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by Jeffrey Burds

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News

Ukraine: **The Meaning of Persecution**

by Jeffrey Burds
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An American scholar reflects on the impact of the Ukrainian Jewish experience on international asylum law in the post-Soviet era.

Until the tumultuous events of the "orange revolution" surrounding the presidential elections in Ukraine in late 2004, western experts on Ukraine almost without exception had celebrated the Ukrainian post-Soviet transition as a huge success, lauding its apparent political stability and ethnic amity.

While the street demonstrations and political crises then brought global attention to the powerful forces of ethnic nationalist divisions in Ukraine, it was the Ukrainian census of 2001 that first led scholars to rethink earlier judgments about ethnic processes in Ukraine. The 2001 census revealed that the population of Ukraine had declined by more than six percent during the first post-Soviet decade, from 51.5 million to 48.1 million. More significantly, however, was the discovery that these declines were concentrated in particular among Ukraine's ethnic minorities. Over the course of the first decade of Ukrainian independence, the number of ethnic Russians declined 26.6 percent, from 11.4 million to 8.3 million, and the number of Jews fell by a whopping 78.7 percent, from 486,326 to 103,600. Even as the proportion of ethnic Ukrainians in Ukraine climbed between 1989 and 2001 from 73 to 78 percent, continuing in this way a century-long process of Ukrainian ethnic homogenization, the proportion of ethnic Russians fell from 22 to 17 percent. Meanwhile, though Jews had started the decade as the third-largest ethnic group in Ukraine, their numbers fell from nearly one percent to 0.2 percent of the Ukrainian population in 2001.

Against the backdrop of rosy appraisals of the Ukrainian transition in journalistic and scholarly accounts, immigration courts in the United States, Canada, Australia, and the European Union were granting asylum to hundreds of thousands of Ukrainian refugees and their families. U.S. statistics reflect a curious pattern: of 518,607 former Soviet citizens who emigrated to the United States. Between 1992 and 2001, 162,272 came from Ukraine: the republic that had made up one-sixth of the USSR's population was now contributing almost one-third of all post-Soviet emigrants to the United States

Even more remarkable, Ukrainian emigrants to America and other western countries did not ride on the coattails of earlier Ukrainian diasporas: nearly three-quarters of these new Ukrainian emigrants to America were protected under the international convention on asylum for refugees, placing Ukraine near the top of all countries that contributed refugees during the same period: 120,869, or three out of four of all immigrants from Ukraine, entered the United States under the asylum convention, as

victims of persecution. Nearly twice as many Ukrainians were granted asylum in the United States as citizens of the Russian Federation, the next largest source of refugees from the former USSR. (It is true, however, that like most asylum seekers in Europe and North America, the large majority of Ukrainian asylum seekers in the United States and the EU were and still are denied refugee status upon first application, although many manage to stay in these countries on a legal or semi-legal basis.)

WHEN IS HATE CRIME NOT PERSECUTION?

In the past decade, three major cases involving Jewish refugees from post-Soviet Ukraine have profoundly reshaped international asylum law. These two cases from America and one from Canada parallel dozens of similar published cases throughout the West. At their core, these precedents redefined the judicial meaning of "persecution," a profound shift that adjusted standards of evidence to the special conditions in post-Soviet Ukraine, opening the way for waves of Jewish, Russian, and other refugees from Ukraine to escape religious and ethnic violence, the very existence of Western scholars had largely missed.

To underline just how important these recent precedents really are, it is helpful to look at an unsuccessful asylum attempt, one of thousands of similar cases that have appeared before immigration authorities. Testifying before a U.S. appeals court in 1999, a Russian Jew from Kyiv, Boris Zviagilsky, described what happened to him in 1992. Anti-Semitic and anti-Russian slurs and graffiti were followed by physical assaults by ultranationalists and warnings to leave Ukraine. Zviagilsky's repeated pleas for help from the Ukrainian police were ignored. Fearing for his life, he fled Ukraine soon after, only to be rejected in his bid for asylum in both in Australia and the United States.

The U.S. government turned down Zviagilsky's claim not because he lacked credible evidence of serious abuse, but rather because of a failure to establish either past "persecution" or a well-founded fear of "future persecution." The U.S. Immigration and Naturalization Service (INS) successfully argued that "the discrimination and mistreatment he [Zviagilsky] complains of are at the hands of private individuals and exist in all societies. … The failure of a government to stop acts of hatred before they occur can hardly be viewed as persecution." Noting that no state can be expected to block all acts of persecution, but suggesting that conditions had changed for the better in post-Soviet Ukraine, the judge ruled that if Zviagilsky returned to Ukraine, he would have "absolutely nothing to fear from the government. He may have a fear of random violence (as do some residents of the United States). I do not believe the asylum laws are designed to grant refugee status under these circumstances."

