHANISTAN SITUATION, *supra* note 21, at 1,

83. UNHCR, STATE OF THE WORLD’S REFUGEES 2006, *supra* note 80, at 144 (citing the Bonn Agreement of December 2001, the Tokyo Conference on Afghanistan of February 2002, and the support of host countries Iran and Pakistan).

84. Muggah, *supra* note 78, at 25.

85. *Id.*

86. *Id.* at 27 (recognizing that returnees are “key players in transition processes” and that the ‘Four Rs’ remain a “core element of the building of a more just social, political and economic order”).

conflict states are characterized by contested territories; changing relationships between the population and the state; broken or damaged institutions and infrastructure; and poor governance.⁸⁷ Under these conditions the repatriation of large numbers of refugees is problematic. Furthermore, many refugees choose to return to their countries before UNHCR assistance is in place, before the state is able to accommodate them, and before others are compelled to do so.⁸⁸

Therefore, a major challenge created by returning refugee populations is that they may become part of the internally displaced population, thus further weakening the state. UNHCR consultant Scott Leckie argues that “limited or *ad hoc* strategies that are endorsed and implemented with the legitimate aim of addressing issues of shelter, urban/rural land and property rights can in fact often act to increase tensions and prolong conflicts.”⁸⁹ Similarly, a recent Brookings Institution report underscores the paramount importance of reintegration of returning refugees and IDPs. Absent successful reintegration, these “populations can be associated with, or fuel through their presence, ‘spoiling’ tactics that can hinder, delay or undermine peace processes.”⁹⁰

All of this indicates that while voluntary repatriation is favored, it does not represent a durable solution unless the returnees are successfully reintegrated into the local community. Reintegration does not happen overnight. Instead, it is a gradual process that involves the re-incorporation of individuals into the political and socioeconomic fabric of their country of origin. The responsibility of the protection of returnees lies with the state of origin, but UNHCR, pursuant to its mandate, monitors the reintegration process.⁹¹ UNHCR ensures that appropriate legal safeguards are essential and recommends, for example, that governments promulgate amnesties or legal guarantees for returnees.⁹² In particular, returnees should not be subject to any punitive or discriminatory action because they had previously fled the country.⁹³ UNHCR also recommends the insertion in any repatriation agreement an obligation incumbent on the authority of the country of origin’s authorities to inform the UNHCR about any legal proceedings instituted against a returnee.⁹⁴

Restoration of property rights to repatriated refugees and IDPs who have experienced loss of land, housing, and personal property are also of particular concern.⁹⁵ In

87. Petrin, *supra* note 74, at 2.

88. For example, many Afghan refugees have been living outside their country for more than twenty years and many more have been born overseas. As a result, they have become used to different living conditions. Others originated from areas currently affected by insurgency and deep structural poverty. This has led to the decline in the pace of repatriation to Afghanistan since 2004. Similar factors are likely affecting repatriation in Iraq presently.

89. Scott Leckie, *Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework*, at iii (UNHCR Legal & Protection Policy Research Series, Paper No. PPLA/2005/01).

90. The Brookings Inst. & Univ. of Bern, *Addressing Internal Displacement in Peace Processes, Peace Agreements and Peace-Building 1* (2007), available at http://www.brookings.edu/~media/Files/rc/reports/2007/09peaceprocesses/2007_peaceprocesses.pdf.

91. See generally UNHCR Statute, *supra* note 8.

92. UNHCR, HANDBOOK ON VOLUNTARY REPATRIATION, *supra* note 7, § 3.1.

93. *Id.* § 2.6.

