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CHALLENGES IN THE RELATIONSHIP BETWEEN THE PROTECTION OF INTERNALLY DISPLACED PERSONS AND INTERNATIONAL REFUGEE LAW

DISSERTATION SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY (LAW)

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ABSTRACT

Internally Displaced Persons ('IDPs') outnumber refugees by two to one and often have the same fears, needs and wants as refugees recognised as such under international law. However, refugee status entails international protection, while IDPs are left to the protection of their own state, which may, but by no means necessarily, be the very entity that has forced them to flee in the first place.

In recent years, there have been significant developments in the realm of IDP protection. This includes the conclusion of two regional treaties on the protection of IDPs, the development of relevant soft law instruments, and the reformed 'Cluster Approach' of humanitarian response. Although the increased focus on IDP protection is a welcome development, the UNHCR has expressed the fear that 'activities for the internally displaced may be (mis)interpreted as obviating the need for international protection and asylum.'

This thesis represents the first legal analysis of the relationship between the protection of IDPs and International Refugee Law. It will discuss five key challenges in this respect. First, the challenge of drawing the attention of the international community to the plight of IDPs; second, the challenge of developing an appropriate framework for the protection of IDPs; third, the challenge of ensuring that internal protection is not interpreted as a substitute for asylum; fourth; the challenge of determining the relationship between complementary protection and internal displacement; and fifth, the challenge of ensuring that IDP protection in an inter-agency context does not trigger the application of Article 1D of the Refugee Convention, rendering the Convention inapplicable to the recipients of that protection.

This thesis will conclude by setting out the future challenges in the relationship between IDP protection and International Refugee Law, by identifying questions left open for further research, and by illustrating the overall impact and importance of this thesis' findings.

Dedicated to

Ms. Clodagh Higgins

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ACHR	1969 American Convention on Human and People's Rights
ACTED	Agency for Technical Cooperation and Development
ADRDM	1948 American Declaration on the Rights and Duties of Man
CARE	Cooperative for Assistance and Relief Everywhere
CAT	1984 Convention Against Torture
CCCM	Camp Coordination and Camp Management
CERD	1965 Convention on the Elimination of All Forms of Racial Discrimination
CRC	1989 Convention on the Rights of the Child
CNDA	Cour Nationale du Droit d'Asile
DRC	Democratic Republic of the Congo
EC	European Community
ECHR	1950 European Convention on Human Rights
ECtHR	European Court of Human Rights
FAO	Food and Agriculture Organisation
IASC	Inter-Agency Standing Committee
ICCPR	1966 International Covenant on Civil and Political Rights
ICESCR	1966 International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IFA	Internal Flight Alternative
IPA	Internal Protection Alternative
IOM	International Organisation for Migration
KFOR	Kosovo Force
LTTE	Liberation Tigers of Tamil Eelam
MEDAIR	Medical Environmental Development With Air Assistance
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
MOU	Memorandum of Understanding
NFI	Non-Food Item
NGO	Non-Governmental Organisation
NSA	Non-State Actor
OAU	Organisation of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the High Commissioner for Human Rights
ORC	Open Relief Centre
PMSC	Private Military and Security Company
R2P	Responsibility to Protect
SGBV	Sexual and Gender-Based Violence
UDHR	1948 Universal Declaration of Human Rights
UNCCP	United Nations Conciliation Commission for Palestine
UNICEF	United Nations Children's Fund
UNMIK	United Nations Interim Administration Mission in Kosovo

UNRPR	United Nations Relief for Palestine Refugees fund
UNRWA	United Nations Relief and Works Agency
UNSC	United Nations Security Council
VCLT	1969 Vienna Convention on the Law of Treaties
WFP	World Food Programme
WHO	World Health Organisation

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CHAPTER 1: INTRODUCTION

1. Introduction

Refugees and Internally Displaced Persons ('IDPs') are among the most vulnerable groups of people in the world. Both groups are compelled to flee their places of habitual residence, often for the same or very similar reasons. These may include war, armed conflict, human rights violations, political instability and/or internal strife. IDPs often share the same experiences, needs, fears and wants as refugees and consequently, IDPs are sometimes referred to as 'internal refugees'.[1] However, this label is misleading as there is a very significant legal distinction between IDPs and refugees which stems primarily from the fact that a refugee has crossed an international frontier while an IDP remains within a state's borders.

This thesis represents an original contribution to knowledge as it is the first legal analysis of the relationship between the protection of IDPs and International Refugee Law. This relationship is of great significance because of the similarity between the plight of IDPs and refugees, the fact that many IDPs go on to cross a border to become refugees, and the fact that the United Nations High Commissioner for Refugees ('UNHCR') is involved in both IDP and refugee protection. The importance of this topic is underlined by the scale of the global problem of forced displacement, which numbered 33.3 million IDPs and 16.7 million refugees at the end of 2013.[2]

This thesis will discuss five key challenges in this relationship. First, the challenge of drawing the attention of the international community to the plight of IDPs; second, the

[1] UNHCR, *The State of the World's Refugees: Human Displacement in the New Millenium* (Oxford University Press 2006), 153.
[2] UNHCR, 'Facts and Figures about Refugees' http://www.unhcr.org.uk/about-us/key-facts-and-figures.html accessed 14 August 2014.

challenge of developing an appropriate framework for the protection of IDPs; third, the challenge of ensuring that internal protection is not interpreted as a substitute for asylum; fourth, the challenge of drawing the parameters of the relationship between complementary protection and internal displacement; and fifth, the challenge of ensuring that IDP protection in an inter-agency context does not trigger the application of Article 1D of the Refugee Convention, rendering the Convention inapplicable to the recipients of that protection. This thesis will conclude by setting out the future challenges in the relationship between IDP protection and International Refugee Law, by identifying questions left open for further research, and by illustrating the overall impact and importance of this thesis' findings. The scope and content of this thesis will be discussed in further detail below, but for the purposes of this introduction, a preliminary overview of the nature of the IDP problem and the difference between IDPs and refugees is warranted.

Article 1A(2) of the 1951 Convention relating to the Status of Refugees ('Refugee Convention') provides that the term 'refugee' shall apply to any person who:

> [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...][3]

IDPs outnumber refugees by almost two to one, totalling 33.3 million at the end of 2013.[4] The most commonly-cited description of IDPs was originally set out in the United Nations Guiding Principles on Internal Displacement,[5] a soft law document which has been

[3] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2).
[4] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 9.
[5] UNCHR, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.

described as a 'standard'[6] and an 'important tool'[7] in IDP protection. Principle 1 describes IDPs as:

> Persons 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 generalised violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognised state border.[8]

IDPs and refugees are similar in the sense that their movement is involuntary and/or coerced and often both categories of persons may have fled their places of habitual residence for similar reasons. As aforementioned, many IDPs go on to cross a border and qualify as refugees. In addition, IDPs and refugees often face the same practical problems such as lack of adequate shelter, food, water, sanitation, and healthcare; risk of sexual and gender-based violence; vulnerability to human smuggling and trafficking; and inadequate access to justice.[9] Nonetheless, there remain substantial differences between the two categories of persons. The first, most fundamental distinction, as set out above, is that the refugee has crossed an international frontier while IDPs remains within their country of origin. The crossing of a border represents the breaking of the bond between the refugee and their country of origin and thus puts the refugee within the protection reach of the international community.[10] The responsibility for IDP protection on the other hand remains with their governments even though these may, but by no means necessarily, be the very actors that have caused the displacement in the first place.

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[6] UNGA Res 58/177 (12 March 2004) UN Doc A/RES/58/177.
[7] UNGA Res 58/177 (12 March 2004) UN Doc A/RES/58/177.
[8] UNCHR 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.
[9] Erika Feller, 'UNHCR's Role in IDP Protection: Opportunities and Challenges' (2006) Forced Migration Review 11, 12.
[10] Atle Grahl-Madsen, *The Status of Refugees in International Law* (A.W. Sijthoff 1966) 79; Andrew Shacknove, 'Who is a Refugee?' (1985) 95 Ethics 274, 275.

Secondly, in order to satisfy the refugee definition, an applicant must show, *inter alia*, that he has fled his country of origin owing to fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion.[11] This list of persecutory grounds is exhaustive. However there is no need to show an element of persecution in order to be described as an IDP and the list of factors causing displacement is not exhaustive.[12] Forced displacement as a result of natural or man-made disasters, for example, would, *ipso facto*, qualify a person as an IDP but not as a refugee.

Thirdly, internal displacement is not explicitly prohibited by international law. In fact, there are a number of situations in which internal displacement is wholly compatible with international law, such as where asylum-seekers are returned to an 'Internal Flight Alternative' in their countries of origin, or where displacement is necessary for the purposes of development projects justified by the public interest. In contrast, the element of persecution in the creation of a refugee situation rationally entails a breach of international law. Although there is no definition of persecution in the Refugee Convention, there is widespread acceptance that persecution entails a systemic violation of human rights and is thus,[13] ipso facto, contrary to international law.

Fourthly, a refugee is entitled to the range of rights set out in the Refugee Convention which encompasses a duty of non-discrimination vis-à-vis citizens or other

[11] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2).
[12] UNCHR, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add, Principle 1.
[13] UNHCR 'Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Art. 1(a)(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (2002)' (7 May 2002) UN Doc HCR/GIP/02/01, para 13; James Hathaway, *The Law of Refugee Status* (Butterworths 1991), 104-105.

residents of the asylum country and refugees regarding a list of rights.[14] These include general provisions, administrative measures, rights relating to juridical status, and rights relating to employment. In this sense, refugee law is distinct from the protection offered to IDPs as it deals with questions relating to immigration, an area in which states are very cautious about guarding their sovereignty. Being categorised as an IDP does not, *ipso facto*, entitle a person to any additional rights under international law.[15] Refugee status also brings a person within the protection mandate of the UN Refugee Agency, the United Nations High Commissioner for Refugees.[16] IDPs, on the other hand, have no specific international agency to protect them.

Fifthly, while it is clear when refugee status begins and ends, the same cannot be said for a situation of internal displacement. Refugee status accrues when an international frontier is crossed, provided that all other elements of the refugee definition are satisfied. However, it is unclear when a person first becomes internally displaced, as there is no consensus about when a movement is voluntary or involuntary, nor is it clear whether the element of coercion should be assessed in objective or subjective terms. Refugee status can be brought to an end by the application of Article 1C of the Refugee Convention. However when a person ceases to become an IDP is unclear, as often displaced persons will never return to their original place of residence, notwithstanding the fact that it is safe to do so.

Sixthly, it is possible for a person to be excluded from the benefits of the Refugee Convention where there are serious reasons for believing that he or she has committed

[14] James Hathaway and Michelle Foster, 'Internal Protection/ Relocation/ Flight Alternative as an Aspect of Refugee Status Determination' (Global Consultation on International Protection, Expert Rountable Discussion organised by the UNHCR, 2001), 44.
[15] However, there are certain regional and non-binding instruments which grant rights to IDPs. See discussion in Chapter 2, Section 3 ('Treaty Law Specific to the Protection of Internally Displaced Persons').
[16] UNGA 'Statute of the Office of the United Nations High Commissioner for Refugees', Annex to Res 428/V (14 December 1950) UN Doc A/RES/428(V), para 6.

certain acts or crimes.[17] No such exclusionary criteria are provided in the Guiding Principles on Internal Displacement, although the Principles are 'without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.'[18]

Finally, the terminology and substance of application relating to durable solutions for IDPs and refugees differ in various respects. For refugees, this could entail residence or naturalisation in the host country, whereas the IDP will remain within the country of origin. In addition, the return of a refugee entails a cross-border movement, which is not the case for IDPs. Furthermore, resettlement for a refugee entails movement to a third country, whereas for an IDP it entails movement to another part of the country.

1.1 Towards a Merging of the IDP and Refugee Categories?

In recent years, there has been academic debate over whether the refugee and IDP categories should be merged. Were such a development to take place, this thesis' topic would be rendered irrelevant.

The arguments in favour of extending the categories of persons entitled to international protection are nonetheless compelling. After all, IDPs and refugees often find themselves in very similar situations and having the same needs, wants and fears. Lee, for example, has argued that the crossing of international frontiers has been over-emphasised and that the requirement of border-crossing has lost its relevance in the post-Cold War era.[19] Furthermore, he states that prior to the conclusion of the Refugee Convention, there had been no agreement to define a refugee as a person being necessarily outside the country

[17] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 1F.
[18] UNCHR, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add, Principle 1.
[19] Luke Lee, 'Internally Displaced Persons and Refugees: Toward a Legal Synthesis?' (1996) 9 Journal of Refugee Studies 27, 30-38.

of his nationality and thus makes a case for '[…] reconsidering the use of the crossing of international borders as a prerequisite to systematic international protection and assistance of people forcibly displaced from their homes.'[20]

While operationally, it may make little sense to distinguish between IDPs and refugees, legally, their situations are very different. International frontiers still regulate the areas of territorial sovereignty and the practical similarities between the plight of IDPs and refugees do not change that fact. Moreover, the rights accorded to refugees are based on the fact that the refugee is outside his country of origin and needs basic entitlements to survive in a country where he or she does not have citizenship. These rights would not make sense if granted to an IDP in a domestic context.[21] Furthermore, to allocate a legal status to IDPs could result in further discrimination between IDPs and other human rights victims who are not displaced. In addition, Barutciski argues that merging the IDP/refugee categories could result in a watering-down of their respective existing protection standards:

> While the distinction between refugees and the internally displaced increasingly blurs as a result of the new interventionism, the present political context raises legitimate concerns that victims of displacement will be left with a form of protection that reflects the lowest common denominator. The reduced international commitment to external asylum means that refugees risk losing their privileged position with regard to protection, while the limited effectiveness of in-country protection indicates that the internally displaced will not actually be offered a new option of remaining in their homes. The resulting trade-off is not an equitable one.[22]

[20] Ibid, 27.
[21] Michael Barutciski, 'Tensions Between the Refugee Concept and the IDP Debate' (1998) 3 Forced Migration Review 11, 12; James C. Hathaway, 'Forced Migration Studies: Could We Agree Just to 'Date'?' (2007) 20 Journal of Refugee Studies 349, 358.
[22] Michael Barutciski, 'The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992–94)' (1996) 8 International Journal of Refugee Law 49, 95.

However, that is not to say that the term IDP is not a useful concept. While the term does not grant legal status in any international legally binding instrument, the concept has succeeded in drawing international attention to a serious forced migration problem and it assists in identifying and addressing the specific needs of IDPs.

2. IDPs and the International Agenda: A Shift Towards 'Preventive Protection'

The *travaux préparatoires* of the Refugee Convention illustrate that its drafters were not concerned with the provision of protection to those within their country of origin.[23] Indeed, although the number of IDPs worldwide numbers 33.3 million, it is only relatively recently that the issue of internal displacement has attracted international concern.[24] Sudan's displacement problem in 1972 was among the first to appear on the international agenda, when the Economic and Social Council requested that UNHCR coordinate humanitarian assistance required for, *inter alia*, 'persons displaced within the country'.[25] This was followed over a decade on by Thailand's proposal that a study be undertaken on the possible establishment of safety zones for refugees or IDPs as a way of lessening the burden on the international community.[26] However, the IDP issue gained significant momentum in the post-Cold War era, when the recognition of refugees was no longer seen

[23] The *travaux préparatoires* indicate that a proposal to include IDPs in the refugee definition was rejected on the basis that the delegates viewed the existence of sufficient national protection as inconsistent with the concept of a refugee. See Hathaway, *The Law of Refugee Status*, fw29-31; *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 [49].
[24] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014).
[25] UN Economic and Social Council Res 1705 (LIII) (27 July 1972) UN Doc E/RES/1705(LIII). See also UN Economic and Social Council Res 1655 (LII) (1 June 1972) UN Doc E/RES/1605(LII).
[26] B.S. Chimni, 'Incarceration of Victims: Deconstruction Safety Zones', in Najeeb Al-Nauimi and Richard Meese, *International Legal Issues Arising under the United Nations Decade of International Law : Proceedings of the Qatar International Law Conference '94* (Martinus Nijhoff 1995), 852.

as a political act highlighting the failure of the country of origin to protect its nationals.[27] Chimni identifies this ideological shift as taking place in two overlapping stages.[28] First, by the replacement of the language of protection with the reality of restriction. In this sense, states employed creative means by which to limit entry of refugees onto their territory such as visa restrictions, carrier sanctions, and engaging in restrictive interpretations of the Refugee Convention. Secondly, a new vocabulary entered refugee discourse, comprising terms such as 'preventive protection', 'the right to remain', 'buffer zones', 'relief corridors', and 'safety zones.' Attention thus turned to policies of containment with the goal of minimising refugee outflows.

This shift in momentum brought about a new dilemma for the UNHCR – should it resist the concept of 'preventive protection' owing to the potential conflict with the right to leave and seek asylum, or should it take a functionalist approach, working with the policy set forth by states, who are the primary funders of UNHCR and thus often designate the use and location of their donations?[29] The UNHCR ultimately opted for the latter approach, and originally defined preventive protection as: '[t]he establishment or undertaking of specific activities inside the country of origin so that people no longer feel compelled to cross borders in search of protection and assistance', which may also include the establishment of safety zones or safe areas inside the country of origin where protection may be sought.[30]

Preventive protection may, as its name suggest, promote humanitarian motives in two respects. First, as outlined by the UNHCR above, it ameliorates the conditions that

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[27] Bill Frelick, 'Preventing Refugee Flows: Protection or Peril' (1993) World Refugee Survey 5; Chimni, 'Incarceration of Victims: Deconstructing Safety Zones' in Al-Nauimi and Meese, 824.
[28] Chimni, 'Incarceration of Victims: Deconstructing Safety Zones' in Al-Nauimi and Meese, 824.
[29] Erin Mooney in Frances Nicholson and Patrick M. Twomey, *Refugee Rights and Realities : Evolving International Concepts and Regimes* (Cambridge University Press 1999), 30; Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (University of Minnesota Press 2000), 19.
[30] UNHCR 'Report of the UNHCR Working Group on International Protection' (6 July 1992), 17-18.

force persons to flee their countries of origin in the first place, and secondly, it assists those who have no desire or intention to cross an international frontier and would otherwise not be within the reach of protection or assistance from an international organisation. Nonetheless, as the following examples will illustrate, preventive protection is at least as much about states' interests as it is about assisting IDPs.[31] In the words of Long:

> […]the growth in the interest in IDP protection [….] [is] directly connected with the reality of border closure, and states' interests in circumventing rather than openly challenging the effect of such closures on refugees' rights to asylum and international protection.[32]

2.1 Sri Lanka, 1990

Although Operation Safe Haven / Operation Provide Comfort in Northern Iraq (discussed below) is the most-cited example of preventive protection, the establishment of Open Relief Centres (ORCs) in Sri Lanka in November 1990 also merits discussion. The purposes of the ORCs were four-fold: first, to maintain UNHCR's presence in the area so as to monitor developments regarding returnees; second, to assist returnees and displaced persons; third, to reduce the pressures on returnees and other persons who may otherwise feel compelled to leave; and fourth, to promote conditions for voluntary repatriation.[33] ORCs were described as 'temporary place[s] where displaced persons on the move can freely enter or leave and obtain essential relief assistance in a relatively safe environment'.[34] They were seen as a test case for establishing to what extent the international community would be prepared to see UNHCR undertake activities in a

[31] Hyndman, 27.
[32] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 134.
[33] US Committee for Refugees, *Sri Lanka, Island of Refugees* (October 1991), 23 as cited in Chimni, 'Incarceration of Victims: Deconstructing Safety Zones', in Al-Nauimi and Meese, 846.
[34] William D. Clarance, 'Open Relief Centres: A Pragmatic Approach to Emergency Relief and Monitoring during Conflict in a Country of Origin' (1991) 3 International Journal of Refugee Law 320, 325.

country of origin which would reduce the push factors of refugee outflows.[35] In contrast to some of the examples below, the ORCs operated relatively safely, despite occasional evictions and security incidents. The ORCs were generally seen as providing a meaningful safe alternative and their establishment may be termed a success, as although safety was not absolute, no-one who sought sanction there is known to have died as a result of military action.[36] The establishment of ORCs can be distinguished from the establishment of preventive protection initiatives elsewhere for two reasons. First, the ORCs were negotiated on the ground, rather than impelled by the will of other states operating through the Security Council and there was consensus between the parties to the conflict that it was a safe area before the arrival of UNHCR. Second, ORCs were situated in both LTTE and government-controlled areas, and were not associated with territorial claims.[37]

2.2 Turkey/ Iraq border, 1991

In April 1991, Turkey closed its borders to refugees from Iraq because it viewed the Kurdish population as a political problem.[38] It relied on its geographic limitation to the Refugee Convention, maintaining that it was only obliged to accept as refugees those having a well-founded fear of persecution as a result of events occurring in Europe.[39] At that time, there were more than 200,000 Kurdish refugees trapped in the mountains of the Turkish-Iraqi border, living in appalling conditions.[40] The initial response of the UNHCR

[35] Chimni, 'Incarceration of Victims: Deconstructing Safety Zones' in Al-Nauimi and Meese, 846.
[36] Chimni, 'Incarceration of Victims: Deconstructing Safety Zones' in ibid, 847.
[37] Chimni, 'Incarceration of Victims: Deconstructing Safety Zones' in ibid, 847.
[38] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 101.
[39] Karin Landgren, 'Safety Zones and International Protection: A Dark Grey Area' (1995) 7 International Journal of Refugee Law 436, 442.
[40] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 107.