Significantly, the only evidence presented by the INS to dispute the likelihood of future persecution if Zviagilsky were forced to return to Ukraine was the U.S. State Department's profile of asylum claims from Ukraine, as well as the State Department's 1995 Country Report on Human Rights Practices in Ukraine. It was standard practice throughout the 1990s for immigration boards around the world to depict individual complaints of persecution as nothing more than unfortunate but isolated one-on-one crimes, and therefore not eligible for protection under the international convention on asylum. In the same vein, the INS cited State Department country reports to justify its denial of claims of persecution, often with success despite that even those country reports identified the existence of violence and intolerance toward Ukraine's religious and ethnic minorities.

Legal experts have long noted that the overly general State Department reports do not adequately document the human-rights situation of foreign nations. The reports are "wholly unsystematic," one scholar, Peter Margulies, wrote in the *Colorado Law Review* in 2000. "At best, these reports amount to a grab bag of facts offering little insight into the risks faced by returning refugees. At worst, they offer an apologia for human rights abuses that is driven by United States foreign policy concerns rather than the safety of refugees," Margulies argued.

GENEVA THEN AND NOW

Established in the wake of the Holocaust some 60 years ago, the international convention on asylum, or Geneva Convention, was designed according to a template grounded in the Jewish Holocaust experience: a strong central state that openly advocated Jewish persecution, a clear line of demarcation where perpetrators and victims were well defined, a clear standard for persecution that lay in the Final Solution and the death camps. The problem in modern asylum cases is that the explicit categories set so long ago have imposed considerable burdens of evidence on refugee petitioners, who must prove that they have been not merely victims of violence, harassment, or discrimination, but that they have actually been persecuted. They must be able to show that they were persecuted because of their membership in a particular social group, and they must be able to establish the reasonable likelihood that they will be persecuted again if forced to return to their host country.

In the United States, three major Ukrainian Jewish asylum cases in the late 1990s fundamentally challenged mainstream views that dismissed claims of persecution directed at Ukraine's ethnic minorities. The first was the case of ethnic Russian and Jewess Irina Chtchetinin, who won asylum at the U.S. Board of Immigration Appeals in California in 1997. Chtchetinin had witnessed ultranationalist gangs in Lviv attack her neighbors, and fled in terror with her husband and three children because she reasonably feared that they would be next. Two of Chtchetinin's Russian-Jewish neighbors had been brutally tortured in their own apartment: the husband was branded with a hot electric clothes iron, his wife's eye was ripped out of its socket, while their assailants screamed anti-Russian and anti-Semitic epithets. Ukrainian police refused even to take a report of the attack, or to follow up with an investigation of the incidents.

The Chtchetinin case is remarkable for several reasons: the perpetrators of the violence were unknown; Ukraine was a state that constitutionally guaranteed the rights of all citizens, including those of religious and ethnic minorities; and Chtchetinin and her family were not actual victims of "excessive" violence (the sort that automatically meets the standards of persecution), but rather of numerous small acts of violence and harassment.

In 1998, Vera Korablina, a "half-Russian, half-Jewish" woman from Kyiv, went to court against U.S. immigration authorities in a case that became perhaps the most important in U.S. immigration law in the past decade. Korablina testified that she was terrorized by an ultranationalist group for nearly a year. Earlier, in 1990, she lost her job of 28 years in a Kyiv machinery factory when her Soviet-era ethnic Russian boss was replaced with an ultranationalist Ukrainian, who fired all the Jewish workers in her section. In October 1993, when she was already working for a new employer, Korablina watched as three nationalist thugs came to her office, brutally beat her employer, and demanded payment of special dues for Russians and Jews

who worked in Ukraine. Police were called, but they never appeared at the scene, and no criminal investigation was ever conducted. Korablina testified that she began receiving death threats by phone and mail, saying that she too (like one of her friends) could disappear. One day in early 1994, two men found her alone in her office, tied her up in a chair, placed a noose around her neck and beat her about the head, yelling that her Russian surname and passport could not conceal her "Yid" origins. In September 1994, the office where she worked was ransacked and anti-Russian and anti-Semitic graffiti painted all over the walls and furniture. Soon after, her Jewish employer disappeared. Even after she had fled to the United States, Korablina's husband and daughter, who initially remained behind, were beaten and threatened with comments such as "your kike wife won't be able to hide for long."