94. *Id.*

95. For a discussion on this issue, see generally FOOD & AGRIC. AGENCY OF THE U.N. ET AL., HANDBOOK ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS:

2005 the UNHCR Special Rapporteur, Paulo Sérgio Pinheiro, prepared a comprehensive study on this issue.⁹⁶ The Special Rapporteur notes that the returning refugees routinely find that their homes or land have become occupied in their absence.⁹⁷ Accordingly, post-conflict states must ensure that any restitutionary procedures involving relocation of these “secondary occupants” contain adequate safeguards to prevent “arbitrary or unlawful forced eviction” in violation of international human rights law.⁹⁸

A further challenge for post-conflict states is the need to distribute resources and strategies equally across the state territory. The specific impact of internal nation-building associated with creating national distinctiveness begins within capital cities. However, such efforts must subsequently be reflected elsewhere in order to have a proper state reconstruction based on fairness and equity.⁹⁹ Moreover, because reconstruction efforts are usually focused on population centers, returning refugees will be drawn disproportionately to these areas, creating overcrowding and other social and economic problems.¹⁰⁰ Repatriation is not a durable solution if it encourages further displacement within the country of origin. The danger exists that repatriation alone is a relocation that converts refugees into IDPs. In this way, returning refugee populations bring a mixture of benefits and challenges for the post-conflict state.

In any population of returnees there will be groups that will be particularly vulnerable. Any successful nation-building exercise must consider these groups and implement procedures and programs that effectively address their particular situations. These vulnerable groups include unaccompanied children, demobilized soldiers, and women, particularly those who do not return as part of a family.

Women who have been the victims of violence, including sexual violence, during flight or while in exile may not wish to return to their families or areas of origin for fear of stigmatization.¹⁰¹ Obviously, the fear of stigmatization requires sensitivity and particular support for those women who are being resettled in a new area. This is particularly relevant in situations where origin state lands may have been sold or repopulated following refugee flight. UNHCR, in this context, highlights that the position of returnee women as heads of households must be recognized, and that

IMPLEMENTING THE ‘PINHEIRO PRINCIPLES’ (2007), available at <ftp://ftp.fao.org/docrep/fao/010/a1131e/a1131e00.pdf>; Leckie, *supra* note 89.

96. See generally The Special Rapporteur, *Final Report of the Special Rapporteur Paulo Sérgio Pinheiro on the Principles on Housing and Property Restitution for Refugees and Displaced Persons*, delivered to the Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005) [hereinafter *Pinheiro Principles*].

97. *Id.* § 17.

98. *Id.*

99. See, e.g., Peris Sean Jones, ‘To Come Together for Progress’: *Modernization and Nation-building in South Africa’s Bantustan Periphery—The Case of Bophuthatswana*, 25 J.S. AFR. STUD. 579 (1999).

100. Petrin, *supra* note 74, at 9 (citing overcrowding and homelessness in Phnom Penh following the influx of repatriated Cambodian refugees who could not afford to return to their rural lands).

101. It is accepted that cultural differences can determine how women who have been the victims of sexual violence may be perceived. This is acknowledged in updated gender guidelines issued by the Chairperson of the Canadian Immigration and Refugee Board pursuant to section 65 (3) of the Immigration Act. IMMIGRATION & REFUGEE BD. OF CAN., WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION § 1 (1996), available at http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women_e.htm (noting that women refugees’ gender-based fear of persecution claims require special analysis).

women should not lose out in the competition for land, both for residential and agricultural use.¹⁰² If women are denied such access this can increase their vulnerability and lead to possible internal displacement.

Of particular relevance in the context of women and girls is Security Council Resolution 1325.¹⁰³ The Resolution's preamble expresses "concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and IDPs, and increasingly are targeted by combatants and armed elements."¹⁰⁴ The Resolution specifically recognizes the significant impact this targeting of women and children has on achieving durable peace and reconciliation.¹⁰⁵ Specific cognizance is given to "the important role of women in the prevention and resolution of conflicts and in peace-building" and calls "for their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security."¹⁰⁶ The Resolution also highlights "the need to mainstream a gender perspective into peacekeeping operations"¹⁰⁷ and for peacekeeping personnel to receive "specialized training . . . on the protection, special needs and human rights of women and children."¹⁰⁸ To this end, U.N. member states are called upon to ensure an increased representation of women at all decision-making levels in national, regional, and international institutions and mechanisms for the prevention, management, and resolution of conflict. In particular, all parties involved in the negotiating and implementing of peace agreements are called upon to adopt a gender perspective. Adoption of this perspective will in turn address the special needs of women and girls during all stages of repatriation, reintegration, rehabilitation, and reconstruction.