was to attempt to persuade Turkey to open its borders.[41] However, the strategic importance of the Turkish border to the United States, United Kingdom, and France meant that within days, UNHCR's attempts were overshadowed by the inter-state negotiations that reflected United States' and allies' reluctance to condemn the Turkish border closure.[42] Notwithstanding the fact that Security Council Resolution 688 reaffirmed the 'sovereignty, territorial integrity, and political independence of Iraq and of all states in the area', the United States, United Kingdom, and France interpreted the resolution's reference to the 'massive flow of refugees towards and across international frontiers' as justifying the creation of a safe zone for Kurds in Iraq without Iraqi consent.[43] On 18 April 1991, Prince Sadruddin Aga Khan - the personal representative of the United Nations Secretary-General for Humanitarian Assistance Related to the Iraq-Kuwait Crisis - signed a memorandum of understanding with the Iraqi government allowing for the establishment of UN humanitarian centres within the country.[44] Towards the end of April, attention turned to the prospect for a mass 'voluntary' repatriation of Kurds from border areas, and UNHCR agreed to participate in the operation as a 'reluctant but pragmatic partner.'[45] As Long states, even if a return to secure safe havens did not breach *refoulement* because lives and freedoms would not be at risk, this did not address the question of refugees' rights to leave their own country and to seek asylum.[46] The establishment of safety zones in Iraq has been

[41] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 108.
[42] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 109.
[43] UNSC Res 688 (5 April 1991) UN Doc S/RES/688; Frelick, 8.
[44] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 115.
[45] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 120.
[46] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 122.

further criticised as legitimising Turkey's decision to close its border and fundamentally compromising UNHCR's ability to insist upon the need for the Turkish state to grant asylum.[47] The legality of the operation has also been questioned.[48] Having said this, the establishment of a safety zones in Iraq has been described as the most successful of the security experiments that took place in the 1990s, as within six weeks of creation, the majority of refugees had been able to leave the mountains and return to Iraq where it was easier to provide humanitarian relief.[49]

2.3 Bosnia, 1992

In July 1992, Slovenia's call to establish safe haven zones in Bosnia was met with significant international support.[50] The United States suggested that assistance, even in the absence of adequate protection, could contribute to the goal of preventing the next wave of refugees.[51] In addition, many states justified their refusal to accept refugees on the grounds that they would be contributing to ethnic cleansing, and also relied upon the 'right to remain' of those displaced by conflict.[52] In two resolutions, the Security Council declared Srebrenica, Sarajevo, Bihac, Tuzla, Zeba, and Gorazde as safe areas.[53] Although the Security Council acted under Chapter VII, no enforcement measures were clearly provided for. In addition, out of the 34,000 troops demanded by UNPROFOR, only 7,600 were

[47] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 128.
[48] Chimni, 'Incarceration of Victims: Deconstructing Safety Zones' in Al-Nauimi and Meese, 830.
[49] Jennifer Hyndman, 'Preventive, Palliative,or Punitive? Safe Spaces in Bosnia-Herzegovina, Somalia, and Sri Lanka' (2003) 16 Journal of Refugee Studies 167, 168; UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 130; Yves Sandoz, 'Safety Zones for Internally Displaced Persons,' in Al-Nauimi and Meese, 917.
[50] Frelick, 9; Chimni, 'Incarceration of Victims: Destructing Safety Zones' in Al-Nauimi and Meese 839.
[51] Frelick, 9.
[52] 'France says on-the-Spot Safe Havens Best Refugee Policy', *Reuters* (Paris, 30 July 1992) cited in ibid, 9.
[53] UNSC Res 819 (16 April 1993) UN Doc S/RES/819; UNSC Res 824 (6 May 1993) UN Doc S/RES/824.

provided.[54] Furthermore, the zones were not demilitarized and the Bosnian army used them as a training ground and for launching attacks.[55] Thus the Bosnian Serbs perceived the safe havens as helping Bosnian forces to maintain territory.[56] Although the safe havens did save lives and offered a degree of sanctuary to those fleeing violence, history has perceived them to be a failure. Two safe havens fell to the Serbs, and Bosnian Serb forces entered Srebrenica in July 1995, following which more than 7,000 Muslim men and boys were killed.[57]

2.4 Kenya/ Somalia border, 1992

In 1992, the space available within Kenya for Somali refugees began to decrease, as Kenya feared infiltration by Somali militants.[58] The Security Council passed Resolution 794 which authorised a Unified Task Force of peacekeeping troops to undertake 'Operation Restore Hope'.[59] This entailed the creation of a preventive zone within Somalia along the Kenyan border in order to slow the flow of potential refugees into Kenya and to encourage Somali refugees in Kenyan camps to return home.[60] However, UNHCR stressed that 'prevention is not […] a substitute for asylum; the right to enjoy asylum, therefore, must continue to be upheld',[61] and Long has stated that in-country protection is an entirely

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[54] UNSC 'Report of the Secretary General pursuant to Security Council Resolution 959' (1994), UN Doc S/1994/1389.
[55] Sophie Haspeslagh, 'The Bosnian "Safe Havens"' <http://www.beyondintractability.org/cic_documents/Safe-Havens-Bosnia.pdf> accessed 27 May 2014, 2.
[56] Sophie Haspeslagh, 'The Bosnian "Safe Havens"' <http://www.beyondintractability.org/cic_documents/Safe-Havens-Bosnia.pdf> accessed 27 May 2014, 2.
[57] Jeffrey Smith, *Srebrenica Massacre* (Encycopaedia Britannica 2014).
[58] Hyndman, 'Preventive, Palliative,or Punitive? Safe Spaces in Bosnia-Herzegovina, Somalia, and Sri Lanka', 178.
[59] UNSC Res 794 (3 December 1992) UN Doc S/RES/794.
[60] UNSC Res 794 (3 December 1992) UN Doc S/RES/794, para 10.
[61] UNHCR 'EXCOM Note on International Protection' (25 August 1992) UN Doc A/AC.96/799, para 26.

impracticable approach for a country such as Somalia.[62] By June 1993, some 12,000 Somali refugees had returned with the help of UNHCR, but the vast majority remained in Kenyan camps.[63] Assessments of the cross-border operation and its implications for refugee protection are mixed, but by mid-1995 the programme had ended, with the majority of refugees remaining in Kenya.[64]

2.5 Rwanda, 1994

In 1994, the Security Council authorised a French proposal for the deployment of a 'temporary multinational force' in Rwanda.[65] Entitled 'Operation Turquoise', its mandate was to contribute to the security and protection of displaced persons, refugees, and civilians at risk, including through the establishment and maintenance of secure humanitarian areas. France's motives were questioned, given its military links with the Hutu and many Hutus fled to Zaire and Burundi once France announced withdrawal.[66] The withdrawal of the French forces was replaced by the UN Assistance Mission for Rwanda. Frustrated by the slow pace at which some 750,000 IDPs were returning to their homes, the presidents of Rwanda, Zaire, and Burundi called for internationally-supervised 'security zones' to be set up in Rwanda to enable the return of Hutu refugees from Zaire and Burundi. By mid-February 1995, the Government estimated that the number of IDPs in Rwanda had dropped to 200,000. In the same month, the international agencies in Rwanda agreed with the Government on an operation to move the displaced home as soon as possible, but the Kibeho operation begun by the Rwandese Patriotic Army on 17 April led to a significant number of deaths. The remaining IDP camps were emptied within 8 days.

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[62] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 339.
[63] Hyndman, 'Preventive, Palliative,or Punitive? Safe Spaces in Bosnia-Herzegovina, Somalia, and Sri Lanka', 178.
[64] Ibid, 179.
[65] UNSC Res 929 (22 June 1994) UN Doc S/RES/929.
[66] Chimni, 'Incarceration of Victims: Deconstructing Safety Zones' in Al-Nauimi and Meese, 849.

Operation Turquoise has been credited as stemming the flow of refugees to Zaire, and thus saving many lives, given the conditions prevailing there.[67] It protected some of the few Tutsis remaining in the zone, and it protected Hutu troops from revenge killings.[68] Nonetheless, the safe haven policy greatly eroded the Rwandan right to flee, as at the same time that thousands of IDPs were killed in Kibeho, France blocked the application of Rwandan's asylum demands on the grounds that they were being protected inside their own country.[69]

2.6 Afghanistan/ Pakistan border, 2000

In the early 1990s, Pakistan's borders remained open to receive Afghan refugees. However, in the mid-1990s the WFP and UNHCR ended food aid to refugee camps, which triggered mass migration to Pakistani cities, resulting in the closure of the border with Afghanistan in November 2000.[70] According to Ferris, the border closure was in part responsible for NGOs' focus on preparing for an IDP rather than a refugee crisis. According to a joint NGO statement in 2001:

> Above all we want to prevent, if humanely possible, the population of Afghanistan becoming refugees by addressing their needs inside the country […] we are seriously concerned that the most immediate problem – the needs of the people inside Afghanistan – is not being adequately addressed […] It must be remembered that these potential refugees are currently trapped inside a closed country. All borders are closed and will probably remain so until the start of the conflict […] if

[67] Chimni, 'Incarceration of Victims: Deconstruction Safety Zones', in ibid, 850.
[68] Landgren, 449.
[69] James C. Hathaway and R. Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 Harvard Human Rights Journal 115, 136-137.
[70] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 267.

> they flee to Afghanistan's borders, our distribution systems will be seriously disrupted.[71]

Assistance to refugees, according to the Pakistani government, was creating a 'pull factor' that was attracting Afghans from within the country and worsening the situation within Pakistan.[72] Pakistan also demanded that the international community increase its assistance and establish IDP camps within Afghanistan itself, arguing that Pakistan would only begin to accept refugees when it did so.[73] Regional state actors were also keen to encourage the establishment of IDP camps. Iran repeatedly stated that it believed the Afghan refugee population should be cared for in camps in Afghanistan and the Iranian Red Crescent Society established two camps on Afghan territory.[74] Although the border closure was largely ineffective in practical terms (it was porous and guards were easily bribed), it signalled Pakistan's hardened stance to Afghan refugees.[75] This stance continued throughout the displacement crisis that followed the start of US military action in Afghanistan post 9/11, when the closure of borders by states neighbouring Afghanistan had a new significance for the United States, owing to plans for a military strike against the Taliban and a desire to prevent identified suspected terrorists from fleeing the country.[76]

2.7 Assessment

[71] 'Working to Solve the Crisis in Afghanistan: a Statement by NGOs', Islamabad, 5 October 2001. NGOs represented: ACTED, ActionAid Pakistan, Action Contre la Faim, Aide Medicale Internationale, CARE International, Concern, DACAAR, Global Relief Foundation, Madera, MEDAIR, Mercy Corps, Ockenden International, Oxfam, SGAA, Save the Children US, Solidarites, Tearfund Ireland, Tearfund UK.
[72] Daniel Langenkamp, 'The Victory of Expediency: Afghan Refugees and Pakistan in the 1990s' (2003) 27 The Fletcher Forum of World Affairs 229, 241.
[73] Ibid, 241.
[74] UNHCR Policy Development and Evaluation Service and Division of Operational Services, Katy Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (June 2010) UN Doc PDES/2010/07, para 292.
[75] Long, para 269.
[76] Ibid, para 276.

According to Long, the shift in the 1990s towards focusing on IDP needs was influenced by the development of an IDP protection framework at that time.[77] Indeed, many of the examples above did ameliorate in some respect the suffering of those remaining within a country's borders. It must also be noted that many IDPs have no desire to cross a border, and thus assistance to those individuals does not have the effect of containment and thus may have purely humanitarian effects. The concept of internal protection as an alternative to international protection is still finding support today, as evidenced by the recently-concluded tripartite agreement between Somalia, Kenya, and the UNHCR for the repatriation of Somalian refugees,[78] and the Tanzanian proposal to create safe zones during the drafting of the Kampala Convention.[79]

However, the above examples illustrate that the increased support for IDP assistance was to do in large part with a desire to curb refugee flows. Indeed, the curbing of refugee flows inevitably worsens an IDP situation, as such IDPs have no choice but to remain displaced within their states. Some have argued that the concept of 'preventive protection' serves as a pretext for governments to push back refugees from their borders; and violates the right to leave one's country and seek asylum as outlined in UDHR.[80] Such safe zones cannot be a replacement for asylum, as only the receiving state can offer the legal and physical guarantees necessary to constitute effective protection. Thus the establishment of safety zones in countries of origin is extremely relevant to this thesis' question, namely, whether IDP protection is in conflict with, or complementary to, the protection of refugees in international law.

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[77] Ibid, para 297.
[78] 'Tripartite Agreement Between the Government of Kenya, the Government of the Federal Republic of Somalia, and the United Nations High Commission of Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya 2013', 10 November 2013.
[79] Information supplied by Dr. Chaloka Beyani, Special Rapporteur on the Human Rights of Internally Displaced Persons, 7 March 2014.
[80] Frelick; Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism*, 22.

3. Overview of the Global Problem of Internal Displacement

An overview of the IDP problem as it stands today is necessary in order to set this thesis in its contemporary context. The IDP problem, in terms of numbers, exceeds that which was in existence at the time of appointment of the first Representative of the Secretary General on Internally Displaced Persons. According to the Internal Displacement Monitoring Centre, there were 33.3 million displaced by conflict and violence at the end of 2013.[81] Sub-Saharan Africa had the largest regional amount of IDPs (12.5 million), and 63% of all IDPs globally came from Syria, Colombia, Nigeria, the Democratic Republic of Congo, and Sudan.[82]

States with at least 1 million IDPs (at the time of writing) include Colombia (5.7 million), Democratic Republic of the Congo (at least 2,551,200), Iraq (at least 2.3 million), Nigeria (3.3 million), Pakistan (at least 1.15 million), Somalia (1.1 million), South Sudan (1,136,000), Sudan (at least 2,890,000) and Syria (6.5 million). States with over 500,000 IDPs include Afghanistan (at least 667,200), Azerbaijan (at least 543,000), Central African Republic (at least 527,000), India (at least 531,000), Myanmar (up to 643,000). [83] Palestine has at least 650,000 IDPs. As the following paragraphs will illustrate, the causes of displacement have varied greatly.

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[81] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 9. This figure does not include those displaced for other reasons, such as natural disasters. In the Philippines, for example, Typhoon Haiyan displaced 4,000,000 persons in November 2013.

[82] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 9.

[83] Internal Displacement Monitoring Centre, 'Latest IDP numbers by country' http://www.internal-displacement.org/global-figures accessed 7 August 2014.

In 2013, most new displacement in the Americas took place in Colombia, where displacement has increased consistently over the last ten years owing primarily to the country's protracted conflict. Widespread abuses, including the recruitment of minors, sexual violence, the use of anti-personnel mines, extortion, and the targeting of human rights workers has also forced people from their homes.[84] In the DRC, various conflicts, including the two wars, have forced people to flee violence and human rights abuses in the DRC since the mid-1990s.[85] Up to a million new people were displaced in the DRC in 2013, owing to inter-communal violence, land disputes, and violence by state and non-state armed groups.[86] The March 23 Movement signed a peace agreement in December 2013, but numerous other armed groups remain active in eastern DRC including the Mai-Mai militias, Raia Mutombiki, the Rwandan Democratic Forces for the Liberation of Rwanda, and the Ugandan Allied Democratic Forces.[87] The Lord's Resistance Army also carried out 195 attacks in 2013, 164 of them in DRC's Orientale province alone.[88]

In Iraq, more than 10% of the population were displaced by sectarian violence between 2006 and 2008.[89] The violence reached unprecedented levels since 2008, displacing nearly 11,800 people. In 2013, up to 2.1 million people were displaced, which includes up to 1.1 million people displaced since the sectarian violence of 2006, and at least 1 million IDPs displaced by previous instances of displacement or newly displaced but unregistered by the

[84] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 38.
[85] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 27.
[86] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 27.
[87] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 27.
[88] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 27.
[89] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 57.

authorities.[90] This was worsened by the influx of more than 200,000 refugees and 50,000 Iraqi returnees from Syria, and thus the authorities had to adopt their activities during 2013 to focus on the IDP situation.[91]

In Nigeria, Boko Haram's attacks on civilians have caused significant displacement in the north of the country.[92] The government's counter-insurgency policy and its excessive use of force against civilians have also forced persons to flee their homes, and its use of self-defence groups known as 'civilian joint task forces' put non-combatants at significant risk of becoming targets for reprisals.[93] Cattle rustling raids and clashes between herders and farmers over land use caused deaths and destruction of property and crops, and led to the displacement of thousands of people in Zamfara, Benue, and Plateau states during 2013.[94] Evictions to make way for road-building projects in Lagos displaced over 9,000 persons in February,[95] with few reports of victims receiving compensation. There are also concerns that the violence may increase as the 2015 elections draw nearer and political allegiances change.[96]

Since Israel's creation in 1948, displacement in Palestine has been caused by Israeli policies that aim to acquire land, redefine geographic boundaries, and usurp Palestinians of land ownership.[97] Other causes of displacement include clearing operations, land

[90] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 57.
[91] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 60.
[92] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 12.
[93] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 31.
[94] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 31.
[95] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 31.
[96] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 31.
[97] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 62.

appropriation measures, evictions, settlement expansion, movement and access restrictions, settler violence, revocation of residency rights, and restricted access to livelihood, opportunities and services.[98] Military incursions such as those into Gaza in 2008 and 2012 and violence and human rights associated with them, have also forced people to flee.[99] The most recent military incursion in 2014 has displaced a quarter of Gaza's 1.8 million population, according to the UN.[100]

Around 3.5 million people, or 9,500 a day, we displaced in Syria in 2013 and by the end of 2013 Syria's displacement crisis had become the largest in the world.[101] Civilians were the worst affected group.[102] At the time of writing (August 2014), the UNHCR has delivered core relief items to more than 2.5 million IDPs in 12 out of the 14 Governorates of Syria, including hard-to-reach areas.[103]

4. Recent Developments in IDP protection

Notwithstanding the fact - or perhaps because of the fact - that there are more IDPs than ever in the world today, the international community has taken significant steps in the move towards a protection framework for IDPs. The first of these developments was the creation of the position of Representative of the Secretary General on Internally Displaced Persons. Francis M. Deng first served in this position from 1992-2004, succeeded by

[98] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 62.
[99] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 62.
[100] BBC news, 'Gaza displaced "near breaking point"' < http://www.bbc.co.uk/news/world-middle-east-28593250> 31 July 2014.
[101] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 57.
[102] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 63.
[103] UNHCR,' 'UNHCR airlift delivering relief for 50,000 IDPs in northeast Syria' http://www.unhcr.org.uk/news-and-views/news-list/news-detail/article/unhcr-airlift-delivering-relief-for-50000-idps-in-northeast-syria.html accessed 21 July 2014.

Walter Kälin from 2004-2010 as the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons. Chaloka Beyani, a professor at London School of Economics, is the current Special Rapporteur on the Human Rights of Internally Displaced Persons, having been appointed to the position in November 2010. The areas of activity of the Special Rapporteur include promoting respect for the human rights of IDPs; engaging in dialogue with governments, NGOs, and other actors; strengthening the international response to internal displacement; and mainstreaming the human rights of IDPs in the UN system.[104]

The second development concerns the introduction in 1998 of the Guiding Principles on Internal Displacement to the then UN Commission on Human Rights. The Guiding Principles identify the rights and guarantees concerning the protection of IDPs during all phases of displacement. Although not a legally binding document, many of the principles are based on an abundance of existing legal provisions. Further, they have been referenced in resolutions of various international organisations and they have also been incorporated into several domestic legal systems.

The third development concerns the doctrine of Responsibility to Protect ('R2P') in the context of IDP situations. This doctrine came into being in 2001 and is formed of two basic principles. First, that state sovereignty implies responsibility and the primary responsibility for the protection of its people lies with the state itself. Second, that where a population is suffering serious harm, as a result of internal war, repression, state failure, or insurgency, and the state is unable or unwilling to halt or avert it, the principle of non-

[104] United Nations Human Rights Office of the High Commissioner of Human Rights, 'Areas of Activity', http://www.ohchr.org/EN/Issues/IDPersons/Pages/Activity.aspx accessed 24 May 2014.

intervention yields to the international responsibility to protect.[105] R2P is not a legal principle, and insofar as the practice of states is concerned, it received partial recognition in the Word Summit Outcome Document adopted by the General Assembly in October 2005, which explicitly imposes responsibility on the international community to take collective action through the Security Council in accordance with the UN Charter 'should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'[106] Since then, R2P has been relied upon by Ban Ki-Moon to take diplomatic steps following the wide-scale displacement in the wake of the post-election violence in Kenya in 2008.[107] In 2011, the Security Council expressly referred to the Libyan authorities' responsibility to protect its people in resolutions which created a no-fly zone,[108] an arms embargo,[109] referred the situation to the ICC,[110] and imposed sanctions on certain individuals.[111] Although this concept is not legally binding, it has been used to justify actions by the international community to protect persons within a state's borders and is thus highly relevant to this thesis' focus.

The third development concerns the 2005 reformulation of the division of labour amongst the UN and other humanitarian agencies. Entitled the 'Cluster Approach', nine different areas of humanitarian response were clustered together and each was assigned a 'cluster lead.' Of particular relevance to this thesis is the role of the UNHCR in the Cluster

[105] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty', December 2001 available at http://responsibilitytoprotect.org/ICISS%20Report.pdf accessed 8 July 2014.
[106] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 139.
[107] UNGA Report of the Secretary-General, 'Implementing the Responsibility to Protect' (2009) UN Doc A/63/677, para 55.
[108] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.
[109] UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.
[110] UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.
[111] UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970; UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

Approach, which was appointed lead role for overseeing protection, emergency shelter and camp management of IDPs.

The fourth set of developments concerns the completion of regional treaties on IDPs. In 2006, the Pact on Security, Stability and Development of the Great Lakes Region was signed by the 11 states of the International Conference of the Great Lakes Region and entered into force in 2008.[112] In addition, the text of the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa is broadly based on the Guiding Principles.[113]

The above four developments will be discussed in more detail in Chapter 2.