CONCRETE FACTS TRUMP ROSY GENERALITIES

While the lower courts had ruled against Korablina's petition for asylum on the grounds that her experiences reflected "discrimination" and not "persecution" as required by the asylum convention, on appeal the Ninth Circuit court established a new, more inclusive definition of persecution that weighed credible evidence of actual persecution more heavily than written laws or friendly reassurances from state leaders: "Cumulatively, the experiences suffered by Korablina compel the conclusion that she suffered persecution. Where evidence of a specific threat on an alien's life, and here there were many, is presented in conjunction with evidence of political and social turmoil, the alien has succeeded in establishing a prima facie eligibility for asylum."

The Korablina decision blasted the assertion that general observations of a rosy nature in State Department human-rights reports could be used by the government to refute well-evidenced claims of persecution: specific and credible evidence of persecution should always be weighed more heavily than general and sweeping statements about internal conditions, the court ruled, and the cumulative effect of several incidents could be used as evidence of actual persecution.

The experiences of the Kraitman family in Kharkiv helped establish a similar precedent in Canada, in 1994. Citing the long record of harassment and beatings to which the Kraitman family had been subjected in Ukraine, the judge in the case of Kraitman v. Canada concluded: "The [Canadian Immigration Board] itself admits that there is a history of both discrimination and persecution in the Ukraine directed at Jews but believes that because the official policy of the country is alleged to be non-racist, the applicants (Jews) have nothing to fear for the future. How naïve." Similarly, in a precedent-setting Australian case, where the Refugee Review Tribunal granted asylum to a Ukrainian Jewish woman in 2004, judge Peter Gacs drew the distinction between what he called "street anti-Semitism" and Ukrainian state law, a distinction that enabled him to weigh the individual refugee's evidence of persecution at the hands of anonymous vigilante thugs higher than the U.S. State Department reports' blanket denials that such persecution even existed.

Another case that profoundly influenced the courts' view of Ukrainian internal conditions concerned a Jewish father and son from Kharkiv, who received U.S. asylum on appeal in 1998. The men, identified only as "O.Z." and "I.Z.", testified that the father had suffered repeated beatings, and received numerous handwritten and graffiti anti-Semitic threats. Eventually, their apartment was vandalized by a local Ukrainian nationalist band. While the INS had argued that the father and son had only experienced "isolated acts of random violence perpetrated by unknown

individuals," the federal judge reversed the INS on the grounds that the petitioners had proven a "well-founded fear of persecution in Ukraine" on the basis of their Jewishness. To send a clear signal of the overriding importance of the new precedent, then-Attorney General Janet Reno ordered the immediate publication of the court's findings.

A NEW STANDARD

The decision also directly addressed the question of whether an act of persecution can exist without government sponsorship: "With regard to the [INS's] suggestion that the incidents of persecution were not 'government-condoned,' we note that the respondent reported at least three of the incidents to the police, who took no action beyond writing a report. It appears that the Ukrainian Government was unable or unwilling to control the respondent's attackers and protect him or his son from the anti-Semitic acts of violence."

Thanks to the precedent established by O.Z. and I.Z., it was no longer necessary for petitioners for asylum to prove that their host government actually supported persecution; instead, they had to meet only the lesser burden of showing that local officials had been informed of the instances of persecution, but had failed to provide effective remedies to prevent further persecution. Such a standard expanded the web of "persecution states" beyond the traditional realm of strong central states intent on persecuting citizens to include countries, like Ukraine, that were unable or unwilling to provide protections to all citizens. Side-by-side with state-sponsored violence, persecution definitions would now include anonymous vigilante violence.

Driven by the special conditions imposed by patterns of anonymous abuse in post-Soviet Ukraine, the cases of Kraitman, Korablina, and O.Z. and I.Z. applied a common-sense approach to violence, accepting an accumulation of individual acts of violence could, over time, amount to persecution, even where existing laws condemned such practices and even when state officials refused to legitimize them. In this way, immigration courts would open an escape route to hundreds of thousands of Ukrainian Jewish and Russian refugees, even as most Western pundits and learned scholars would fail even to notice that such violence was even taking place.