This gender mainstreaming is reflected in the *United Nations Development Programme Manual, Gender Approaches in Conflict and Post Conflict Situations*.¹⁰⁹ The manual highlights a number of instances in which women may be disadvantaged if certain issues are not addressed within the reconstruction and rehabilitation process. These instances include women's unequal access to the media and the media's

102. UNHCR, HANDBOOK ON VOLUNTARY REPATRIATION, *supra* note 7, § 7.1.

103. S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

104. *Id.*, Preamble.

105. *Id.*

106. *Id.*

107. *Id.* The Resolution makes specific reference to the Windhoek Declaration and the Namibia Plan of Action on Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations (S/2000/693). *Id.* In May 2000, Windhoek, Namibia, was the venue for "Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations," a seminar organized by the Lessons Learned Unit of the U.N. Department of Peacekeeping Operations and hosted by the Government of Namibia. There, parties examined practical ways to determine how the U.N. and Member States could realize the aims reflected in the seminar's title. The seminar's recommendations were put forward in the "The Namibia Plan of Action," the spirit of which resonates in Resolution 1325.

108. *Id.* For guiding principles on treatment of children and their "best interests," see Convention on the Rights of the Child, G.A. Res. 44/25, art. 3, U.N. Doc. A/RES/44/25 (Nov. 20, 1989).

109. U.N. DEV. PROGRAMME, GENDER APPROACHES IN CONFLICT AND POST-CONFLICT SITUATIONS (2002), available at <http://www.undp.org/women/docs/gendermanualfinalBCPR.pdf>. The manual was the product of a seminar, held in Rome in April 2001, co-organized by the UNDP Bureau for Crisis Prevention and Recovery and the Italian Ministry of Foreign Affairs. *Id.* at 2. Participants included members of "various Italian . . . NGOs and U.N. agencies directly involved in emergency, crisis response and recovery operations." *Id.*

consequential lack of focus on the particular needs and perspectives of women.¹¹⁰ There are also the potential disadvantages that flow from the incorrect assumption that combatants are all male, resulting in disproportionate relief measures.¹¹¹ These issues must be addressed in the demobilization process.

It is equally important that nation-building actors acknowledge that women refugees may not wish to return to their state of origin if post-conflict gender relations mirror the *status quo ante*. Thus, gender mainstreaming has to be reflected in “the reconstruction of civil society, reorganization of the police and armed forces, promotion of human rights, organization of elections, access to and control over resources . . . and the setting up of truth and reconciliation commissions.”¹¹² Gender mainstreaming in the reconstruction process has precipitated a burgeoning literature and academic discipline.¹¹³ It is sufficient at this juncture to say that it is incumbent upon nation-building actors to approach their task with heightened gender sensitivity. Although women are not the only victims of war and failed nations, their participation in holistic post-conflict reconstruction will yield more sustainable institutions and improve the prospects for enduring peace and stability.

Turning to demobilized soldiers, UNHCR highlights the negative consequences for community reconciliation and social stability that may follow from demobilization.¹¹⁴ A consequential risk is that of a rise in crime rate and a worsening of security conditions, particularly in areas populated by such returnees.¹¹⁵ Of course, in addition to the issues surrounding the individual person there is also a need to address, for instance, material destruction, such as dwellings, schools, and hospitals, and the absence of development activities which may be compounded by anti-personnel mines throughout affected areas. Obviously voluntary repatriation is not viable in patently dangerous situations where there is a risk of bodily injury or death. This risk is particularly acute when land mines have been used in the preceding conflict. The responsibility of locating and removing land mines lies with the country of origin and is an essential first step.