5. Research Question

Although the increased focus on IDP protection is a welcome development, it could have negative results. The UNHCR, for example, has expressed the fear that 'activities for the internally displaced may be (mis)interpreted as obviating the need for international protection and asylum.'[114] The aim of this thesis is to explore some of the current challenges in the relationship between the protection of IDPs and international refugee law. More specifically, this thesis will address the question of whether increased IDP protection measures are complementary to, or in conflict with, international refugee law.

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[112] 2006 Pact on Security, Stability and Development in the Great Lakes Region ('Great Lakes Pact') 46 I.L.M. 175.

[113] 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('Kampala Convention') 52 I.L.M. 400.

[114] UNHCR 'Internally Displaced Persons – The Role of the High Commissioner for Refugees' (2000) 140. See also the address of the High Commissioner for Refugees Sadako Ogata, who stressed that 'any attempt to develop protection standards for the internally displaced should take care not to undermine the existing obligations of refugee law, particularly that of asylum and non-refoulement.' Sadako Ogata, Norwegian Government Roundtable Discussion on United Nations Human Rights Protection for Internally Displaced Persons (Norwegian Refugee Council, 1993, Nyon Switzerand February 1993), 84.

6. Literature Review

The literature to date has not dealt extensively with the relationship between IDP protection and refugee law. Nonetheless, the UNHCR outlined numerous instances where its involvement with IDPs complements its primary mandate, that of refugee protection. By extension, these examples served to illustrate in a more general sense the ways in which IDP protection is complementary to refugee protection.

- Countries of asylum may be more willing to uphold their obligations under the Refugee Convention if IDP protection is available within refugees' countries of origin. Involvement with the internally displaced may prevent or lessen refugee outflows in two respects. First, it may contribute to ameliorating the push factors of forced migration and thus reduce the need to seek asylum abroad. Second, protection of the internally displaced may be necessary where there is a chance that territorial disputes or ethnic violence will lead to a break-up of a state and mass outflow of refugees.[115]
- Where refugees and displaced persons are generated by the same causes and surround a border, often the refugee problem cannot be addressed without first attending to the needs of the internally displaced. This was seen in the UNHCR's involvement with the Kurdish crisis in Northern Iraq in the early 1990s.[116]

[115] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007), para 35; UNHCR 'Internally Displaced Persons – The Role of the High Commissioner for Refugees' (2000), 37.
[116] UNHCR 'Internally Displaced Persons – The Role of the High Commissioner for Refugees' (2000), 136.

- In assisting IDPs, UNHCR gains a much better knowledge of the push factors of displacement, both internal and external, and can thus improve asylum management, especially concerning eligibility procedures.[117]
- Internal conflicts of a secessionist nature may uproot people within national boundaries, which then become international borders. For example in the Former Yugoslavia in the mid-1990s, the UNHCR decided to provide protection and assistance to the uprooted on the basis of humanitarian need, rather than refugee status. In such cases, internally displaced are termed as such only in the short-term, and borders (which may shift) should not be the only factor in determining where to focus international assistance.[118]
- The collaboration with authorities can be much closer, bringing with it improved possibilities of access to a wide range of stakeholders not only with ministries and local authorities, but at the very highest level of government.[119]
- Refugees may seek asylum in a state where there are IDPs, and both IDPs and refugees may be in need of the same type of humanitarian assistance and/or protection.[120] This was the case when refugees from Sierra Leone sought asylum in Liberia, where it was too difficult to distinguish between the two categories, thus the protection of IDPs had a positive effect on the protection of refugees and vice versa.[121]
- As refugees are often repatriated to areas where internal displacement exists, involvement with IDPs is essential for the purposes of maintaining a

[117] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007), para 35.
[118] UNHCR 'Internally Displaced Persons – The Role of the High Commissioner for Refugees' (2000), 137.
[119] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007), para 35.
[120] UNHCR Protection Aspects of UNHCR Activities on Behalf of Internally Displaced Persons' (17 August 1994) UN Doc EC/1994/SCP/CRP.2, para 39.
[121] UNHCR 'Internally Displaced Persons – The Role of the High Commissioner for Refugees' (2000), 37.

> comprehensive approach to protection.[122] In such circumstances, it may be conceptually and operationally difficult to distinguish between the refugees and internally displaced, as was the situation in Mozambique, Sierra Leone, Afghanistan and Guatemala.[123]

That said, the literature to date has also raised some concerns regarding the negative impact IDP protection may have on refugee protection. UNHCR has admitted that assistance to IDPs in their own country may have unintended political consequences. Such a strategy may undermine the concept of the state, state authority, and the obligation of the state itself to provide protection if an international agency will do it instead.[124] Providing safe spaces may also prove to be ineffective, as many of the examples discussed above illustrate. UNHCR has also highlighted some operational concerns stemming from the differences between the categories of IDP and refugee. More often than in refugee situations, IDP operations involve UNHCR working in dangerous and unstable environments not controlled fully by national authorities.[125] IDP operations are also often in situations of international armed conflicts, where UNHCR faces additional challenges such as logistical problems, negotiating access to victims, and staff security.[126] UNHCR is in danger of being manipulated by both external powers as a substitute for political action and by the parties to the conflict who seek to divert humanitarian aid.[127] More generally, UNHCR's involvement with IDPs could put further strain on what are already over-stretched UNHCR resources,

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[122] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007), para. 35. See also UNHCR Protection Aspects of UNHCR Activities on Behalf of Internally Displaced Persons' (17 August 1994) UN Doc EC/1994/SCP/CRP.2, para 15.
[123]UNHCR 'Internally Displaced Persons – The Role of the High Commissioner for Refugees' (2000), 37.
[124] Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism*, 20.
[125] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007), para 39.
[126] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007), para 39.
[127] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007), para 39.

which will inevitably affect the UNHCR's primary mandate, that is, the protection of refugees.[128]

Three further aspects of conflict may arise. First, as the above examples of 'safe havens' illustrate, the primary motivation behind IDP discourse could be to serve the political interests of refugee-receiving states. In this sense, states could justify the closure of borders which prevents IDPs from fleeing the country and seeking asylum abroad.[129] Secondly, protection activities on behalf of IDPs could be seen as providing an 'Internal Flight Alternative', and thus those claiming asylum will not be recognised as refugees as lack of protection is a key criterion in order to fulfil the refugee definition.[130] Finally, protection activities on behalf of IDPs from agencies other than the UNHCR could trigger the application of Article 1D of the Refugee Convention, which would render the Refugee Convention inapplicable to those persons.[131] The validity of these concerns is demonstrated by the fact that the General Assembly has repeatedly asserted that activities on behalf of IDPs must not undermine the institution of asylum.[132] This concern is also reflected in Principle 15(c) of the Guiding Principles on Internal Displacement, which reaffirms the right of IDPs to seek asylum.[133]

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[128] UNHCR 'UNHCR's Expanded Role in Support of the Inter-Agency Response to Internal Displacement Situations' (8 June 2006) UN Doc EC/57/SC/CRP.18, 12.
[129] Barutciski, 'The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992–94); UNHCR 'UNHCR's Expanded Role in Support of the Inter-Agency Response to Internal Displacement Situations' (8 June 2006) UN Doc EC/57/SC/CRP.18, 12.
[130] UNHCR 'UNHCR's Expanded Role in Support of the Inter-Agency Response to Internal Displacement Situations' (8 June 2006) UN Doc EC/57/SC/CRP.18, 12.
[131] UNHCR 'UNHCR's Expanded Role in Support of the Inter-Agency Response to Internal Displacement Situations' (8 June 2006) UN Doc EC/57/SC/CRP.18, 12.
[132] UNGA Res 49/169 (23 December 1994) UN Doc A/RES/49/169; UNGA Res 50/152 (9 February 1996) UN Doc A/RES/50/152.
[133] UNCHR, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.

The UNHCR has identified criteria that would indicate that its activities with IDPs are being relied upon by refugee-receiving states to deny asylum. These include border closure; large-scale deployment of security or immigration personnel at frontiers; policies or measures restricting or preventing departure from the country; denial of admission at borders; denial of access to asylum procedures; systematic rejection of refugee status or other protected status for those who have left their country of origin as a result of the conflict; decisions by adjudicating bodies that these persons have an 'Internal Flight Alternative' and are therefore not in need of international protection; *refoulement*; actions to create 'safe' enclaves, with people fleeing the conflict being forced to move or return to these areas within a country of origin; and denial of access of UNHCR to persons having crossed the border.[134]

Should any of these indicators arise, the UNHCR has stated that it would 'undertake strong representations to ensure that the option and ability to realise asylum is always available.'[135] This could eventually lead to UNHCR withdrawing from an IDP operation, and the Inter-Agency Standing Committee ('IASC') has endorsed a mechanism within the cluster leadership approach to ensure the timely identification of another agency to take on the leadership role.[136] This raises two important questions: first, if UNHCR decided not to get involved in an IDP situation, or to withdraw, is there a risk that another agency's involvement might undermine asylum? Second, to what extent might UNHCR be able to withdraw from IDP

[134] UNHCR EXCOM 'UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement: Policy Framework and Implementation Strategy' (4 June 2007) UN Doc EC/58/SC/CRP.18, paras 44, 46.
[135] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007), 11.
[136] UNHCR EXCOM 'UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement: Policy Framework and Implementation Strategy' (4 June 2007) UN Doc EC/58/SC/CRP.18, para 50. The IASC is a unique inter-agency form for coordination, policy development and decision-making involving the key UN and non-UN humanitarian partners.

protection without endangering its protection role in relation to IDPs?[137] However, it is submitted that the more important issue is whether such actions of refugee-receiving states interpreting IDP protection measures as a substitute for asylum would actually be in breach of international law obligations and it is this question that will be the concern of this thesis.

7. Methodology and Sources

The methodology employed in this thesis is primarily of a doctrinal nature and this thesis' question centres on an interpretation of the Refugee Convention in light of recent developments in IDP protection. In accordance with the rules set out in the 1969 Vienna Convention on the Law of Treaties,[138] this thesis examines the Refugee Convention 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' To establish the context of the Refugee Convention, this thesis has regard to the subsequent agreements between the parties relating to the treaty, such as the 1967 Protocol Relating to the Status of Refugees.[139] The context of the Refugee Convention also includes subsequent practice in the application of the treaty,[140] which for the purposes of this thesis includes domestic court decisions in Canada, New Zealand, Australia, the United Kingdom, and France; as well as any rules of international law applicable between the parties such as the European Convention on

[137] Feller, 13.
[138] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[139] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
[140] 'It is a general principle of law, which has been applied in many contexts, that a party's attitude, state of mind or intentions at a later date can be regarded as good evidence – in relation to the same or a closely connected matter - of his attitude, state of mind or intentions at an earlier date also; provided of course that there is no direct evidence rebutting the presumption thus raised.' (*Temple of Preah Vihear* (*Cambodia v Thailand*) (Judgment) [1962] I.C.J. Rep 61, 119).

Human Rights,[141] the International Covenant on Civil and Political Rights,[142] and the International Covenant on Economic, Social, and Cultural Rights.[143] Decisions from international courts are also examined by this thesis to establish the Refugee Convention's context as well as regional systems of law such as that of the EU. Where the meaning of a particular phrase is unclear, recourse is had to the preparatory work of the Refugee Convention such as draft versions of the Convention and statements made by delegates at the time of drafting.

In terms of secondary sources, documents produced by the UNHCR provide valuable guidance on how the Convention should be interpreted, particularly in light of the fact that one of the High Commissioner's functions is to supervise the application of international conventions for the protection of refugees.[144] Thus the UNHCR website is frequently referenced in this work, as well as various UNHCR guidelines and handbooks on refugee protection. Country of origin guidelines from various jurisdictions and reports from national refugee councils, most notably the Danish Immigration Service, have been cited in this thesis, as well as soft law instruments such as the Guiding Principles on Internal Displacement. Legal commentary from publicists such as Phuong, Goodwin-Gill, Hathaway, Shacknove, and McAdam has also provided valuable guidance on the interpretation of the Refugee Convention.

However, IDP and refugee protection cannot be examined solely in its legal context. Account must be taken of the realities and practicalities of the issues that this

[141] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
[142] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[143] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[144] UNGA 'Statute of the Office of the United Nations High Commissioner for Refugees', Annex to Res 428/V (14 December 1950) UN Doc A/RES/428(V), para 8(a).

thesis deals with, and therefore this thesis has also engaged in non-doctrinal research. UNHCR documents have been examined in this regard, as well as documents emanating from other UN bodies and institutions, such as the Human Rights Council and the Special Rapporteur on the Human Rights of Internally Displaced Persons. Other useful sources include newspaper articles, non-legal commentary (most notably that published in the Forced Migration Review), and publications by organisations such as Human Rights Watch, Amnesty International, the European Council on Refugees and Exiles, and the European Legal Network on Asylum. This author also engaged in discussions with stakeholders such as Professor Chaloka Beyani, UN Special Rapporteur for the Human Rights of Internally Displaced Persons; Pia Oberoi, Office of the UN High Commissioner for Human Rights; and Allehone Abebe, Nina Schrepfer, Jonathan Hoskins, and Jackie Keegan of the UNHCR for their thoughts on the subject of this thesis.

8. Thesis Contents

Although this thesis is contextualised by the realities and practicalities of forced migration, it is primarily legal in nature. Logistical, resource, and financial issues are referred to briefly and are not explored in great depth. This introductory chapter has set out the differences between IDPs and refugees and the evolution of the internal displacement phenomenon, referring to specific situations that illustrate the contemporary debates on this question and the general relevance of this thesis. Chapter 2 is the first with a doctrinal focus, setting out the legal and institutional protection (or lack thereof) available for IDPs.

There is a possibility that IDP protection measures may be interpreted as an 'Internal Flight Alternative' and used by governments to deny refugee status. Chapter 3 will address this issue by first briefly tracing the development of the IFA concept by explaining its relationship with the refugee definition. The analysis will then turn to the issue upon which state practice, UNHCR publications and academic writing have been divided the most - the relevance of human rights protection in the proposed IFA. Three jurisdictions will be examined: Canada, New Zealand, and the United Kingdom. This chapter will also examine the work of Hathaway and the arguments put forward by others that the Guiding Principles on Internal Displacement and the Refugee Convention's cessation clauses are to be taken into account when determining the existence of an IFA. This chapter will determine which of these interpretations, if any, is most compatible with the Convention text.

Chapter 4 will examine whether, and if so, under what circumstances, protection afforded by non-state actors (e.g. international organisations such as the UNHCR) to IDPs may amount to an IFA. Although the Refugee Convention refers to protection by an asylum seeker's country of nationality, it does not specify that such protection must be provided exclusively by the state, as opposed to being provided on the territory of the country of nationality. Article 7 of the Recast 2011 EC Qualification Directive sets out that 'protection' may be provided by 'international organizations, controlling the State or a substantial part of the territory of the State.'[145] By examining relevant jurisprudence, this chapter will determine the criteria which need to be satisfied before an international organisation will qualify as an actor of protection for the purposes of the refugee definition. These criteria will be

[145] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

applied by analogy to the UNHCR, owing to its role in the protection of IDPs. Despite the fact that there are numerous organisations who assist IDPs, the focus of this thesis is on the work of the UNHCR. This is because the UNHCR's primary mandate is to protect refugees, and thus its involvement with IDPs will illustrate most clearly where complementarities and conflicts will arise between refugee and IDP protection.

If an asylum seeker is found not to satisfy the refugee definition by virtue of having an IFA, is return by the state to the country of origin prohibited on the grounds that the asylum seeker will become an IDP? Chapter 5 will examine the jurisprudence of human rights courts and treaty monitoring bodies to determine where these institutions have found that removal would violate the human rights treaty in question and will set out the circumstances under which a person may rely on the human rights law to prevent expulsion to a territory where he or she would become internally displaced.

Chapter 6 will examine whether an approach to IDP protection which involves actors of protection other than the UNHCR could trigger the application of Article 1D of the Convention. This article states that the Convention 'shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.' An examination of the literature and case law on this topic will reveal whether Article 1D has any application beyond its historical context.

This thesis will conclude by summarising the findings of this research. It will also set out future challenges in the relationship between the protection of IDPs and International Refugee Law, and will set out questions that have been left open for

further research. The research results of this thesis will shed light on the legal implications of the activities of the UNHCR and various stakeholders in IDP protection. In addition, it will question the legality of various bases upon which states deny refugee status and thus will be of interest to practitioners. Finally, as this thesis deals with a topic which in factual terms is of great importance but which, in scholarly terms, has been largely neglected, it is expected to yield numerous publications.

CHAPTER 2: LEGAL AND INSTITUTIONAL PROTECTION OF IDPS

1. The International Legal Framework of IDP Protection

The inadequacy of IDP protection is illustrated by the scarcity of legal provisions governing this area. By virtue of remaining inside an international frontier, IDPs are not allocated a legal status and until recently, had no treaty specifically for their protection. IDPs are nonetheless protected by human rights and humanitarian law, and by analogy, refugee law.[146]

1.1 International Human Rights Law

It should be noted that with the exception of two regional instruments,[147] there is no explicit prohibition of internal displacement in any legally binding international agreement. Human rights law is nonetheless relevant as it applies to all humans without distinction. However, some instruments contain provisions that are particularly relevant to the internally displaced.

- *International Covenant on Civil and Political Rights 1966 ('ICCPR')*:[148] Article 12 of the ICCPR protects freedom of movement and thus forced displacement is *prima facie* unacceptable under that Covenant.[149] This has been confirmed by the Human Rights Committee in General Comment 27, which noted that 'the right to reside in a place of one's choice within the

[146] Joan Fitzpatrick, 'Human Rights and Forced Displacement: Converging Standards', in Anne F. Bayefsky and Joan Fitzpatrick (eds), *Human Rights and Forced Displacement* (Martinus Nijhoff 2000), 3; Walter Kälin, 'The Role of the Guiding Principles on Internal Displacement' (2005) Forced Migration Review 8, 8.
[147] The Kampala Convention (Art 3(1)(a)), and the Great Lakes Protocol on IDPs (Art 3(1)) both oblige states to prevent arbitrary displacement.
[148] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[149] Martin Scheinin, Forced Displacement and the Covenant on Civil and Political Rights in Bayefsky and Fitzpatrick, 66.

territory includes protection against all forms of internal displacement.'[150] Similarly, Article 26 of the same instrument sets forth the principles of equality and non-discrimination, while the right to liberty and security of the person is protected by Article 9. In addition, Article 17 provides that no-one shall be subjected to arbitrary or unlawful interference with, *inter alia*, his home, and the Human Rights Committee has found that forced evictions can result in a violation of this provision.[151] However, articles 12, 17, 26, and many others may be derogated from in time of emergency,[152] provided the criteria set out by Article 4 are satisfied.[153]

- *International Covenant on Economic, Social and Cultural Rights 1966 ('ICESCR')*:[154] Article 11 of this Covenant protects the right to an adequate standard of living, including the right to adequate housing. In General Comment 7, the Committee on Economic, Social and Cultural Rights was of the view that Article 11 entails 'the right to be protected against "arbitrary or unlawful interference" with one's home', and that this right 'is not qualified by considerations relating to its available resources.'[155] In addition, the

[150] UN Human Rights Committee 'General Comment No. 27: Article 12 (Freedom of Movement)' (1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 7.
[151] UN Human Rights Committee, *Chiti v Zambia* Communication No. 1303/2004 (2012) UN Doc CCPR/C/105/D/1303/2004; UN Human Rights Committee, *Naidenova v Bulgaria* Communication No. 2073/2011 (2012) UN Doc CCPRC/106/D/2073/2011 [15].
[152] Article 4(2) of the ICCPR provides that no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made.
[153] Article 4 of the ICCPR states that the measures taken must be 'strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [the state party's] other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.' Additionally, any State Party availing of the right of derogation must immediately inform the Secretary-General of the United Nations, and must further inform him when the derogation is terminated.
[154] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[155] Committee on Economic, Social, and Cultural Rights 'General Comment no. 7: Article 11.1 (The Right to Adequate Housing: Forced Evictions)' (1997) UN Doc E/1998/22, para 8.

Committee held that 'evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.'[156]

- *Convention on the Elimination of All Forms of Racial Discrimination 1965 ('CERD')*:[157] Article 5 of the CERD prohibits discrimination and guarantees, *inter alia*, the rights of security of the person, freedom of movement, and housing. General Recommendation XXII of the Committee on the Elimination of all Forms of Racial Discrimination sets out that Article 5 entails the right of IDPs of voluntary and safe return to their homes and the right to restoration and compensation of property that was seized during displacement.[158] General Recommendation XXII also asserts that the obligation of non-*refoulement* attaches to states *vis-à-vis* IDPs.[159]
- *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984*:[160] Article 16 of the CAT provides that States Parties:

> 'shall undertake to prevent in any territory under its jurisdiction […] acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture […] when such acts are committed by or at the instigation of or with the consent or acquiescent of a public official or other person acting in an official capacity.'

The Committee against Torture has found that forced evictions resulting in internal displacement can amount to a violation of Article 16 even where such

[156] Committee on Economic, Social, and Cultural Rights 'General Comment no. 7: Article 11.1 (The Right to Adequate Housing: Forced Evictions)' (1997) UN Doc E/1998/22, para 16.
[157] International Convention for the Elimination of all Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.
[158] UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXII (Article 5 and Refugees and Displaced Persons)' (1996) UN Doc A/51/18, Annex VIII paras 2 (a) and (c).
[159] UN Committee on the Elimination of Racial Discrimination 'General Recommendation XXII (Article 5 and Refugees and Displaced Persons)' (1996) UN Doc A/51/18, Annex VIII, para 2(b).
[160] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

evictions are not carried out by public officials.[161] In addition, the Committee has held that Israel's policies of demolishing housing may amount to cruel, inhuman or degrading treatment in violation of Article 16.[162]

- *International Labour Organisation Conventions (No. 169 and 107)*: Article 16 of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) provides that the peoples to which the Convention applies shall not be removed from the lands which they occupy.[163] Similarly, Article 12 of the Indigenous and Tribal Populations Convention, 1957 (No. 107) provides that:

> [t]he populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.[164]

- *Convention on the Prevention and Punishment of the Crime of Genocide 1948 ('Genocide Convention')*:[165] Article 2(e) of the Genocide Convention lists the forcible transfer of children as an act that may, under certain circumstances, constitute genocide.

Notwithstanding these provisions, the application of human rights law is limited in the sense that where a norm does not form part of customary international law, it is only applicable insofar as the state is bound by the treaty in question. The effectiveness of human rights law in the protection of IDPs is further constrained by

[161] UN Committee against Torture, *Hajrizi Dzemajl et al. v. Yugoslavia* (2002) UN Doc CAT/C/29/D/161/2000.
[162] UN Committee Against Torture 'Report of the Committee Against Torture: Israel' (17 May 2002) UN Doc A/57/44, paras 52-53.
[163] Indigenous and Tribal Peoples Convention (No. 169), 1650 UNTS 383. (adopted 27 June 1989, entered into force 5 September 1991).
[164] 1957 Indigenous and Tribal Populations Convention (No. 107).
[165] Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

the fact that it does not generally apply to non-state actors and that it has weak enforcement mechanisms.

1.2 Regional Human Rights Law

- *European Convention on Human Rights 1955 ('ECHR')*:[166] Despite the fact that there is no explicit prohibition of internal displacement contained in the ECHR, in examining situations of internal displacement, the European Court of Human Rights ('ECtHR') has found violations of Article 8 (respect for private and family life, home and correspondence),[167] Article 3 (the prohibition of torture and inhuman or degrading treatment or punishment),[168] Article 13 (the right to an effective remedy),[169] and Article 1 of Protocol 1 (the right to peaceful enjoyment of possessions).[170] However, the Court has not gone as far as explicitly stating that internal displacement, *per se*, is incompatible with the ECHR. As a matter of fact, it has considered the Internal Flight Alternative, as outlined above, as compatible with the

[166] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
[167] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Xenidin-Arestis v Turkey* App no 46347/99 (ECHR, 22 December 2005); *Demades v Turkey* App no 16219/90 (ECHR, 31 October 2003); *Yoyler v Turkey* App no 26973/95 (ECHR, 24 July 2003); *Mentes and Others v Turkey* App no 58/1996/677/867 (ECHR, 28 November 1997).
[168] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Yoyler v Turkey* App no 26973/95 (ECHR, 24 July 2003); *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011); *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007); *Dulas v Turkey* App no 25801/94 (ECHR, 30 January 2001).
[169] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Yoyler v Turkey* App no 26973/95 (ECHR, 24 July 2003); *Dogan v Turkey* App no 29361/07 (ECHR, 27 May 2010); *Dulas v Turkey* App no 25801/94 (ECHR, 30 January 2001).
[170] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Xenidin-Arestis v Turkey* App no 46347/99 (ECHR, 22 December 2005); *Demades v Turkey* App no 16219/90 (ECHR, 31 October 2003); *Yoyler v Turkey* App no 26973/95 (ECHR, 24 July 2003); *Dogan v Turkey* App no 29361/07 (ECHR, 27 May 2010); *Dulas v Turkey* App no 25801/94 (ECHR, 30 January 2001).

ECHR.[171] Thus in many circumstances, internal displacement has not been found to be inconsistent with the ECHR.

- *African Charter on Human and People's Rights 1981 ('Banjul Charter')*:[172] The Charter does not explicitly prohibit internal displacement. However similar to the above instruments, numerous provisions protect rights which may be violated in the course of displacement. In case ***279/03-296/05: Sudan Human Rights Organisation & Centre for Housing Rights and Evictions (COHRE)/ Sudan***,[173] the African Commission on Human and People's Rights found that the internal displacement by Sudan of the indigenous black tribes in the Darfur region violated numerous provisions of the Banjul Charter. These included the prohibition of cruel, inhuman or degrading punishment and treatment (Article 5); the obligation to respect the liberty and security of the person (Article 6); the right to be heard (Article 7); the right to freedom of movement (Article 12); the right to property (Article 14); the right to enjoy the best attainable state of physical and mental health (Article 16); protection of family rights (Article 18); and the right of all peoples to economic, social and cultural development (Article 22). In addition, the Commission has the broadest jurisdiction of all the supervisory bodies discussed in this chapter, as it can consider 'any other relevant human rights instrument ratified by the States concerned'.[174]

[171] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011); *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007).
[172] 1981 African (Banjul) Charter on Human and Peoples' Rights 21 I.L.M. 58.
[173] *Sudan Human Rights Organisation & Centre for Housing Rights and Evictions (COHRE) v Sudan,* 209/03 – 296/05, African Commission on Human and People's Rights (13-27 May 2009).
[174] 1998 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, Oau Doc. Oau/Leg/Exp/Afchpr/Prot (Iii).

- *American Convention on Human Rights 1969 ('ACHR')*:[175] The Inter-American Court on Human Rights and Inter-American Commission on Human Rights have found multiple violations of the ACHR in situations concerning internal displacement. These rights include Article 5 (right to humane treatment),[176] Article 7 (right to personal liberty),[177] Article 11(2) (protection of honour and dignity),[178] Article 19 (protection of the child),[179] Article 21 (right to property),[180] Article 22 (freedom of movement),[181] and Articles 8 and 25 of the Convention (judicial guarantees and judicial protection) in relation to Article 1(1) (obligation to respect rights).[182]

- *American Declaration on the Rights and Duties of Man 1949 ('ADRDM')*:[183] The ADRDM also contains rights which may be violated in situations of internal displacement. These include Article V (the right to the protection of personal honour and reputation, and to private and family life), Article VI (the right to a family and protection thereof), Article VIII (the right to residence

[175] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144.
[176] *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *La Granja, Ituango v Colombia,* Inter-American Commission of Human Rights Report No 5700 (2 October 2000).
[177] *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005).
[178] *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *La Granja, Ituango v Colombia,* Inter-American Commission of Human Rights Report No 5700 (2 October 2000).
[179] *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *La Granja, Ituango v Colombia,* Inter-American Commission of Human Rights Report No 5700 (2 October 2000).
[180] *Case of the Moiwana Community v Suriname*, Inter-American Court of Human Rights Series C No 124 (15 June 2005); *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *La Granja, Ituango v Colombia,* Inter-American Commission of Human Rights Report No 5700 (2 October 2000) .
[181] *Case of the Moiwana Community v Suriname*, Inter-American Court of Human Rights Series C No 124 (15 June 2005); *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *La Granja, Ituango v Colombia,* Inter-American Commission of Human Rights Report No 5700 (2 October 2000).
[182] *Case of the Moiwana Community v Suriname*, Inter-American Court of Human Rights Series C No 124 (15 June 2005); *La Granja, Ituango v Colombia*, Inter-American Commission of Human Rights Report No 5700 (2 October 2000).
[183] 1948 American Declaration on the Rights and Duties of Man O.A.S. Res. XXX.

and movement), Article IX (the right to inviolability of the home), Article XI (right to the preservation of health and well-being), and Article XXIII (the right to property).

1.3 International Humanitarian Law

Humanitarian law also provides protection to the internally displaced. Its protection is more comprehensive during an international conflict as the Geneva Convention relative to the Protection of Civilian Persons in Time of War ('Fourth Geneva Convention') and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ('Additional Protocol I') are applicable.[184] Article 49 of the former Convention prohibits individual or mass forcible transfers, and this provision forms part of customary international law.[185]

The applicability of humanitarian law in non-international armed conflict is much less. Such limited coverage is regrettable, considering that the largest amount of IDPs is created during internal armed conflict and it is in that situation that the need for specific protection arises.[186] However, common Article 3 of the Geneva Conventions ('Common Article 3'),[187] is applicable in situations of 'armed conflict

[184]1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War ('Fourth Geneva Convention') (adopted 12 August 1949, entered into force 21 October 1950) 75 UNT.S. 287; 1977 Declaration on Territorial Asylum (Adopted by the Committee of Ministers on 18 November 1977 at the 278th Meeting of the Ministers' Deputies).

[185] T.M.C. Asser Instituut, *Yearbook of International Humanitarian Law* (T.M.C Asser Press 1998), 261.

[186] Catherine Phuong, *The International Protection of Internally Displaced Persons* (Cambridge University Press 2004), 41.

[187] 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ('First Geneva Convention') (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ('Second Geneva Convention') (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War ('Third Geneva Convention'), (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Fourth Geneva Convention.

not of an international character'. It requires that parties to such a conflict shall be required to apply 'at a minimum' the following provisions:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Common Article 3 has been declared by the International Court of Justice as forming part of customary international law,[188] and therefore applies regardless of whether the state in question is a party to the Geneva Conventions. However, these provisions are

[188] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, 104.

'almost skeletal' when compared to the rules applicable to international conflicts.[189] Nonetheless, the guarantees applicable in non-international armed conflicts are expanded upon in Additional Protocol II to the Geneva Conventions.[190] It is composed of 28 articles which contain more detailed provisions on fundamental guarantees, treatment of the wounded and sick, and the protection of the civilian population. Of particular relevance to IDPs is Article 17, which prohibits the forced movement of civilians. Additional Protocol II is only applicable in those states which are parties to it, which excludes many that have serious armed conflicts taking place on their territory. Even then, its threshold of applicability is more restricted than that of Common Article 3. Whereas Common Article 3 applies to any armed conflict occurring within a state, Article 1(1) of the Protocol II provides that it shall apply only to armed conflicts which:

> [...] take place within the territory of [a state party] between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Article 1(2) then adds:

> This Protocol shall not apply to situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Therefore while Additional Protocol II is useful in expanding the protection afforded by Common Article 3, it has a very limited field of applicability, confined essentially to civil wars in which both parties control parts of territory.

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[189] Christopher Greenwood, 'The Law of War (International Humanitarian Law)' in Malcolm D. Evans, *International Law* (2nd edn, Oxford University Press 2006), 807.
[190] Steve Peers, *EU Immigration and Asylum Law, Text and Commentary* (2nd rev. edn, Martinus Nijhoff 2012).

While international human rights law has at least weak enforcement mechanisms, neither the Geneva Conventions nor their Additional Protocols provide for any complaints or enforcement mechanism. Enforcement is primarily left to individual states by means of domestic jurisdiction. Violations of more important provisions of the Geneva Conventions and Additional Protocol I are known as 'Grave Breaches' of those treaties and all states have jurisdiction to prosecute persons accused of these crimes. In addition, the International Criminal Court and various international tribunals have jurisdiction to try war crimes and/or grave breaches of the Geneva Conventions. The remit of such jurisdiction will be expanded upon in more detail in the next section on International Criminal Law.

1.4 International Criminal Law

The United Nations International Criminal Tribunal for the Former Yugoslavia ('ICTY') has jurisdiction to try Grave Breaches of the Geneva Conventions which includes the forcible transfer of civilians.[191] The Tribunal also has the jurisdiction to try war crimes,[192] and Article 4(2)(e) of the ICTY statute includes the forcible transfer of children as an action that may, under certain circumstances, constitute genocide. Article 5(h) and 5(i) list 'persecution' and 'other inhumane acts', respectively, as examples of Crimes against Humanity. The former requires discriminatory intent, and thus forced displacement coupled with this specific intent can constitute 'persecution' and as such, qualify as Crime against Humanity.[193] As for the latter, the Trial Chamber in the ***Kupreškić et al.*** judgment held that forcible displacement within or

[191] UNSC, 'Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)' Res 827 (25 May 1993) UN Doc S/RES/827, art. 2(g).
[192] UNSC, 'Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)' Res 827 (25 May 1993) UN Doc S/RES/827, art. 2(g), art. 3
[193] *Prosecutor v Radislav Krstić* (Judgment) ICTY-98-33-T (2 August 2001).

between national borders is included as an inhumane act under Article 5(i) defining Crimes against Humanity.[194]

The United Nations International Criminal Tribunal for Rwanda ('ICTR') has jurisdiction to try Grave Breaches of the Geneva Conventions.[195] It also includes the forcible transfer of children as an act that may constitute genocide, and the category of 'other inhumane acts' as above, is included as a crime against humanity.

Finally, The International Criminal Court ('ICC') has jurisdiction to try grave breaches of the Geneva Conventions, namely war crimes (whether in an international or non-international context), which may include the transfer of persons within or outside a particular territory and/or 'ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.'[196] In addition, Article 7(i)(d) lists the forcible transfer of a population as an act that may constitute a Crime Against Humanity, and forcible transfer is defined as 'forced displacement of the persons concerned by expulsion or any other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'[197] Further, Article 6(e) lists the forcible transfer of children as an act that may constitute the crime of Genocide.

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[194] *Prosecutor v. Kupreškić et al* (Judgment) ICTY-95-16-T (14 January 2000) [566].
[195] UNSC, 'Statute of the International Criminal Tribunal for Rwanda' Res 955 (8 November 1994) UN Doc S/RES/955, art. 4.
[196] 1998 Rome Statute of the International Criminal Court (adopted 17 July 1988, entered into force 1 July 2002) 2187 UNTS 90, arts. 8(2)(a)(vii), 8(2)(b)(viii), 8(2)(e)(viii).
[197] Ibid art 7(2)(d).

1.5 International Refugee Law

Finally, refugee law offers a useful example when developing a protection framework for the internally displaced. It can serve as a 'point of comparison' and 'might also inspire standard-setting for internally displaced persons.'[198] Many of the Guiding Principles were inspired by provisions of Refugee Law, including the Refugee Convention,[199] the Convention Governing the Specific Aspects of the Refugee Problem in Africa ('OAU Convention'),[200] and UNHCR documents, such as the 1991 Guidelines on the Protection of Refugee Women and the 1994 Guidelines on the Protection and Care of Refugee Children.[201] Consequently, the influence of Refugee Law may be seen in many of the Guiding Principles. For example, the right of non-*refoulement* which is found in Article 33(1) of the Refugee Convention is set out in Principle 15,[202] notwithstanding that no right in the context of IDPs existed in international law.[203] In addition, the right of voluntary return of IDPs (Principle 28) was influenced by Article 5 of the 1969 OAU Refugee Convention. Finally, inspiration also came from ExCom,[204] in the formulation of the principle of family reunification (Principle 7), which was influenced, in part, by UNHCR ExCom

[198] UNECOSOC, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights Resolution 1995/57, Compilation and Analysis of Legal Norms' (22 February 1996) UN Doc E/CN.4/1996/52/Add.2, para 33; Phuong, 47.
[199] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).
[200] Convention Governing the Specific Aspects of the Refugee Problem in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.
[201] UNHCR 'Guidelines on the Protection of Refugee Women' (1991) UN Doc EC/SCP/ 67; UNHCR 'Refugee Children: Guidelines on Protection and Care' (1994).
[202] UNCHR, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.
[203] Phil Orchard, 'Protection of Internally Displaced Persons: Soft Law as a Norm-Generating Mechanism' (2010) 36 Review of International Studies 281, 284.
[204] The Executive Committee of the High Commissioner's Programme (ExCom) meets in Geneva annually to review and approve UNHCR's programmes and budget, advise on international protection, and discuss a wide range of other issues with UNHCR and its intergovernmental and non-governmental partners.

Conclusion No. 24 (XXXII) - 1981 which states that '[...] every effort should be made to ensure the reunification of separated refugee families.'[205]

2. Soft Law

2.1 The Guiding Principles on Internal Displacement

In 1992 IDPs worldwide numbered 25 million.[206] As outlined above, the protection afforded to IDPs under international law was not comprehensive and varied according to circumstance. Following a request from the UN Commission on Human Rights,[207] the UN Secretary-General appointed Mr. Francis Deng as his Representative on Internally Displaced Persons. One of Mr. Deng's tasks was to direct a team of experts in examining the existing legal protection for IDPs which resulted in a report entitled the 'Compilation and Analysis of Legal Norms.'[208] The report concluded that there remained some gaps in IDP protection, it identified a need 'to restate general principles of protection in more specific detail', and finally, it advocated the creation of 'a future international instrument on the protection of the internally displaced.'[209]

The General Assembly heeded this suggestion, and together with the Commission on Human Rights it requested Mr. Deng to create an 'appropriate'

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[205] UNHCR EXCOM Conclusion No 24 (XXXII) 'Family Reunification' (1981).
[206] Francis Deng, 'As Conflict Rages Across the Globe, People are Not Protected in Their Own Country', MIT Centre for International Studies, 4 June 2007 http://www.alternet.org/world/52544/?page=entire accessed 27 May 2014.
[207] UNCHR Res 1992/73 (5 March 1992) UN Doc E/CN.4/RES/1992/73.
[208] UNCHR 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.
[209] UNECOSOC, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights Resolution 1995/57, Compilation and Analysis of Legal Norms' (22 February 1996) UN Doc E/CN.4/1996/52/Add.2, para. 413.

framework for the protection of IDPs.[210] The form of the framework was unspecified, and consequently the Representative decided to elaborate a set of non-binding Guiding Principles. The 30 principles were divided into five parts – i) General Principles; ii) Principles Relating to Protection from Displacement; iii) Principles Relating to Protection During Displacement; iv) Principles Relating to Humanitarian Assistance and v) Principles Relating to Return, Resettlement and Reintegration.

(a) A Treaty on Internal Displacement?

At first glance, it may have seemed preferable to employ a legally binding treaty. Nonetheless, in the specific context of IDPs, the decision to use a non-binding instrument was probably a wise one. When the Guiding Principles were being drafted, there was virtually no governmental support for a convention and the decision to use a non-binding instrument may be seen as an attempt to mitigate sovereignty concerns.[211] Furthermore, the issue of IDPs was extremely sensitive and international organisations feared that a binding convention could undermine the Refugee Convention. There was concern that legally binding IDP protection could be used by governments as an excuse to deny asylum, citing an IFA as a basis for which to deny refugee status.[212]

Additionally, with the number of IDPs outnumbering that of refugees, it was clear that the need for protection was urgent. Treaty negotiation could take decades,

[210] UNCHR Res 1996/52 (19 April 1996) UN Doc E/CN.4/RES/1996/52.
[211] Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' 10 Global Governance: A Review of Multilateralism and International Organizations (2004) 459, 464
[212] Ibid, 464; Phuong, 39; Erika Feller, 'UNHCR's Role in IDP Protection: Opportunities and Challenges' (2006) Forced Migration Review 11; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 157. See also Council Directive (EC) 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L304/12, which allows Member States to take into account internal protection measures in determining eligibility for asylum.

whereas a non-binding instrument could be drafted in a much shorter space of time.[213] It was feared that governments would use negotiations as an opportunity to water down existing human rights law by creating an IDP protection framework that was weaker than those existing provisions applicable to the internally displaced.[214] The International Committee of the Red Cross (ICRC) believed it would be difficult to reach consensus on the term 'displaced persons' since the result would be the lowest common denominator, and this would be a depletion of existing IDP protection.[215] Additionally, governments could use the opportunity to weaken the development of human rights norms as customary international law by denouncing their validity.[216]

Moreover, there was no guarantee that a treaty would be successful, or that it would attract the number of ratifications necessary for it to come into force.[217] This was the case for the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,[218] which only entered into force twelve years after its initial adoption by the General Assembly.[219]

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[213] Cohen, 464; Alan E. Boyle and Christine M. Chinkin, *The Making of International Law* (Oxford University Press 2007), 214; Walter Kalin, 'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework' (Roundtable Meeting, Ralph Bunche Institute for International Studies, CUNY Graduate Centre, 19 December 2001), 2; David Fisher, 'Epilogue: International Law on the Internally Displaced Persons', in Paula Banerjee, Sabyasachi Basu Ray Chaudhury and Samir Kumar Das, *Internal Displacement in South Asia : the Relevance of the UN's Guiding Principles* (SAGE 2005), 318.

[214] Jeff Crisp, 'Forced Displacement in Africa: Dimensions, Difficulties and Policy Considerations', New Issues in Refugee Research 2006 http://www.unhcr.org/refworld/pdfid/4ff15cc42.pdf accessed 3 October 2012, 12.

[215] International Committee of the Red Cross, 'The ICRC and Internally Displaced Persons' (1995) 305 International Review of the Red Cross 182, 185; Jean-Phillippe Lavoyer, 'Refugees and IDPs: International Humanitarian Law and the Role of the ICRC' (1995) 305 International Review of the Red Cross 162, 170.

[216] Cohen, 464.

[217] Kalin, 3.

[218] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 39481.

[219] Migrant Workers Need Protection: UN Treaty Comes into Force', Human Rights Watch, Press Release, 30 June 2003 http://www.hrw.org/en/news/2003/06/30/migrant-workers-need-protection accessed on 8 October 2012.

Finally, it was felt that it was too early to draft a treaty on IDPs as it would entail a merging of human rights and humanitarian law.[220] While some rights may be exclusively matters of international humanitarian law, some may be the sole concern of human rights and others may fall within the remit of both disciplines.[221] Accordingly, the distinction between both branches of law, notably, the presence of an armed conflict, is fundamental, and it was feared that many states would have opposed the combination of the two.[222]

(b) The Legal Weight of the Guiding Principles on Internal Displacement

The publication of the Guiding Principles on Internal Displacement ('Guiding Principles') has been described as a 'benchmark'[223] and a 'watershed event'[224] in the area of IDP protection. Under the leadership of Francis Deng, the then-Representative of the Secretary-General on Internally Displaced Persons, the Guiding Principles were submitted to the Human Rights Commission in 1998 and aimed to 'address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection.'[225] However, the legal status of the Guiding Principles is unclear and the question remains whether they offer any substantial additional legal protection to the internally displaced. Their legal authority may be challenged on three grounds: First, they were not drafted by states and were in fact met by considerable hesitation by some states in the General Assembly. Secondly, not

[220] Kalin, 3.
[221] *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [106]; Theodor Meron, *Human Rights in Internal Strife : their International Protection* (Grotius Publications 1987), 27.
[222] Kalin, 4.
[223] John Holmes, 'Ten Years of the Guiding Principles' (2008) Forced Migration Review 3.
[224] John Bennett, 'Forced Migration within National Borders: The IDP Agenda' (1998) 1 Forced Migration Review 4, 5.
[225] UNCHR, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.

all Principles reflect hard law and thus are not, *ipso facto*, legally binding. Finally, although the Principles have been referred to in the resolutions of international organisations and have influenced domestic policies, they are not opposable to states.