As discussed above, nation-building is the creation and strengthening of government institutions and a return to the rule of law. Initially what is required is stabilization in the country of origin through humanitarian and disaster relief assistance—essentially rebuilding the infrastructure and restarting the economy. The second phase of reconstruction, consisting of the creation of self-sustaining political and economic institutions that will ultimately permit competent and democratic governance and economic growth, can only be initiated after stability has been attained.

110. *Id.* at 6.

111. *Id.* (explaining that “women do not benefit from land allocations, credit schemes, etc.” granted on a priority basis to young male demobilized combatants).

112. *Id.* at 11.

113. For further literature, see U.N. Development Programme, <http://www.sdn.undp.org/gender/resources> (last visited Mar. 5, 2008).

114. UNHCR, HANDBOOK ON VOLUNTARY REPATRIATION, *supra* note 7, § 6.2.

115. *Id.*

IV. CONCLUSION

Although this Article has addressed the issues of returning populations and IDPs, there may be occasions when a state will have been a host state to refugees from other countries. In these situations actors must adopt a different perspective and employ different tools to integrate the guest population. However, the goal of reintegration remains the same. Examples of such successful processes have been seen in Guatemala and Mexico following the refugee crisis in Central America in the 1980s.¹¹⁶ Refugees who are concentrated in isolated camps cannot contribute to development and the nation-building effort. Regional development may be better promoted simply by allowing refugees to engage in the local economy, thereby “contributing to agricultural production, providing labour and increasing local vendors’ income.”¹¹⁷

At this juncture, it is appropriate to postulate some recommendations that attempt to address the concerns previously discussed. Nation-building demands durable solutions for refugees and IDPs. The establishment of peace is a *sine qua non* for nation-building. Peace is necessary for voluntary repatriation, which in turn will facilitate the reconstruction of a nation. Initially, voluntary repatriation should be carried out according to international standards and widely recognized and accepted international law norms—international human rights instruments, cessation of status and fundamental changes in the country of origin, voluntariness, ensuring return in safety and with dignity, responsibilities of the host country, and responsibilities of the country of origin. Meeting these standards should take precedence over any political considerations. Abiding by these standards will secure a lasting peace and promote nation-building. Experiences in Central America and the Balkans reveal that solutions for refugees and IDPs have increasingly been integrated into peace agreements and nation-building efforts.

Second, the return of large portions of the state population requires initial evidence of the suitability and stability of the new laws and governmental structures in the nation. Voluntary repatriation of refugees can take place when there is a fundamental change of circumstances, which entails the consolidation, over time, of a process of stabilization in the country of origin that provoked the original flight. A lower threshold of “change in the circumstances” can be applied only by the informed refugee’s decision to repatriate.

Third, at arrival, respect for human rights and the ability to generate and re-distribute wealth effectively will legitimize the idea of nationhood. The international community can assist in overcoming difficulties in implementation, but it cannot assume the mantle of government or substitute the relationship of government with its citizens. Such a relationship forms the basis of society and can only be developed by reciprocated trust, respect of the law, and sense of identity, not by the international community.

Fourth, state approaches to resettling returning refugee populations have in the past been incongruous since they have treated refugees as individuals operating in a vacuum and have failed to consider the need to settle them alongside families and

116. See generally Ron Redmond, *The Human Side of CIREFCA*, REFUGEES MAG., Mar. 1, 1995, available at <http://www.unhcr.org/publ/PUBL/3b5426de4.html>.

117. UNHCR, STATE OF THE WORLD’S REFUGEES 2006, *supra* note 80, at 116.

social support networks.¹¹⁸ Therefore, planning for repatriation at the local level is a key aspect of reintegration and social policy that will reduce the need for additional migration and displacement upon return.

Repatriation in itself is of no value if it only denotes return. What this Article has sought to underscore is that a comprehensive, holistic approach that recognizes the myriad issues involved is a prerequisite to the success of any nation-building enterprise.

118. Petrin, *supra* note 74.