Regarding the legal foundation of the Principles, the drafters of the Guiding Principles claimed they were careful 'to not go beyond what can be based on existing international law'.[226] Nonetheless, when drafting the Principles they noted that gaps remained in the protection of IDPs. Further examination reveals that some of the Guiding Principles have little or no counterparts in existing law, and thus represent the declaration of new rights. Take for example, Principle 15:

> Internally displaced persons have:
>
> […]
>
> (d) the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

With regard to paragraph (d), there is no provision of international law that applies the above principle to the internally displaced. Indeed, Walter Kälin, the former Representative of the Secretary General on the Human Rights of Internally Displaced Persons acknowledged that this 'states a novel principle with no direct antecedent in existing instruments.'[227] Nonetheless, the drafters of the Guiding Principles found it appropriate to draw an analogy with Article 33(1) of the Refugee Convention. This provision encompasses the right of non-*refoulement*, that is, that no refugee may be expelled to territories where his life or freedom would be threatened on the basis of race, religion, nationality, membership of a particular social group or political

[226] Walter Kälin, 'The Guiding Principles on Internal Displacement - Introduction' (1998) 10 International Journal of Refugee Law 557, 562.
[227] Walter Kälin, 'Guiding Principles on Internal Displacement Annotations' (2008) 38 Studies in Transnational Legal Policy 69.

opinion. As noted by the drafters of the Principles, this is an entirely new principle as regards IDPs,[228] and thus it is somewhat curious to claim that the Principles are based solely on existing or implied law.

Similarly, Principle 29 is also located in the grey area between *lex lata* and *lex ferenda*. The principle deals with restitution for property loss and recognises a duty of authorities to assist IDPs in recovering dispossessed property. When such recovery is not possible, 'competent authorities shall provide or assist those persons in obtaining appropriate compensation or another form of just reparation.' When the Guiding Principles were being drafted, the right to reclaim property was not established in international law.[229] No explicit provision guaranteeing the right of restitution of property has been formulated in the main human rights instruments and the principle of compensation for property loss has been developed mainly by the regional bodies, i.e. the European Court of Human Rights and the Inter-American Commission on Human Rights.[230] As noted by Williams, the entitlement to legal remedies for property confiscation was defined by international human rights law as a procedural right to a fair hearing, without identifying a specific right to restitution.[231] As a matter of fact, Principle 29 appeared to anticipate the development of the law, since, at the time of drafting, 'the question as to whether nationals are generally entitled to compensation for losses of their property […] probably [had] to be answered in the negative.'[232] The fact that the drafters were unable to clarify the meaning of 'property' in the Guiding Principles further highlights the lack of legal provisions

[228] Ibid, 69.
[229] Phuong, 64.
[230] Ibid, 64. See also, for example, *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005).
[231] Rhodri C Williams, 'Guiding Principle 29 and the Right to Restitution' (2008) Forced Migration Review 23, 23.
[232] R. Hofmann, 'International Humanitarian Law and the Law of Refugees and Internally Displaced Persons,' in *Law in Humanitarian Crisis* (Brussels 1995), 297 as cited in Phuong, 64.

governing this area. Nonetheless, the drafters of the Guiding Principles concluded that a right to restitution existed, and Principle 29 provides for a right to compensation where recovery for dispossessed property is not possible.

It is questionable therefore whether all Guiding Principles have a solid background in international law, and indeed, even Walter Kälin could only go so far as to say that 'no new law in the strict sense of the word was created in most cases.'[233] [emphasis added]. However, there is no way at all that the Guiding Principles could have created new law, as they were not the product of states.

That said, although not *ipso facto* legally binding, the Guiding Principles have been quite influential in domestic spheres. Both Burundi and Angola passed legislation in which the preamble recognises the Guiding Principles as authoritative.[234] Other governments, such as those of Georgia, Liberia, Nepal and Sri Lanka have used the Principles as a basis for domestic laws and policies. The most significant of all has been the acceptance of the Guiding Principles in Colombia. Laws, decrees and policies that reflect the Guiding Principles on Internal Displacement have been enacted, and Colombia's laws on internal displacement are now among the most advanced in the world.[235] The Constitutional Court has held that the national authorities are bound by the Guiding Principles,[236] and must carry out

[233] Walter Kälin, 'The Future of the Guiding Principles on Internal Displacement' (2006) Forced Migration Review 5, 5.
[234] Protocol for the Creation of a Permanent Framework for Consultation on the Protection of Displaced Persons (2001) (Burundi); Council of Ministers Decree No. 1/01 (2002) (Angola); Council of Ministers Decree No. 79/02 (2002) (Angola).
[235] UNHCR, 153.
[236] Constitutional Court Decision T-025 (2004); Constitutional Court Decision SU-1150 (2000); Constitutional Court Decision T-327 (2001).

IDP protection 'in conditions that are compatible with full respect for the Guiding Principles.'[237]

The Guiding Principles have also been referenced by resolutions of the General Assembly. In 2000, the General Assembly described the Principles as part of 'a comprehensive framework for the protection of internally displaced persons.'[238] The language of the relevant General Assembly resolutions grew gradually warmer and more welcoming of the Principles, and by 2004 the Guiding Principles were being described as 'an important tool for dealing with situations of internal displacement.'[239] The resolution went on to say:

> [The General Assembly] welcomes the fact that an increasing number of States, United Nations organizations and regional and non-governmental organizations are applying them as a standard, and encourages all relevant actors to make use of the Guiding Principles when dealing with situations of internal displacement.[240]

This phraseology was repeated in numerous subsequent resolutions,[241] and in 2008, the General Assembly described the Principles as 'the key international framework' for the protection of the internally displaced.[242]

While the above paragraphs illustrate that the Guiding Principles have been welcomed by the General Assembly, it must be emphasised that not once is there any mention of the Principles becoming binding or representing law. The strongest affirmation of the Guiding Principles was their description in 2008 as the 'key

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[237] Constitutional Court Decision T-178 (2005).
[238] UNGA Res 54/167 (25 February 2000) UN Doc A/RES/54/167.
[239] UNGA Res 58/177 (12 March 2004) UN Doc A/RES/58/177.
[240] UNGA Res 58/177 (12 March 2004) UN Doc A/RES/58/177.
[241] UNGA Res 60/168 (7 March 2006) UN Doc A/RES/60/168; UNGA Res 62/153 (6 March 2008) UN Doc A/RES/62/153.
[242] UNGA Res 63/307 (30 September 2009) UN Doc A/RES/63/307.

international framework' for the internally displaced, which is a notable restraint from describing the principles as law.[243] In fact, the decision to omit the word 'legal' is significant, as the meaning of 'framework' by no means implies a binding quality. Furthermore, their description as a 'key international framework' was not well-received by states,[244] and thus one could even argue that their status as such (as a key international framework) could be in doubt. This is supported by the fact that since 2008, the General Assembly has not used the term 'key', preferring instead to refer to the Guiding Principles as 'an important international framework for the protection of Internally Displaced Persons.'[245]

It is therefore submitted that the legal weight of the Guiding Principles is as follows. *Ipso facto*, as the product of non-state actors, the Guiding Principles cannot be binding. However, many principles have binding authority from the hard law from which they are derived. Other principles, such as Principle 15 and Principle 29, as discussed above, are not binding on states and represent *lex ferenda*. Nonetheless, the Guiding Principles have been welcomed by the General Assembly and have been influential in domestic spheres. Therefore although not directly opposable to states in a general sense, they represent an important step forward in the protection of IDPs.

[243] Patrick Schmidt, 'Process and Prospects for the U.N. Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment' (2003-2004) 35 Georgetown Journal of International Law 483, 508.
[244] The resolution in question did not receive a significant amount of support. The resolution was adopted 48 votes to 19, with 78 states abstaining and 47 non-voting. It may be recalled that in the Nuclear Weapons Advisory Opinion (*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 294), the resolutions in question were not found to represent *opinio juris*, precisely because of the lack of support the resolution had received.
[245] UNGA Res 64/162 (18 December 2009) UN Doc A/RES/64/162; UNGA Res 66/165 (19 December 2011) UN Doc A/RES/66/165.

2.2 London Declaration of International Law Principles on Internally Displaced Persons

The London Declaration of International Law Principles on Internally Displaced Persons was approved by the International Law Association at its 69th conference in the year 2000.[246] The Declaration is comprised of 18 articles setting out the rights and obligations *vis-à-vis* IDPs for all states, *de facto* authorities, and international organisations and it builds on the rights set out in the Guiding Principles on Internal Displacement. However, the Declaration is different to the Guiding Principles in the sense that the former focuses on the status of IDPs under international law, whereas the latter is a guide to the treatment of IDPs from the perspective of their needs.[247] In this sense, the Declaration deals with issues that are not addressed by the Guiding Principles, such as the establishment and status of safe areas, the prevention of ethnic cleansing, institutional protection of IDPs, and the role of the Security Council in dealing with IDP situations that constitute a threat to international peace and security.[248]

2.3 United Nations Principles on Housing Restitution for Refugees and Displaced Persons ('the Pinheiro Principles')[249]

In 2003, the Sub-Commission on the Promotion and Protection of Human Rights requested Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons, Paulo Sérgio Pinheiro, to prepare draft principles on

[246] International Law Association, Declaration of International Law Principles on Internally Displaced Persons, 29 July 2000.
[247] Luke T. Lee, 'The London Declaration of International Law Principles on Internally Displaced Persons' (2001) 95 The American Journal of International Law 454, 454.
[248] Ibid, 456.
[249] ECOSOC 'Principles on Housing and Property Restitution for Refugees and Displaced Persons', annex to Commission on Human Rights Res 2005/17 (28 June 2005) UN Doc E/CN.4/Sub.2/2005/17.

housing and property restitution for refugees and IDPs. Following consultation with various states, UN agencies, and stakeholders, the text was endorsed by the Sub-Commission in 2005. The principles are designed to provide practical guidance to states, UN agencies, and the international community on how best to address the complex legal and technical issues surrounding restitution of housing, land, and property. Principles 2-10 set out the right to property restitution and related overarching principles - which are based on existing hard law - applied in the context of housing and property restitution. Principles 11-22 give guidance on the development of national housing and property restitution institutions, and ensuring access to these by all displaced persons. Finally, Principle 22 discusses the responsibility of the international community to protect housing and property restitution rights.

3. Treaty Law Specific to the Protection of Internally Displaced Persons

3.1 2006 Pact on Security, Stability and Development in the Great Lakes Region ('Great Lakes Pact')

In 2006 the Pact on Security, Stability and Development in the Great Lakes Region was signed by the 11 states of the International Conference of the Great Lakes Region.[250] The Great Lakes Pact was ratified by all member states (Angola, Burundi, the Central African Republic, Democratic Republic of Congo, Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia) and entered into force in June 2008.

[250] Great Lakes Pact.

Two of the Pact's ten protocols are relevant to the issue of internal displacement: the Protocol on the Protection and Assistance to Internally Displaced Persons,[251] and the Protocol on the Property Rights of Returning Populations.[252] To a lesser extent, the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children also deals with IDP protection, as there is a high level of sexual violence in situations where IDPs are found.[253]

The Great Lakes Pact as a whole is highly significant in the context of the Guiding Principles as it was the first multilateral instrument in the international community which binds member states to implement the Guiding Principles in their domestic legislation. Article 9 of the Protocol on the Protection and Assistance to IDPs is particularly relevant. States Parties are obliged 'to adopt and implement the Guiding Principles as a regional framework for providing protection and assistance to internally displaced persons in the Great Lakes Region', to 'use the "Annotations of the Guiding Principles on Internal Displacement" as an authoritative source for interpreting the application of the Guiding Principles' and to 'enact national legislation to domesticate the Guiding Principles fully and to provide a legal framework for their implementation within national legal systems.'[254]

3.2 2010 Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('Kampala Convention')

The trend of binding states at regional level has continued on the African continent and the African Union recently adopted the Convention for the Protection and

[251] Ibid, Protocol on the Protection and Assistance to Internally Displaced Persons.
[252] Ibid, Protocol on the Protection and Assistance to Internally Displaced Persons; ibid, Protocol on the Property Rights of Returning Populations.
[253] Ibid, Protocol on the Prevention and Suppression of Sexual Violence against Women and Children.
[254] Ibid, Protocol on the Protection and Assistance of Internally Displaced Persons.

Assistance of Internally Displaced Persons in Africa,[255] the text of which is broadly based on the Guiding Principles.[256]

The objectives of the Convention are to promote and strengthen regional and national IDP protection measures, to establish a legal framework for the prevention of internal displacement and the protection of IDPs, and to set out the obligations of states parties, non-state actors, and stakeholders regarding the prevention of internal displacement and assistance to IDPs in Africa. The Convention sets out the responsibilities of States Parties relating to prevention, protection, and assistance in situations of internal displacement as well as States Parties' obligations relating to sustainable reform, local integration or relocation. The Convention also sets out the obligations of international organisations, humanitarian agencies, and the African Union; and contains provisions on the protection and assistance to IDPs in situations of armed conflict. In addition, the Convention sets out an obligation on States Parties to prevent, as much as possible, displacement caused by projects carried out by public or private actors. Finally the Convention obliges States Parties to create an updated register of IDPs and to provide persons affected by displacement with effective remedies.

The Kampala Convention represents the first continent-wide instrument for the protection of the internally displaced. It was unanimously adopted by 46 African nations and signed by 17 heads of state, governments and ministers for foreign affairs. The Convention entered into force on 6 September 2012. At the time of writing (September 2014), the Convention has 22 States Parties.

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[255] Kampala Convention.
[256] Brigitta Jakasa and Jeremy Smith, 'Africa: From Voluntary Principles to Binding Standards' (2008) Forced Migration Review 18, 18.

3.3 Assessment of the Legal Framework of IDP Protection

The legal regime applicable to IDPs may therefore be summarised as follows. IDPs, owing to the fact that they have not crossed an international frontier, are primarily the responsibility of their own governments. Therefore, unlike refugees, they have neither international legal status nor an international agency specifically dedicated to their protection.[257]

That is not to say that IDPs are not without legal protection. Refugee law, by analogy, may offer a useful blueprint for the development of legal protection of IDPs. IDPs are also entitled to the protection of international human rights law, humanitarian law, and international criminal law.

Although the Guiding Principles are a welcome development in the area of IDP protection, their basis in existing hard law is questionable. Furthermore, their incorporation into domestic law has been limited, and the General Assembly has stopped well short of declaring the principles as law. It is therefore submitted that while the Principles are a useful framework in developing policies and principles relevant to IDP protection, they are not yet opposable to states in the sense that they form part of international law.

Finally, the regional treaties on the protection of IDPs may be heralded as a welcome development in this area, especially by virtue of the fact that the traditional belief was that it would be extremely difficult, if not impossible, to draft a treaty dealing with the protection of IDPs. The Great Lakes Pact binds 11 countries with

[257] The term 'international legal status' is used in the sense of a status provided by a multilateral non-regional treaty.

significant IDP problems, and the Kampala Convention has the potential to have significant impact on the continent which is most affected by the IDP problem.

4. Institutional Protection of IDPs

4.1 The Role of the UNHCR

Various organisations have a role to play in protecting and assisting IDPs. These include the IOM, OHCHR, and UNICEF. However, the focus of this chapter will be on the UNHCR's role as it is the only organisation within the cluster approach whose primary mandate is the protection of refugees, and thus serves as the best case study for this thesis' core question.[258]

The United Nations High Commissioner for Refugees ('UNHCR') is a subsidiary organ of the United Nations which was established by the General Assembly under Article 22 of the Charter of the United Nations.[259] The mandate of the UNHCR primarily derives from its statute, which makes no explicit reference to the protection of persons aside from refugees as defined in paragraph 6 and, by way of extension, those recognised as such under the 1951 Convention.[260] That is not to say that the protection of persons other than refugees is necessarily incompatible with the mandate of the UNHCR. The mandate of the UNHCR must be understood in the light of every succeeding General Assembly resolution dealing with the work of the UNHCR. Over the course of its history, resolutions of the General Assembly have expanded the UNHCR's competence beyond 1951 Convention refugees to also

[258] Office for the Coordination of Humanitarian Affairs, 'Leadership', http://www.unocha.org/what-we-do/coordination/leadership/overview accessed on 27 May 2014.
[259] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[260] UNGA 'Statute of the Office of the United Nations High Commissioner for Refugees', Annex to Res 428/V (14 December 1950) UN Doc A/RES/428(V), para 6.

include refugees as defined in the OAU Convention, and the Cartagena Declaration on Refugees,[261] and also other categories of persons such as stateless persons, repatriating refugees, IDPs and populations affected by war. In addition, the UNHCR no longer solely makes reference to refugees, but often to 'persons of concern to UNHCR.'[262] Of these various groups of 'persons of concern', IDPs form the largest.

4.2 The Evolution of UNHCR's Mandate Towards Internally Displaced Persons

Paragraph 9 of the UNHCR's Statute recognises that the High Commissioner 'may engage in such activities […] as the General Assembly may determine, within the limits of the resources placed at his disposal.'[263] However, Goodwin-Gill cautioned in 2000:

> [Paragraph 9] is not a blank cheque for everything and anything else and especially not a formal, legal basis for activities that compromise [UNHCR's] primary function of providing international protection to refugees and trespass on the jurisdiction of other actors.[264]

Nonetheless, Paragraph 9 is the main legal basis upon which UNHCR justifies its involvement with IDPs. Reference has also been made to Paragraph 3 of the Statute, which provides that the High Commissioner 'shall follow policy directives given to him by the General Assembly or the Economic and Social Council'. UNHCR also considers the advice of the Executive Committee of the High Commissioner's Programme (ExCom), a subsidiary organ of the General Assembly and the governing body of the UNHCR. In addition, Paragraph 2 of the Statute provides that the work of

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[261] Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 'Cartagena Declaration on Refugees' (19-22 November 1984).
[262] UNHCR 'Statistical Yearbook' (2002), Table I.1. Persons of concern include asylum-seekers, stateless persons, IDPs, and returnees.
[263] UNGA 'Statute of the Office of the United Nations High Commissioner for Refugees', Annex to Res 428/V (14 December 1950) UN Doc A/RES/428(V), para 6.
[264] Guy S. Goodwin-Gill, 'UNHCR and Internal Displacement: Stepping into a Legal and Political Minefield' [2000] US Committee for Refugees, World Refugee Survey 26, 28.

the UNHCR 'shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.'

A series of UN General Assembly resolutions has encouraged UNHCR involvement with IDPs, dating from as far back as 1972, where the Economic and Social Council called on the UNHCR to extend assistance both to refugees returning to southern Sudan and 'other displaced persons.'[265] Explicit reference to IDPs is found in General Assembly resolution 48/116 (1993), commending the UNHCR for its work with IDPs.[266] This sentiment was restated by the General Assembly in resolution 53/125 (1998):

> '[...] reaffirms its support for the High Commissioner's efforts, on the basis of specific requests from the Secretary-General or the competent principal organs of the United Nations, and with the consent of the concerned state, and taking into account the complementarities of the mandates and expertise of other relevant organisations, to provide humanitarian assistance and protection to persons displaced within their own country in specific situations calling for the Office's particular expertise, especially where such efforts could contribute to the prevention or solution of refugee problems.'[267]

ExCom has also welcomed UNHCR's activities in favour of IDPs. In its Conclusion No. 75 (XLV) of 1994, it endorsed UNHCR's expanding role in this area and referred to Resolution 48/116 as an 'appropriate framework for the involvement of the High Commissioner in situations of internal displacement.'[268] It also elaborated on elements of this resolution, such as the close relationship between internal

[265] UN Economic and Social Council Res 1705 (LIII) (27 July 1972) UN Doc E/RES/1705(LIII).
[266] UNGA Res 48/116 (20 December 1993) UN Doc A/RES/48/116.
[267] UNGA Res 53/125 (9 December 1998) UN Doc A/RES/53/125.
[268] UNHCR Conclusion No 75 (XLV) 'Internally Displaced Persons' (1994).

displacement and refugee phenomena, the expertise of UNHCR in this area and the need for close collaboration between UNHCR and other stakeholders.[269]

4.3 Criteria for UNHCR's Involvement with IDPs

The UNHCR has stated that before it becomes involved in an IDP operation, the following criteria must be satisfied: (i) there must be a request from the UN Secretary-General or competent organ of the UN (such as the Economic and Social Council); (ii) consent of the state concerned must be received and where applicable, other entities in a conflict; (iii) there must be access to the affected population; (iv) there must be adequate security for staff of UNHCR and affected populations; (v) there must be clear lines of accountability and with the ability to intervene directly on protection matters; and (vi) there must be adequate resources and capacity.[270] The basis of UNHCR's involvement with IDPs can be summarised in UN General Assembly Resolution 53/125 (1998), which reiterates:

> […] support for the role of the Office of the High Commissioner in providing humanitarian assistance and protection to internally displaced persons, on the basis of specific requests from the Secretary-General or the competent organs of the United Nations and with the consent of the State concerned, taking into account the complementarities of the mandates and expertise of other relevant organisations […][271]

The resolution also underlines that 'activities on behalf of internally displaced persons must not undermine the institution of asylum.'[272]

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[269] UNHCR Conclusion No 75 (XLV) 'Internally Displaced Persons' (1994).
[270] UNHCR 'Internally Displaced Persons – The Role of the High Commissioner for Refugees' (2000), 2.
[271] UNGA Res 53/125 (9 December 1998) UN Doc A/RES/53/125.
[272] UNGA Res 53/125 (9 December 1998) UN Doc A/RES/53/125.

4.4 The 'Collaborative Approach'

Before 2005, under the so-called 'Collaborative Approach', all agencies shared the responsibility for responding to situations of internal displacement. This included the UNHCR, the United Nations Children's Fund ('UNICEF'), the World Food Programme ('WFP'), the World Health Organisation ('WHO'), the United Nations Development Programme ('UNDP'), the Office of the High Commissioner for Human Rights ('OHCHR'), the International Organisation for Migration ('IOM') and NGOs. Although activities were coordinated by the Emergency Relief Coordinator, there was no accountability or locus of responsibility. In addition, there was no predictability of action as the different agencies were able to pick and choose which situations to act upon. A UNHCR report published in 2005 made it clear that the agency had been 'uncertain, inconsistent and unpredictable' in its policies towards IDPs.[273] That same year, the Secretary-General issued a report entitled 'Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations' which identified 'significant capacity gaps' in areas such as shelter and camp management and protection.[274] It recognised that the protection of civilians is primarily the responsibility of states, but also that 'the humanitarian system must work to fill protection gaps'[275] and that:

> […] partnerships within the system may be necessary to overcome those gaps in assistance - such as protection and camp management in situations involving IDPs - that do not enjoy leadership from any one agency.[276]

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[273] Vanessa Matter and Paul White, UNHCR Evaluation and Policy Analysis Unit 'Consistent and Predictable Responses to IDPs: A Review of UNHCR's Decision-Making Processes' (March 2005) UN Doc EPAU/2005/2.
[274] UNECOSOC 'Report of the Secretary-General: Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations' (2005) UN Doc A/60/87–E/2005/78, 8.
[275] Secretary-General of the United Nations, *Strenghtening of the Coordination of Emergency Humanitarian Assistance of the United Nations* (A/60/87-E/2005/78 2005), 9.
[276] Ibid, 10.

4.5 The 'Cluster Approach'

To address these concerns, the Inter-Agency Standing Committee agreed to a division of labour amongst the UN and other humanitarian agencies in 2005. Called the 'Cluster Approach', nine different areas of humanitarian response were clustered together and each was assigned a 'cluster lead.' The cluster lead must set out the needs, organise planning, coordination and reporting for the relevant situation. It is the first port of call and the provider of last resort in respect of each individual operation.

The aims of the reform were to improve the predictability, timeliness and effectiveness of humanitarian response; to provide leadership and accountability; and to address the responsibility gaps identified in the Secretary-General's report.[277] The Cluster Approach was originally implemented in Chad, Liberia, Democratic Republic of Congo, Somalia and Uganda.

Under the new approach, UNHCR was given lead responsibility in the areas of protection, emergency shelter, and camp management for conflict-induced IDPs. UNHCR also joined as a member in several other clusters, such as water/sanitation/hygiene (led by UNICEF), logistics (led by the WFP) and early recovery (led by UNDP). According to Professor Walter Kälin, the then-Representative of the Secretary-General on the Human Rights of Internally Displaced Persons:

> […] it is obvious that UNHCR is the organisation with the most experience and capacity to protect and assist persons displaced by armed conflict who are in camps or to organise IDP returns in safety or dignity after the end of conflict. Indeed, it is difficult to understand why there should not be at least a presumption that the High

[277] United Nations Office for the Coordination of Humanitarian Affairs, 'Cluster 2006 – Appeal for Improving Humanitarian Response Capacity' http://www.unocha.org/cap/appeals/cluster-2006-appeal-improving-humanitarian-response-capacity accessed 27 May 2014.

> Commissioner for Refugees should assume responsibility in such situations.[278]

The UNHCR was the obvious candidate for this role, having vast experience with uprooted populations and a mandate encompassing protection and assistance, as well as having been involved in IDP operations since the 1960s. According to the UNHCR, it has an interest in protecting all those who, had they crossed an international border, would have had a claim to international protection. This interest arises because of the similarity between such internally displaced persons and refugees, the causes and consequences of their displacement, and their humanitarian needs.[279]

The new 'Cluster Approach' was not in itself a mandate-giving mechanism, but a more clearly spelled-out role, based on the notion that governments have the primary role for protection of their citizens.[280] It is an arrangement through which the existing mandates of international organisations are brought together in a coordinated and predictable fashion.[281] Therefore, although it may seem that the UNHCR is being given a new responsibility under the cluster approach, in reality it is merely operating under its existing mandate of protecting IDPs. However, the most significant change of the new cluster approach is the allocation of responsibility of protection to the UNHCR, which is the biggest gap in the safeguarding of IDPs. More generally, the UNHCR now has a much larger involvement with IDPs in the past, when it only intervened on a case-by-case basis.

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[278] Interview with Prof. Walter Kälin, Forced Migration Review, Supplement, October 2005, 6.
[279] UNHCR 'Internally Displaced Persons – The Role of the High Commissioner for Refugees' (2000), 3.
[280] UNHCR Policy Development and Evaluation Service and Division of Operational Services, 'UNHCR's Expanded Role in Support of the Inter-Agency Response to Situations of Internal Displacement' (November 2006), UN Doc PDES/2006/06, 9.
[281] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007), 4.

CHAPTER 3: IDP PROTECTION MEASURES AS A POTENTIAL INTERNAL FLIGHT ALTERNATIVE

1. Introduction

The Internal Flight Alternative ('IFA') is neither a defence nor a legal doctrine.[1] It has been referred to as 'a shorthand way of describing a factual situation'[2] and stems from the premise that if there is a safe place within a refugee applicant's country of origin where he or she can relocate, the refugee definition is not engaged. The IFA concept emerged in domestic German jurisprudence in the 1980s and quickly spread unevenly across the jurisprudence of developed countries. Today, it is an inherent part of refugee status determinations in most States Parties to the 1951 Convention, and has been incorporated into Article 8 of the 2011 Recast EC Qualification Directive.[3] The relevance of the IFA to this thesis is whether internal protection measures on behalf of IDPs could constitute same. Thus when assessing refugee states, the availability of such protection for IDPs could negate the presence of a 'well-founded fear of being persecuted' necessary to qualify as a refugee, and/or result in the conclusion that the asylum-seeker is unable to show that protection is unavailable to him within the whole of his country of origin. Refugee status would thus be denied on the basis of an available IFA.

[1] *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160, 22 Imm LR (2d) 12 [2].
[2] Ibid [2].
[3] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

International law 'has always been susceptible to the tyranny of phrases',[4] and the IFA concept is an example of such a phrase. It does not appear in the refugee definition and no explicit reference was made to its existence at the time of drafting.[5] As refugee law lacks an international mechanism capable of providing a common interpretation of the 1951 Convention Relating to the Status of Refugees ('Refugee Convention'),[6] the IFA's interpretation has primarily been left to the States Parties by means of domestic court decisions. Unsurprisingly, views on its interpretation have varied. This is reflected in the different names by which the concept has come to be referred to as, including the 'Internal Protection' alternative,[7] the 'Internal Relocation' alternative,[8] and the 'Safe Haven' concept.[9] Some commentators have expressed dissatisfaction with the term 'IFA', preferring instead to use terms that focus on protection and relocation.[10] This is because the test is forward-looking in that it assesses the relevant circumstances in the proposed relocation area at the time of taking the decision, rather than assessing the actual flight situation which occurred in the past and would therefore be a backward-looking test. Nonetheless, as it is most

[4] James Leslie Brierly, 'Matters of Domestic Jurisdiction' in James L. Brierly, Hersch Lauterpacht and Cl Humphrey M. Waldock, *The Basis of Obligation in International Law, and other papers* (Clarendon Press 1958), 81.
[5] Nehemiah Robinson, *Convention relating to the Status of Refugees: its History, Contents and Interpretation; a Commentary* (Institute of Jewish Affairs, World Jewish Congress 1953), para 10; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [7]; *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437, 124 ALR 265 [441].
[6] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2).
[7] UNHCR 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR' (1995) 1 European Series 1, 95; Andreas Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol : a Commentary* (Oxford University Press 2010), 446; *Refugee Appeal No. 71684/99* [2000] INLR 165 [67].
[8] UNHCR 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR', 95; Zimmermann, 446.
[9] *A.E, F.E. v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531 [2].
[10] European Legal Network on Asylum, *Research Paper on the Application of the Concept of Internal Protection Alternative* (2000); Hathaway and Foster, 'Internal Protection/ Relocation/ Flight Alternative as an Aspect of Refugee Status Determination', 20.

commonly known by the term 'IFA', it will be referred to as such for the purposes of this chapter.

The relatively recent decisions taken by Norway, Denmark, and the Netherlands that Mogadishu may qualify as an IFA serves to highlight the importance of this issue with regard to IDPs.[11] In particular, these examples emphasise that difficult conditions facing IDPs will not necessarily preclude the finding of an IFA, and indeed, that improvements in the situation facing IDPs, however slight, may be a contributing factor in determining the existence of an IFA.

Denmark's decision followed the publication of a joint report in May 2013 by the Danish Immigration Service's and the Norwegian Landinfo's fact finding mission.[12] The report analysed numerous aspects of security and protection in Mogadishu. However the information on IDPs is of particular relevance to this thesis. The report characterised IDPs as 'vulnerable' and 'at risk of abuse', stating that many IDP women from minority clans are at risk of rape.[13] A previous 2012 report from the same source stated that IDPs do not enjoy security to the same extent as others and that there are still many human rights abuses in IDP settlements.[14] The report also stated that IDP children are amongst the most vulnerable people in Mogadishu owing to malnutrition and lack of medical

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[11] 'Vanskeligere for Somalia-flyktninger å få opphold i Norge', *Dagbladet* (Oslo,7 January 2013); Amnesty International, 'Returns to South and Central Somalia: A Violation of International Law' (15 May 2013) < http://reliefweb.int/sites/reliefweb.int/files/resources/afr520082013en_0.pdf> accessed 9 July 2014.

[12] Landinfo and Danish Immigration Service, *Security and protection in Mogadishu and South-Central Somalia: Joint report from the Danish Immigration Service's and the Norwegian Landinfo's fact finding mission to Nairobi, Kenya and Mogadishu, Somalia* (Copenhagen, 2013).

[13] Ibid 18, 20.

[14] Danish Immigration Service and Norweigian Landinfo, *Update on security and human rights issues in South-Central Somalia, including in Mogadishu: Joint report from the Danish Immigration Service's and the Norwegian Landinfo's fact finding mission to Nairobi, Kenya and Mogadishu, Somalia* (2012), 40, 58.

treatment.[15] In addition, the report drew attention to the practice of camp 'gatekeepers', who restricted the freedom of movement of IDPs by holding them 'hostage' in exchange for a fee.[16] According to Amnesty International, although there is no longer a famine in Somalia, 1.05 million people remain in an acute food security emergency and ongoing instability and restrictions on access remain 'major obstacles to aid delivery'.[17] Amnesty International has also reported that the humanitarian situation in IDP settlements both in Mogadishu and in south and central Somalia shows little change, if any, from 2011 when the European Court of Human Rights found that the situation concerning the most basic needs, such as food, hygiene and shelter and vulnerability to violence meant that the conditions were sufficiently dire to amount to inhuman and degrading treatment.[18] It is clear, therefore, that conditions facing IDPs in Mogadishu are extremely difficult.

Although the main basis for the Norwegian, Dutch, and Danish decisions was an improvement in the general security situation, the 2013 report made specific references to improvement in the IDP situation in Mogadishu. Such developments include the joint project of the Danish and Norwegian Refugee Councils regarding the allocation of land and resettlement of evicted IDPs, the cooperation of NGOs and UN agencies with the Somali National Government regarding the relocation of IDPs, the work of OCHA and UNHCR in addressing the needs of IDPs, the tripartite cluster project regarding improvements to be made in the newly-established IDP camps, the UNHCR's dialogue with the Somali

[15] Ibid, 58.
[16] Ibid, 16.
[17] Amnesty International, 'Returns to South and Central Somalia: A Violation of International Law' (15 May 2013) < http://reliefweb.int/sites/reliefweb.int/files/resources/afr520082013en_0.pdf> accessed 9 July 2014, 5.
[18] Amnesty International, 'Returns to South and Central Somalia: A Violation of International Law' (15 May 2013) < http://reliefweb.int/sites/reliefweb.int/files/resources/afr520082013en_0.pdf> accessed 9 July 2014., 4; *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011)

National Government on capacity-building, and the drafting of a policy for IDPs in Mogadishu.[19] It is unclear to what extent these factors played a part in the IFA determination. However this example certainly raises the question of to what extent IDP protection measures may be considered a factor in the IFA inquiry, and whether or not human rights considerations are relevant when determining the existence of an IFA.

In addressing the content of the IFA inquiry, this chapter will first examine the development of the IFA test. The main thrust of the IFA test across various jurisdictions is that it must be reasonable,[20] or put another way, it must not be unduly harsh.[21] This chapter will also examine the suggestion that the IFA test should be informed by the application of the cessation clauses in the Refugee Convention.[22] However, the focus of this chapter will be on the issue upon which states have diverged widely in their jurisprudence - the relevance and applicable standard of human rights considerations in determining the existence of an IFA. Four different approaches will be discussed in this respect. First, this chapter examines the position advocated by the UNHCR that protection of basic civil, political and socio-economic

[19] Landinfo and Danish Immigration Service 46, 48.
[20] *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*, 443; *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson* [1998] QB 929; *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160, 22 Imm LR (2d) 12 ; *Januzi v Secretary of State for the Home Department* [8];
[21] *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160, 22 Imm LR (2d) 12 [13]; *Karanakaran v. Secretary of State for the Home Department* [2000] All ER 449 [7]; *A.E, F.E. v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531; *The Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678.
[22] Rodger Haines, 'International Judicial Co-Operation in Asylum Laws: Suggestions for the Future. The Perspective of a Decision-Maker' in Geoffrey Care and Hugo Storey (eds), *Asylum Law : Report and papers delivered at the First International Judicial Conference held at Inner Temple London 1 and 2 December 1995* (Judicial Conference on Asylum Law, Steering Committee 1996); Joan Fitzpatrick, 'The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection' (1998-1999) 13 Georgetown Immigration Law Journal 343; Marx, 190.

rights is a core requirement of the IFA.[23] This chapter then discusses the relevance of the Guiding Principles on Internal Displacement to the IFA inquiry owing to the fact that those who return to their country and are forced to relocate to obtain protection are in effect, IDPs.[24] Thirdly, this chapter analyses the approach put forward by the Michigan Guidelines on the Internal Protection Alternative which was approved in New Zealand,[25] and fourthly, this chapter examines the approach which has been established in the jurisprudence of the United Kingdom. This chapter argues that the Refugee Convention ought to be interpreted in light of human rights considerations. However, regard must be had to the clear limits the drafters placed on the text. In the context of the IFA inquiry, therefore, human rights considerations must be taken into account insofar as protection of human rights forms an ingredient of effective protection from the persecution feared. In addition, human rights conditions in the IFA may be of relevance when considering the possibility of indirect *refoulement*. Aside from these two instances, expulsion to an IFA where human rights standards are generally low is outside of the scope of the Refugee Convention. Complementary protection, as discussed in the next chapter, may nonetheless preclude expulsion in this regard and it is by taking such an approach to the IFA inquiry that the distinction between refugee and humanitarian claims may be appropriately maintained.

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[23] UNHCR 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees' (23 July 2003) UN Doc HCR/GIP/03/04, para 28.

[24] UNCHR, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.

[25] 'The Michigan Guidelines on the Internal Protection Alternative' (First Colloquium on Challenges in International Refugee Law, Michigan, April 1999); *Refugee Appeal No. 71684/99* [2000] INLR 165.

2. The Nexus between the Refugee Convention and the Internal Flight Alternative

It is difficult to pinpoint the exact source of the IFA concept in international law. According to Article 1A(2) of the Refugee Convention, a refugee is a person who:

> [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...]

Clearly, there is no mention of an IFA in the refugee definition and no explicit reference was made to its existence at the time of drafting.[26] This is not surprising, considering that the traditional assumption at the time was that state sovereignty extended over the whole of the state. However, *travaux préparatoires* show that a proposal to include IDPs in the refugee definition was rejected on the basis that the delegates viewed the existence of sufficient national protection as inconsistent with the concept of a refugee.[27] Nonetheless, two years after the conclusion of the Refugee Convention, the IFA concept was alluded to by Robinson. Regarding the meaning of persecution, he commented that 'happenings of a local character, for instance, riots in a certain region or events which are being combated by the authorities' would not qualify a person for refugee status 'because in such cases there would be no reason for a person possessing a nationality to be unwilling to avail himself of the protection of his country.'[28]

States have held that there exists a nexus between the IFA and the refugee definition in two main respects. The first is based on the definition's requirement that

[26] *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson* [1998] QB 929 [10]; *Januzi v Secretary of State for the Home Department* [7]; *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* 441.
[27] Hathaway, *The Law of Refugee Status*, 29-31; *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 [49].
[28] Robinson, 46.

the fear must be 'well-founded'. This has been interpreted to mean that the fear is not well-founded where the persecutory source of the fear could be avoided by relocating to a safe area within the country of origin.[29]

The second basis for the IFA lies in the notion of 'protection'.[30] As aforementioned, states have generally interpreted 'protection' to mean protection exercised by the state within the refugee's country of origin, rather than the exercise of diplomatic protection in a host country. The focus of the refugee definition is not upon protection in a particular region, but upon the more general notion of protection by that country.[31] If within that country, obtaining its 'protection' is merely a question of relocating, it implies that inability or the unwillingness to return is for reasons extrinsic to those set out in the Refugee Convention and that the claimant is therefore not a Convention refugee. Rather than being 'basically at odds with fundamental refugee protection principles',[32] the IFA is based on the notion of 'surrogate' international refugee protection, which is an exception to the normal principle of international law that protection is usually the obligation of the country of nationality.[33]

A third possibility was referred to in the Australian case of ***SZATV v Minister for Immigration and Citizenship*** **[2007]**.[34] This was linked to the 'owing to' criterion, that is, that if the asylum-seeker is outside the country of his nationality not

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[29] *Januzi v Secretary of State for the Home Department*.
[30] *Refugee Appeal No 76044* [2008] NZRSAA 80 [110].
[31] *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [8].
[32] UNHCR 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR', 63; UNHCR 'Position Paper on Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-Called "Internal Flight Alternative" or "Relocation Principle")' (February 1999), 2.
[33] *Canada (Attorney General) v. Ward* [1993] 2 SCR 689 [25]; *Horvath (A.P.) v Secretary of State for the Home Department* [2001] 1 AC 489; Hathaway, *The Law of Refugee Status*, 135; *Refugee Appeal No 76044* [2008] NZRSAA 80 [102]; *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* 441.
[34] *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40.

owing to the propounded fear but for some extrinsic reason outside of those enumerated in the Refugee Convention, he does not qualify as a refugee. The High Court found this basis unconvincing, stating that it would introduce an element of causation into refugee determination process and that 'such arguments bedevil the law.'[35]

Regardless of which part of the Refugee Convention the IFA concept is linked to, it is clear that the 'well-founded fear' and 'protection' elements are interconnected when it comes to the IFA concept.[36] In any event, states have placed an equal emphasis, if not a greater emphasis, on the publications of the UNHCR, in particular, the 1979 Handbook on Procedures and Criteria for Determining Refugee Status.[37] Paragraph 91 states:

> The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.[38]

3. Regional Conventions and the Internal Flight Alternative

Some authors have argued that the possibility of an IFA was ruled out by the drafters of the most important regional treaty on refugees, the 1969 Organisation

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[35] Ibid [54].
[36] Zimmermann, 447.
[37] *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson* [1998] QB 929 [12]; *A.E, F.E. v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531 [19]; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [9]; *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*, 442.
[38] UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (Reedited January 1992) UN Doc HCR/IP/4/Eng/REV.1.

of African Union (OAU) Convention Governing Specific Aspects of the Refugee Problem in Africa.[39] Article 1(2) of this Convention states:

> The term 'refugee' shall also apply to every person who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The non-binding Cartagena Declaration on Refugees employs a similar expanded definition of a refugee.[40] While it does not state that the reason for being outside the country of origin may have its locus 'in either part of the whole' of a country of origin, it does state the necessity 'of bearing in mind…the precedent of the OAU Convention (article 1, paragraph 2).'

The reference to 'either part or the whole of [the] country of origin', and to the OAU Convention, respectively, is the basis upon which the argument is made that the above Conventions preclude the existence of an IFA. However, it is not clear that this interpretation is correct since it could be argued that where there is a place within the country of origin where protection is available, the person is not 'compelled to leave his place of habitual residence in order to seek refuge outside the country' as the OAU Convention states. In any event, Grahl-Madsen remarked that the reference to 'either part or the whole of [the] country of origin' in the OAU Convention 1969 has had no persuasive powers in countries not parties to that Convention.[41] He further notes that the result of

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[39] Convention Governing the Specific Aspects of the Refugee Problem in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45; Storey H, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined' (1998) 10 International Journal of Refugee Law 499, 503.

[40] Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 'Cartagena Declaration on Refugees' (19-22 November 1984).

[41] Atle Grahl-Madsen, Peter Macalister-Smith and Gudmundur Alfredsson, *The Land Beyond : Collected Essays on Refugee Law and Policy* (Martinus Nijhoffs 2001), 98.

these more strict interpretations seems to be that relatively fewer persons pass the test for obtaining recognition as refugees.

4. The Scope and Content of the Internal Flight Alternative

There has been some consensus amongst different jurisdictions concerning the content of the IFA. The main thrust of the IFA test is that it must be reasonable,[42] or put another way, it must not be unduly harsh.[43] Courts have generally focused on three facets of the IFA test – procedural aspects, accessibility and safety in the proposed IFA.

4.1 Procedural Aspects

The IFA test is forward-looking and the feasibility of the proposed IFA must be based on current country conditions, taking into account future risks.[44] The test is not whether a person could have sought safety at the time of flight, rather, whether it is possible to return the asylum-seeker to the proposed IFA. Finally, the decision-maker must take into account the claimant's individual circumstances and make an objective decision based on the cumulative effect of these factors.[45]

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[42] *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*, 443; *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson* [1998] QB 929; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426; *The Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678; *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160, 22 Imm LR (2d) 12; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [8].

[43] *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160, 22 Imm LR (2d) 12; *Karanakaran v. Secretary of State for the Home Department* [2000] All ER 449]7]; *A.E, F.E. v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531; *The Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678.

[44] *A.E, F.E. v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531 [26].

[45] *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160, 22 Imm LR (2d) 12 [12]; *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson* [1998] QB 929 [18]; *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 [81].

4.2 Accessibility

According to this criterion, the IFA must be realistic and practical, in that there must be no physical or legal impediments to its accessibility.[46] As was stated in ***Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* [1993]**, the leading Canadian case on the matter:

> An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety.[47]

4.3 Conditions in the Proposed Internal Flight Alternative

Article 8(2) of the recast Qualification Directive states that Member States 'shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant…'[48] This reflects the practice which occurs during asylum determination procedures generally. The IFA must be meaningful, in that it must be stable and durable.[49] In particular, there must be no risk of new persecution or of return to territories where the person's life or limb could be in danger.

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[46] *Ramanathan v. Canada (Minister of Citizenship and Immigration)* 1998 CarswellNat 1687, 152 FTR 305, 442.
[47] *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160, 22 Imm LR (2d) 12 [14]; *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 [80].
[48] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.
[49] *The Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678 [5]; Hathaway, *The Law of Refugee Status*, 134.

Above all, conditions in the IFA must be such that it is reasonable to expect the claimant to relocate there.[50] As stated in ***Thirunavukkarasu***, the claimants 'should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available.'[51] Some states have also taken into account personal circumstances of the applicant, such as age, linguistic abilities and family ties in the proposed IFA.[52]

Finally, the proposed relocation site must be outside of the reach of the agents of persecution. Where the persecutor is the state, Kelley remarks that state practice has led to three positions. Some states will consider whether an IFA exists notwithstanding the fact that the persecutor is the state. Others refuse to find an IFA where the persecution stems from the state. In addition, some states find a presumption against there being an IFA in such a scenario.[53]

5. Analogy with Cessation Clauses – Article 1C(5) of the Refugee Convention

Article 1C(5) provides that the Convention shall cease to apply to a person if:

> […] He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality […]

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[50] *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 [80]; *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [442].
[51] *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160, 22 Imm LR (2d) 12 [14.]
[52] *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 [81]; *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1993 CarswellNat 160, 22 Imm LR (2d) 12.
[53] Ninette Kelley, 'Internal Flight/Relocation/Protection Alternative: Is it Reasonable?' (2002) 14 International Journal of Refugee Law 4, 16.

Cessation clauses are also found in the 1969 OAU Convention (Art 1(4)(e)) and in the Statute of the Office of the United Nations High Commissioner for Refugees (Para 6(a)(e)).[54] The cessation clauses in these three instruments are very similar.

Some commentators have suggested that an analogy should be drawn with article 1C(5) of the Refugee Convention when examining the conditions that must be satisfied in order for an IFA to exist.[55] This is because both cessation of refugee status and the IFA inquiry concern the definition of a refugee under article 1 of the Refugee Convention and both entail consideration of the adequacy of protection in the refugee's country of origin. This would lead to a more holistic interpretation of the concept of 'protection' as enshrined in the Refugee Convention.

Before engaging in an analysis of this proposition, some further considerations must be borne in mind, namely, that cessation clauses and the IFA are applied in very different factual circumstances. Cessation clauses are clearly set out in the Refugee Convention and can only be applied to persons that have previously been recognised as refugees and thus have been recognised to have a well-founded fear of persecution in their country of origin. The issue under consideration in this respect is whether the circumstances under which such persecution arose have now changed to such an extent that persecution is no longer feared and it is no longer reasonable to refuse to avail of protection of the country of origin. This can be contrasted to the IFA, a concept which has not been included in the Refugee Convention and the

[54] UNGA 'Statute of the Office of the United Nations High Commissioner for Refugees', Annex to Res 428/V (14 December 1950) UN Doc A/RES/428(V), para 6; Convention Governing the Specific Aspects of the Refugee Problem in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

[55] Rodger Haines, 'International Judicial Co-Operation in Asylum Laws: Suggestions for the Future. The Perspective of a Decision-Maker' in Care and Storey, 114; Reinhard Marx, 'The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures' (2002) 14 International Journal of Refugee Law 179, 190. See also Joan Fitzpatrick, 'The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection' (1998-1999) 13 Georgetown Immigration Law Journal 343, 362.

existence of which is examined in the context of refugee status determination proceedings where the persecution feared cannot be said to exist throughout the country of origin. Arguably, therefore, the standard of protection in the country of origin necessary to trigger the application of cessation clauses should be higher than that leading to the application of the IFA concept, as a well-founded fear of persecution has already been found to exist in the former case.

Notwithstanding the above qualification, an examination of the context in which cessation clauses are applied may be a useful exercise for determining how the IFA should be applied. The UNHCR has issued guidelines for the conditions that must be satisfied before cessation of refugee status owing to changed circumstances.[56] Three aspects, in particular, must be examined before cessation is determined. First, the change must be of a fundamental character, that is, changes which have taken place must address the causes of displacement which led to the recognition of refugee status.[57] This may take the form of the ending of hostilities; a complete political change and/or the return to a situation of peace and stability.

Secondly, the change must be of an enduring nature. Apparent significant and profound changes should be given time to consolidate before any decision on cessation is made.[58] A longer period of time will need to have elapsed before the

[56] UNHCR 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' (10 February 2003) UN Doc HCR/GIP/03/03.
[57] UNHCR 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' (10 February 2003) UN Doc HCR/GIP/03/03, para 10; UNHCR 'Discussion Note on the Application of the "ceased circumstances" Cessation Clauses in the 1951 Convention' (20 December 1991) UN Doc EC/SCP/1992/CRP.1, para 11.
[58] UNHCR 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' (10 February 2003) UN Doc HCR/GIP/03/03, para 13; UNHCR 'Discussion Note on the Application of the "ceased circumstances" Cessation Clauses in the 1951 Convention' (20 December 1991) UN Doc EC/SCP/1992/CRP.1, para 12.

durability of change can be tested where the changes have taken place violently, for example, the overthrow of a regime.[59]

Finally, and most importantly for the purposes of this chapter, there must be a restoration of protection in the country of origin. Such protection must be both available and effective and requires more than simply physical safety or security. There must be a functioning government and basic administrative structures as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.[60]

The UNHCR notes that the general human rights situation is an important indicator in this respect. Specific factors to consider include the level of democratic development in the country, the holding of free and fair elections, and the adherence to international human rights instruments. The UNHCR further maintains that human rights standards in the country of origin do not necessarily have to be exemplary provided that significant improvements in this respect have been made. Examples of this would include the protection of the right to life and liberty and the prohibition of torture, marked progress in establishing and independent judiciary, fair trials and access to courts, as well as protection amongst others of the fundamental rights to freedom of expression, association and religion.[61]

The ECJ has also dealt with the issue of cessation of refugee status. In the case of ***Abdulla***, the Court held that refugee status ceases to exist where the relevant

[59] UNHCR 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' (10 February 2003) UN Doc HCR/GIP/03/03 para 14.
[60] UNHCR 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' (10 February 2003) UN Doc HCR/GIP/03/03, para 15.
[61] UNHCR 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' (10 February 2003) UN Doc HCR/GIP/03/03, para 16.

individual no longer appears to be exposed, in his country of origin, to unavailability of protection against acts of persecution.[62] This implies that the change in circumstances has remedied the reasons which led to the recognition of refugee status. A relevant criterion in this respect is whether the actor(s) of protection of the country of origin has taken reasonable steps to prevent the persecution, that it therefore operates, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection.[63] In this sense, account may be taken of the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country.[64]

In addition, the ECJ noted that article 11(2) of the Qualification Directive provides that the change of circumstances recorded by the competent authorities must be 'of such a significant and non-temporary nature' that the refugee's fear of persecution can no longer be regarded as well founded.[65] This will be the case when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated.[66] The assessment of the significant and non-temporary nature of the change of circumstances thus implies that there is no well-founded fear of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of article 9(1) of the Directive.[67]

It is unclear whether cessation owing to change of circumstances can be declared for a specific area or whether it must be declared country-wide. The

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[62] Joined cases C-175/08, C-176/08, C-178/08 and C-179/08, [2010] All ER (D) 54 (Mar) *Aydin Salahadin Abdulla (C-175/08), Kamil Hasan (C-176/08), Ahmed Adem, Hamrin Mosa Rashi (C-178/08) and Dler Jamal (C-179/08) v Bundesrepublik Deutschland* [69].
[63] Ibid, [70].
[64] Ibid, [71].
[65] Ibid, [72].
[66] Ibid, [73].
[67] Ibid, [73].

UNHCR Standing Committee has said that 'national protection […] would need to include […] peace and security in the area concerned [emphasis added].' However, the UNHCR later issued guidelines that stated that 'changes in the refugee's country of origin affecting only part of the territory should not, in principle, lead to cessation of refugee status.'[68] In ***Abdulla***, the ECJ confirmed that article 7, which concerns protection provided by non-state actors, including international organisations, does indeed apply to cessation under article 11(1)(e) of the Qualifying Directive.[69] This is significant as, due to the reference in article 7(1) to protection being provided in a 'substantial part of a territory', the effect of the ECJ judgment is that cessation of refugee status can occur even if the change of circumstances have only occurred in part of the territory.[70] Thus the interpretation of the UNHCR is at odds with that of the ECJ, as the former's approach is that significant changes must take place throughout the territory to trigger cessation of refugee status.

Regardless of whether or not cessation of status may occur in relation to part or the whole of the country of origin, the circumstances under which cessation may be declared is relevant for the purposes of the IFA inquiry. Evidently human rights standards also come into play, but like the IFA inquiry, there is little clarity or consensus about what these human rights considerations entail.[71]

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[68] UNHCR 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' (10 February 2003) UN Doc HCR/GIP/03/03, para 17.
[69] Joined Cases C-175/08, C-176/08, C-178/08, C-179/08 *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi, and Dler Jamal v Bundesrepublik Deutschland* [75].
[70] Maria O'Sullivan, 'Territorial Protection: Cessation of Refugee Status and Internal Flight Alternative Compared' in Satvinder S. Juss, *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2013), 211.
[71] Fitzpatrick, 366.

6. Protection of Human Rights in the Proposed IFA

There is ample scholarly opinion to the effect that the Refugee Convention is 'part and parcel' of the broader international human rights law framework.[72] Chetail, for example, posits that:

> […] [H]uman rights law has become the ultimate benchmark for determining who is a refugee. The authoritative intrusion of human rights has proved to be instrumental in infusing a common and dynamic understanding of the refugee definition that is more consonant with and loyal to the evolution of international law. It thus avoids the Geneva Convention to be a mere legal anachronism by adapting it to the changing realities of forced migrations.[73]

This argument finds its roots in the Convention's preamble, which should be taken into account when assessing the Convention's object and purpose.[74] The preamble shows that the States Parties were concerned 'that human beings [should] enjoy fundamental rights and freedoms without discrimination.' Further support for this contention lies in the interpretation of the term 'persecution' as found in the Convention. Despite the Convention's silence on the definition of this term, the link between serious human rights violations and persecution has been frequently made.[75] This is reflected in article 9 of the Recast EC Qualification Directive, which states that acts of persecution must 'be sufficiently serious by their nature or repetition as to

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[72] UNHCR 'UNHCR and Human Rights: A Policy Paper Resulting from Deliberations in the Policy Committee on the Basis of a Paper Prepared by the Division of International Protection' (6 August 1997) UN Doc AHC/97/325l; Alice Edwards, 'Human Rights, Refugees and the Right 'to Enjoy' Asylum' 17 International Journal of Refugee Law 293, 297; Erika Feller, 'International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future' 83 International Review of the Red Cross 581, 582; Reinhard Marx, 'The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures' 14 International Journal of Refugee Law 179, 206.

[73] Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marin (ed), *Migrations and Human Rights, Collected Courses of the Academy of European Law* (Oxford University Press 2013), 9.

[74] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art. 31(1), art. 31(2).

[75] UNHCR 'Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Art. 1(a)(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (2002)' (7 May 2002) UN Doc HCR/GIP/02/01, para 13; Hathaway, *The Law of Refugee Status*, 104, 105.

constitute a severe violation of basic human rights.'[76] Human rights considerations have also been used to give fuller meaning to the term 'social group' within the refugee definition.[77] If the overall object and purpose of the Convention is one of protection, and in light of the fact that the Convention must be interpreted in good faith, one must question whether drawing distinctions based on IFA is compatible with the Convention's aims.[78] As expressed by Kirby J in the Australian case of ***SZATV v. Minister for Immigration and Citizenship [2007]***:

> [It] is essential to ensure that the decision-maker never loses sight of the protective purposes of the Refugees Convention and does not read into its provisions qualifications, limitations and exceptions that are not there.[79]

However, a note of caution must be taken at this juncture, as the Refugee Convention's relationship with human rights is far from certain. In particular, it is unclear whether human rights law informs the interpretation of the Refugee Convention, or whether it has a more influential role in that it defines its parameters. It has been argued that the aim of the Refugee Convention is to provide international protection to a narrowly defined category of persons who can prove a well-founded fear of persecution for enumerated Convention reasons. According to its drafters, the Refugee Convention's goal was not of protecting those in need of human rights protection generally but to deal 'only with the problem of legal protection and

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[76] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art. 9(1)(a).
[77] Alice Edwards, 'Human Rights, Refugees and the Right 'To Enjoy' Asylum' (2005) 17 International Journal of Refugee Law 293, 295; UNHCR 'Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (7 May 2002) UN Doc HCR/GIP/02/02.
[78] Zimmermann, 458.
[79] *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 [67].

status.'[80] As stated by Dawson J in the Australian High Court case of ***A v Minister for Immigration and Ethnic Affairs*** **[1997]**:

> […] [N]o matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee in terms of the Convention. And by incorporating the five Convention reasons the Convention plainly contemplates that there will even be persons fearing persecution who will not be able to gain asylum as refugees [...] It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them.[81]

Secondly, as Steinbock argues, it is significant that the refugee definition makes no mention of many human rights that, at the time of its drafting, had just been enunciated in the Universal Declaration of Human Rights ('UDHR'). Rather, the Convention's preamble simply refers to the UDHR and UN Charter as setting out the principle that human beings shall enjoy fundamental rights without discrimination, and the operative part of the Convention focuses on putting refugees on a more equal footing with nationals of the host state.[82]

Thirdly, the Convention's applicability is limited by its exclusion and cessation clauses. Human rights lawyers tend to be 'suspicious' of such concepts of deserving and undeserving persons.[83] In light of these considerations, one must be mindful that there may be limits as to how far the Refugee Convention may be interpreted as a human rights convention.

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[80] Barutciski, 'Tensions Between the Refugee Concept and the IDP Debate', 12; Statement of Mr. Henkin of the USA (18 August 1950) UN doc. E/AC.7/SR 161.
[81] *A v Minister for Immigration and Ethnic Affairs* 2 BHRC 143, 248. This was subsequently confirmed by the judgment of Baroness Hale in *The Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678.
[82] Daniel J. Steinbock, 'The Refugee Definition as Law: Issues of Interpretation', in Nicholson and Twomey, 31.
[83] Colin Harvey, 'Refugees, Rights and Human Security' [2001] 19 New Directions for Refugee Policy 99, 96.

This discussion sets the scene for the focus of this chapter - the relevance of human rights protection in the proposed IFA. This issue has been discussed in relation to the 'reasonableness' criterion of the proposed IFA, and as an independent criterion in its own right. The spectrum of positions on this matter is very broad, ranging from an insistence on protection of basic civil, political and socioeconomic rights, to the proposition that human rights considerations (persecution aside) are a neutral factor for the purposes of IFA determination. The following paragraphs will outline the differing stances that have been taken with a view to determining which of these, if any, is most compatible with the Refugee Convention.

6.1 The Refugee Convention as a Human Rights Convention?

As outlined above, the nexus between human rights considerations and the Refugee Convention's object, purpose, and context is not entirely clear. Nonetheless, three considerations must be borne in mind. First, the preamble, which affirms the relevance of the Universal Declaration of Human Rights and UN Charter, should be taken into consideration when ascertaining the object and purpose of the Convention.[84] Secondly, the practice of states in taking a human rights-based approach in the interpretation of the terms 'persecution' and 'particular social group', as outlined above, ought to be taken into account. Thirdly, any relevant rules of international law applicable in the relations between the parties also form part of its context.[85] Thus the fact that an overwhelming majority of the Refugee Convention's States Parties are parties to at least one, if not many, human rights based treaties, is relevant in the interpretation of the Refugee's Convention's terms. Therefore, it is

[84] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(2).
[85] Ibid, art 31(3)(c).

safe to say that human rights considerations, at the very least, inform the interpretation of the Refugee Convention.

However, the difficulty with this proposition in the context of the IFA inquiry is ascertaining the content of the standard that ought to be applied. This is illustrated by an examination of the UNHCR's position with regard to the IFA, which posits that the reasonableness inquiry should focus on whether adequate protection of basic civil, political and socio-economic rights is available in the proposed area of relocation.[86] Similar approaches are also found in literature and case-law.[87]

Although a welcome attempt to bring clarity to this amorphous area of refugee law, the UNHCR's approach may be criticised for two reasons. First, there is no clear basis in law for requiring the application of this particular standard, that is, 'basic norms of civil, political and socio-economic rights' to the IFA inquiry. Secondly, the UNHCR and various writers who advocate this interpretation give little or no further clarification as to what would constitute 'basic' human rights. Indeed, Hathaway and Foster acknowledge that 'the minimum acceptable level of legal rights inherent in the notion of 'protection' is certainly open to debate'.[88] The lack of a definite list or standard of core human rights norms is arguably the greatest hurdle to this proposed interpretation of the IFA for numerous reasons.

First, as the human rights obligations by which different states are bound vary, and as there is no uniform and ascertainable standard of human rights for refugees upon which states have agreed, the human rights approach to the IFA seems to suffer

[86] UNHCR, 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR', 64.
[87] Ibid, 64; Hugo Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined' (1998) 10 International Journal of Refugee Law 499, 530; Zimmermann, 458; *Butler v Attorney General* [1999] NZAR 205 [7].
[88] Hathaway and Foster, 'Internal Protection/ Relocation/ Flight Alternative as an Aspect of Refugee Status Determination', 43.

from an inherent difficulty. Can there exist a hierarchy of rights under international law,[89] considering that 'all human rights are universal, indivisible and interdependent and interrelated?'[90] Even if such a hierarchy exists, which rights constitute the list of 'basic' human rights? Is it formed of the so-called 'International Bill of Rights', consisting of the (non-binding) UDHR, the ICCPR and the ICESCR? Or does it consist of those rights which are 'non-derogable' under the above treaties?[91] Or should the hierarchy of rights consist of two further tiers - rights that are derogable in times of public emergency and certain socioeconomic rights, with socioeconomic rights and those rights that are not codified in ICESCR or ICCPR falling outside the scope of a state's duty of protection?[92] Evidently, the human rights interpretation approach raises more questions than it answers.

Even if a core human rights standard could be identified, it is doubtful that it would be an 'objective and apolitical yardstick' for measuring standards within the IFA as propounded by Towle.[93] The difficulty in measuring human rights standards in another jurisdiction is especially apparent in the realm of socioeconomic rights. Notwithstanding the fact that the Committee on Economic, Social and Cultural Rights has identified a 'minimum core obligation' to ensure the satisfaction of rights incumbent on States Parties,[94] these rights have traditionally been seen as open-ended,

[89] Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12 European Journal of International Law 917, 918; Theodore Meron, 'On a Hierarchy of International Human Rights' (1986) 80 American Journal of International Law 1.
[90] UNGA 'World Conference on Human Rights, Vienna Declaration and Programme of Action 1993' (12 July 1993) UN Doc A/CONF.157/23, para 5.
[91] Zimmermann, 458; Koji.
[92] Hathaway, *The Law of Refugee Status*, 105-112.
[93] Richard Towle, 'Human Rights Standards: A Paradigm for Refugee Protection?' in Bayefsky and Fitzpatrick, 31.
[94] Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, par 1)' (1990) UN Doc CESCR-E/1991/23, para 10.

indeterminate and lacking conceptual clarity.[95] Furthermore, as the obligation on states is to 'take steps […] to the maximum of its available resources with a view to achieving progressively the full realisation of the rights recognised' in the Convention, it would be very difficult for a court to assess the situation in a foreign jurisdiction.[96] It would have to adjust its expectations for each state owing to the fact that states enjoy different levels of development and therefore different levels of potential for the fulfilment of rights.[97] Furthermore it would mean that each IFA would be subjected to a different threshold of socioeconomic provision depending on the country in which the IFA is located. Far from being a universal standard, it would vary widely depending on the level of development in the state concerned.

Finally, the human rights approach has been rejected by the Court of Appeal of England and Wales. In the words of Lord Phillips MR:

> An asylum-seeker who has no well-founded fear of persecution but has left his home country because he does not there enjoy [basic norms of civil, political and socio-economic human rights] will not be entitled to refugee status. When considering whether it is reasonable for an asylum seeker to relocate in a safe haven, in the sole context of considering whether he enjoys refugee status, we cannot see how the fact that he will not there enjoy the basic norms of civil, political and socio-economic rights will normally be relevant. If that is the position in the safe haven, it is likely to be the position throughout the country. In such circumstances it will be a neutral factor when considering whether it is reasonable for him to move from the place where persecution is feared to the safe haven.[98]

In short a human rights interpretation of the IFA requiring the protection of 'basic civil, political, and socio-economic rights', although desirable, suffers from numerous

[95] David Marcus, 'The Normative Development of Socioeconomic Rights through Supranational Adjudication' (2006) 42 Stanford Journal of International Law 53, 59.
[96] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 2(1).
[97] Marcus, 61.
[98] *A.E, F.E. v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531 [38].

inherent difficulties. It is therefore submitted that this standard is not applicable in the IFA inquiry and we must look elsewhere when ascertaining the relevant benchmark in terms of human rights considerations (if any) when assessing the existence of an IFA.

6.2 The Guiding Principles on Internal Displacement[99]

The Guiding Principles on Internal Displacement have also been advocated as a potential yardstick by which human rights conditions within a proposed IFA could be measured.[100] After all, if an asylum seeker is forced to relocate to a safe place within his or her country of origin, in effect, he or she will become internally displaced. Whether or not this is in itself is a breach of human rights remains a question for further research, as the prohibition of internal displacement has not yet been firmly established in general international law. However, for the time being, the Guiding Principles have the potential to provide a helpful recapitulation of the human rights applicable to persons who have been forced to relocate, framed with specific reference to their needs.[101]

The use of the Guiding Principles to determine the adequacy of human rights protection in a proposed IFA suffers from many of the same shortcomings as the 'core' human rights approach outlined above. Another problem with using the Guiding Principles as a benchmark for IFA determination is that the protections set out in the Guiding Principles are quite far-reaching. Situations that would violate the Guiding Principles would include the denial of the right to visit the grave sites of deceased relatives (Principle 16), lack of access to essential sanitation facilities

[99] UNCHR 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.
[100] Elizabeth Ferris, 'Internal Displacement and the Right to Seek Asylum' (2008) 27 Refugee Survey Quarterly 76, 88; Hathaway and Foster, 'Internal Protection/ Relocation/ Flight Alternative as an Aspect of Refugee Status Determination', 45.
[101] Hathaway and Foster, 'Internal Protection/ Relocation/ Flight Alternative as an Aspect of Refugee Status Determination', 43.

(Principle 18), the inability to receive a passport (Principle 20), and arbitrary confiscation of property (Principle 21). Refugee status granted on the basis of risks inconsistent with the Guiding Principles could go far beyond what was intended by the drafters of the Convention as the risk of such harms would not create an entitlement to refugee status.[102]

Perhaps the biggest problem with using the Guiding Principles as a potential standard for IFA determination is that it is not clear whether some of the Guiding Principles are in fact hard law. As the legal standing of the Guiding Principles is discussed in detail in Chapter 2, it is unnecessary to do so again here. However, suffice it to say that Principle 15 (concerning the prohibition of internal *refoulement*), Principle 29 (restitution for property loss), and the principles on humanitarian assistance have a questionable basis in international law, and indeed, Kälin could only go so far as to say that 'no new law in the strict sense of the word was created [by the Guiding Principles] in *most* cases' (emphasis added).[103] Thus some of the Guiding Principles are not binding on states, and may go beyond what states are willing to accept in practice. Consequently the Guiding Principles are not an appropriate standard by which to measure the existence of an IFA.

6.3 The Michigan Guidelines on the Internal Protection Alternative/ the New Zealand approach

The Michigan Guidelines on the Internal Protection Alternative are the product of a study convened by the Programme in Refugee and Asylum Law, The University of Michigan Law School in April 1999. The Guidelines were drafted by various students

[102] Ibid, 44.
[103] Kälin, 'The Future of the Guiding Principles on Internal Displacement', 5.

and academics in the field of refugee law, including Professor Hathaway, and have been followed in New Zealand jurisprudence.[104]

Paragraph 21 of the Guidelines states that when determining the existence of an IFA, reference should be made to the rights which make up what the Guidelines interpret the Refugee Convention's definition of protection to be, notably articles 2-33. Paragraph 22 of the Guidelines states that 'at a minimum […] conditions in the proposed site of internal protection ought to satisfy the affirmative, yet relative, standards set by this textually explicit definition of the content of protection.'[105] This concept of protection entails a duty of non-discrimination *vis-à-vis* citizens or other residents of the asylum country and refugees regarding a list of rights.[106] These include general provisions, administrative measures, rights relating to juridical status, and rights relating to gainful employment. The Guidelines state that if this approach is followed, there is no additional duty to assess the 'reasonableness' of the IFA.[107]

The Guidelines have been appraised by Kelley (albeit with some qualifications, as outlined below), who states that this more limited range of rights recognised by the Guidelines would lead to more consistent results than the broader standard advocated by the UNHCR.[108] The Guidelines standard was also followed in New Zealand jurisprudence. The New Zealand Refugee Status Appeals Authority in ***Refugee Appeal No. 71684/99*** **[2000]** was 'of the view that the Michigan Guidelines properly reflect and summarise, though more succinctly and more elegantly, the

[104] *Refugee Appeal No. 71684/99* [2000] INLR 165.
[105] First Colloquium on Challenges in International Refugee Law, 'The Michigan Guidelines on the Internal Protection Alternative' (Program in Refugee and Asylum Law, University of Michigan Law School, 9-11 April 1990), para 22.
[106] Hathaway and Foster, 'Internal Protection/ Relocation/ Flight Alternative as an Aspect of Refugee Status Determination', 44.
[107] James Hathaway, 'First Colloquium on Challenges in International Refugee Law' (The University of Michigan Law School, April 9-11, 1999), para 23.
[108] Kelley, 42.

principles to be applied in New Zealand' and that the Guidelines could 'therefore be properly used to inform the New Zealand law.'[109] The judgment then reproduced the Guidelines in full. Rodger P.G. Haines, Q.C., one of the drafters of the Guidelines, was also the Chairperson of the New Zealand Appeals Authority in this particular case.

While a clearer standard for the determination of an IFA would generally be a welcome proposal, it is not evident that the rights set out in the Refugee Convention may be transposed to the IFA inquiry for numerous reasons. The first concerns the rationale behind their adoption, as was set out by the New Zealand case of ***Refugee Appeal No. 76044*** **[2008]**. The Refugee Status Appeals Authority, quoting ***SZATV v. Minister for Immigration and Citizenship*** **[2007],** stated that the IFA has 'a fragile footing in the text of the [...] Convention' and that its origins were therefore 'suspect.'[110] According to the Authority, it was therefore important that the principles employed in the determination of an IFA were at least consistent with the language, object and purposes of the Convention. Considering that the Refugee Convention itself defines genuine access to international surrogate protection as encapsulating, at a minimum, those rights contained in articles 2-33, the Authority held that it 'is consistent with both principle and logic of the Convention for those same rights to be used to measure genuine access to meaningful state protection internally in the country of origin when withholding recognition of refugee status from someone who is presumptively a refugee.'[111]

It is submitted that this rationale misinterprets the nature of the Refugee Convention. The Convention is addressed to persons who are outside their countries

[109] *Refugee Appeal No. 71684/99* [2000] INLR 165 [65].
[110] *Refugee Appeal No 76044* [2008] NZRSAA 80 [147].
[111] Ibid [147].

of nationality and are in need of international protection. It is not addressed to determining the rights applicable to an asylum seeker within his country of origin and this is acknowledged by the drafters of the Michigan Guidelines.[112] In a similar vein, there is a distinction to be drawn between the meaning of the word 'protection' in the refugee definition, which refers to the lack of protection in the country of nationality, and the international 'protection' which accrues when the refugee is in the asylum state, as set out in articles 2-33. Only the former concept of 'protection' is relevant to the IFA inquiry. This is highlighted by the fact that articles 2-33 make no reference to protection from persecution, which should form the core of the IFA analysis. In addition, the Refugee Convention is not aimed at the 'general levelling up of living standards around the world, desirable though of course that is.'[113] Refugees and those displaced internally are fundamentally different, in that the international community's access to IDPs can be limited or qualified. This is not the case with refugees.[114] Furthermore, the rights that are set out in the Convention accrue to a person after they have satisfied the criteria of the refugee definition. To treat those rights as a standard which forms part of the refugee definition would be premature and would possibly entail extending the reach of the refugee definition beyond that which was envisaged by its drafters. As previously outlined, the *travaux préparatoires* show that it was the intent of the drafters that persons displaced within their countries of origin were not to be protected by the Refugee Convention. The Refugee Convention cannot therefore be used as a backdoor to provide international protection for those displaced internally.

[112] Hathaway and Foster, 'Internal Protection/ Relocation/ Flight Alternative as an Aspect of Refugee Status Determination', 45.
[113] *The Secretary of State for the Home Department v AH (Sudan)* [5].
[114] Barutciski, 'Tensions Between the Refugee Concept and the IDP Debate', 12.

Further, to treat articles 2-33 as part of the refugee definition would mean that the inquiry into IFA is 'really an inquiry into whether a person who is *prima facie* a refugee [...] should lose that status by the application of the internal protection principle.'[115] This rationale would entail treating the IFA as an unwritten exclusion clause. However, the exclusion clauses in the Convention are exhaustive and thus the argument that an unwritten exclusion clause exists is difficult to maintain. Furthermore, this would be at odds with the logic by which exclusion causes are applied. Such clauses come into play after an asylum seeker has fulfilled the criteria of the refugee definition. Regardless of the approach taken, a person who has an IFA does not qualify as a refugee on account of a failure to meet the definition, either for lack of a well-founded fear or the ability to avail himself of the protection of his country of nationality.[116]

Finally, in the words of Kelley:

> [The effect of the Michigan Guidelines] is […] to use the narrow standards of protection contained in the Convention as a substitute for the more extensive ones contained within subsequent human rights treaties. The approach … would also suggest that so long as the state treats the refugee in the IFA equally with respect to the narrow range of rights in the Convention, protection would be satisfied even if a greater range of rights were accorded to the refugee's fellow citizens. In effect the state protection requirement would be met even when the refugee is denied core entitlements available to other citizens provided they are also denied to non-citizens.[117]

The second reason is a practical one, in that the rights which are set out in the Refugee Convention are not applicable in an internal context. It is true that the Michigan Guidelines '[do] not suggest a literal interpretation of Articles 2-33 in considering internal protection, but rather that decision makers seek inspiration from

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[115] *Refugee Appeal No. 71684/99* [2000] INLR 165 [61].
[116] Zimmermann, 449.
[117] Kelley, 35.

the kind of interests protected by these Articles.'[118] Even if the Guidelines are employed in this very general manner, it nonetheless would entail reading into the Convention a standard which has clearly been set for persons in a different legal and factual scenario and thus has a different conceptual basis. While refugees and IDPs often have similar protection needs, the situation of persons who have crossed an international frontier is different from that of persons who are obliged to relocate within their country of origin to receive protection. As noted by Barutciski, refugees are granted basic socio-economic rights for the purposes of maintaining themselves in a foreign country in which they do not have citizenship status.[119] It would not make sense to look to these rights for guidance when considering the situation of citizens in their country of origin. Moreover, there are various levels at which the relevant rights are required to be conferred.[120] In the case of some rights, refugees must be treated in the same manner as nationals of the country of asylum (e.g articles 4 and 14). Some rights entail a duty to afford refugees the 'most favourable treatment accorded to nationals of another country in the same circumstances' (for example, articles 15, 17). Others must be granted in a manner at least as favourable as conditions granted to other aliens generally (for example, articles 7 and 13). This may be contrasted with the right of IDPs under the Guiding Principles to 'enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country.'[121] The fact that these rights are granted relative to the situation in the asylum

[118] Hathaway and Foster, 'Internal Protection/ Relocation/ Flight Alternative as an Aspect of Refugee Status Determination', 409.
[119] Barutciski, 'Tensions Between the Refugee Concept and the IDP Debate', 12.
[120] Marx, 204.
[121] UNCHR, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add., Principle 1.

state makes it difficult to accept that such a specific standard can be used as general guidelines to assess the situation in a country of origin.[122]

Thirdly, it is important to remember, as Marx points out, that there is no obligation on parties to the Convention to abstain from deportation if the conditions in the IFA fall below the protection standard set out in the Convention.[123] Where a person satisfies the refugee definition, the state is bound by article 32, which prohibits the expulsion of a refugee lawfully within its territory save on the grounds of national security and public order. The state is also bound by the principle of *non-refoulement*, as laid down in article 33, which prohibits the return of refugees to places where their lives or freedoms are endangered on Convention grounds. As the Convention explicitly sets out the exceptions to the general right of states to deport aliens within their territory, the argument that another unenumerated exception exists is difficult to maintain.

Finally, the legal weight of the Guidelines must be borne in mind when assessing their authoritative value. As mentioned previously, the Guidelines were drafted by a team of academics led by Professor Hathaway. Such academic writings are not referred to as authoritative by the Vienna Convention on the Law of Treaties.[124] However, according to the 1945 Statute of the International Court of Justice (ICJ) 'teachings of the most highly qualified publicists' may be applied by the court as 'a subsidiary means for the determination of the rules of law'.[125] Considering that the ICJ is the body to which disputes concerning the Refugee Convention are to be referred to, it is possible that the Michigan Guidelines could be considered in that

[122] Marx, 204.
[123] Ibid, 203.
[124] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[125] 1946 Statute of the International Court of Justice, art 38(1)(d).

context. Furthermore, the publications of eminent scholars are frequently cited by domestic asylum determination bodies.

However, the problem with the Michigan Guidelines as an authoritative interpretation of international law is the sources upon which they are based. Their drafters maintain that they are 'the product of collective study of relevant norms' and that they 'informed primarily by the jurisprudence of leading developed states of asylum.'[126] It is true that parts of the Guidelines do indeed reflect the jurisprudence of various domestic courts as outlined above. However, the applicability of articles 2-33 to the IFA had not at the time of the Guidelines' drafting been established in domestic jurisprudence, at least insofar as this author's research has revealed. It therefore appears that, at the time of drafting, the Guidelines were a declaration of *lex feranda* and as they were not drafted by states, they have little legal authority.

Fourteen years on, can it be said that the situation has changed? It is true that the Guidelines have subsequently been approved in New Zealand jurisprudence, but the practice of one state does not a rule of customary international law make. In any event, this practice has been counter-balanced by the outright rejection of the Guidelines by the House of Lords.[127] It is therefore submitted on the basis of the conceptual, practical and legal grounds set out above that the protection standard put forward by the Guidelines in paragraph 21 is neither binding nor evidence of the practice of states generally. That is not to say that a customary rule cannot develop from the Guidelines, nor that states are not free to adopt them. However aside from New Zealand practice such acceptance has not yet come to pass.

6.4 The Approach in the United Kingdom

[126] The Michigan Guidelines on the Internal Protection Alternative, para 6.
[127] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426.

The Michigan Guidelines/ New Zealand approach was rejected by the House of Lords in the case of ***Januzi (FC) v Secretary of State for the Home Department and Others*** **[2003].**[128] Taking a textual approach to the interpretation of the Refugee Convention, Lord Bingham noted that as a general rule, 'the parties to an international Convention are not to be treated as having agreed something they did not agree.'[129] He cited with approval the broad approach taken by the case of ***E and another v Secretary of State for the Home Department*** **[2003]** which emphasised that the failure to protect (as opposed to discriminatory denial of) basic human rights does not constitute persecution under the Refugee Convention and made a distinction between (i) the right to refugee status under the refugee Convention; (ii) the right to remain by reason of the Human Rights Convention; and (iii) considerations which may be relevant to the grant of leave to remain for humanitarian reasons.[130] Lord Bingham stated that this approach was to be preferred to the Michigan Guidelines/ New Zealand approach and outlined numerous reasons to support this contention.

First, he noted that the Convention is addressed to the rights in the country of asylum of refugees recognised as such.[131] As discussed above, the Convention is not explicitly directed to defining the rights in the country of their nationality of claimants for asylum who may be able to relocate.

Secondly, he argued that acceptance of that rule could not be implied into the Convention. Acknowledging the human rights overtones in the Convention's preamble, he emphasised that the thrust of the Convention is to provide effective protection against persecution for Convention reasons. It was not directed

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[128] Ibid, approved in *The Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678.
[129] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [4].
[130] *E v Secretary of State for the Home Department* [2003] EWCA Civ 1032; [2004] QB 531 [16]; *A.E, F.E. v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531 [67].
[131] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [15].

(persecution apart) to the level of rights prevailing in the country of nationality.[132] He noted the non-binding character of the UDHR and that the ICCPR and the ICESCR had yet to be adopted when the Convention was completed.[133] On this point, it must be remembered that subsequent practice of States Parties may under some circumstances be relevant for the purposes of treaty interpretation.[134] The fact that the ICCPR and ICESCR were drafted after the completion of the Refugee Convention therefore does not, of itself, rule them out as a relevant source of interpretation. Lord Bingham may thus have gone too far by dismissing human rights instruments on the grounds that the Refugee Convention preceded their conclusion.

Thirdly, he drew attention to the fact that the rule is not expressed in the 2004 EC Qualification Directive.[135] He noted that the Directive is binding on Member States of the European Union who could not, consistently with their obligations under the Convention, have bound themselves to observe a standard lower than it required. This point is not entirely convincing. The Directive set a minimum standard only and it explicitly acknowledges that the primary instrument binding on states is the Refugee Convention.[136] States are therefore free to employ higher standards when determining whether to return an asylum-seeker to his country of origin, and this may include the 'Hathaway/ New Zealand rule.' The fact that the rule is not included in the Directive therefore does not clarify its standing in international law. This point

[132] Ibid [16].
[133] Ibid [16].
[134] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(b).
[135] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [17].
[136] Hugo Storey, 'EU Refugee Qualification Directive: a Brave New World?' (2008) 20 International Journal of Refugee Law 1, 7; Council Directive (EC) 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L304/12, Recital 2, 16.

was made in New Zealand Refugee Status Appeals Authority in ***Refugee Appeal No. 76044*** **[2008]** when analysing ***Januzi***.[137]

Fourthly, he stated that the rule is not, currently, supported by such uniformity of state practice based on *opino juris* and such consensus of professional and academic opinion as would be necessary to establish a rule of customary international law.[138] On this ground, it should be noted that it is unnecessary to establish a consensus of academic and professional opinion to establish the existence of a customary norm – the relevant criteria are the degree of state practice and *opinio juris* supporting the rule.[139] In any event, as the judgment of ***Refugee Appeal No. 76044*** **[2008]** pointed out, the rule was never advocated as one that was customary in nature.[140] This is true. However as previously outlined, prior to its adoption by the New Zealand Refugee Status Appeals Authority there was not a single example of state practice to support its existence. The Refugee Convention is applied by states in asylum determination proceedings. It is not self-applying, desirable as that may be. The pertinent evidence for the existence of a customary rule is what states do in practice, not declarations made within the academic community. Nonetheless, although Lord Bingham was correct in stating that he was not bound by this rule, there was nothing prohibiting him from adopting the rule and contributing to state practice in this regard. As is evident from the judgment, this was not his desire.

Finally, Lord Bingham stated that the adoption of the rule would give the Convention an effect which is not only unintended but also anomalous in its consequences:

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[137] *Refugee Appeal No 76044* [2008] NZRSAA 80 [149].
[138] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [18].
[139] *North Sea Continental Shelf* (*Federal Republic of Germany v Netherlands, Federal Republic of Germany v Denmark*) (Judgment) [1969] ICJ Rep 3.
[140] *Refugee Appeal No 76044* [2008] NZRSAA 80 [149].

> Suppose a person is subject to persecution for Convention reasons in the country of his nationality. It is a poor country. Standards of social provision are low. There is a high level of deprivation and want. Respect for human rights is scant. He escapes to a rich country where, if recognised as a refugee, he would enjoy all the rights guaranteed to refugees in that country. He could, with no fear of persecution, live elsewhere in his country of nationality, but would there suffer all the drawbacks of living in a poor and backward country. It would be strange if the accident of persecution were to entitle him to escape, not only from that persecution, but from the deprivation to which his home country is subject. It would, of course, be different if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment.[141]

This point was confirmed by Baroness Hale in ***Secretary of State for the Home Department v AH (Sudan) and others (FC)*** **[2007]**:

> If people can return to live a life which is normal in that context, and free from the well-founded fear of persecution, they cannot take advantage of past persecution to achieve a better life in the country to which they have fled.*[142]*

The thrust of this point is that the application of the Michigan Guidelines rule to the IFA would expand the applicability net of the Refugee Convention far beyond what was anticipated by its drafters and that this result would be too far removed from the purposes of the Convention. According to ***Januzi***, if the issue of an IFA is raised, the relevant comparison would be between conditions in the place of relocation and those which prevailed elsewhere in the country of nationality.[143] By contrast, a comparison between the asylum seeker's circumstances in the receiving country with the place of relocation was not relevant, though it could be relevant within the framework of complementary protection. Thus humanitarian considerations (persecution apart) did

[141] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [19].
[142] *The Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678 [27].
[143] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [46].

not form part of the IFA inquiry for the purposes of the refugee definition, but such considerations fell within the realm of other conventions.

The logic of this conclusion is best illustrated by direct application to the facts of the case: the first applicant, Mr. Januzi was resisting expulsion not because of fear of persecution in Pristina, but because for medical reasons, it would be unduly harsh for him to relocate there. If he were to succeed on the basis of the Refugee Convention, he would be a refugee for socioeconomic reasons, rather than for a well-founded fear of persecution, and thus in refusing his refugee status, this case seemed to reflect a desire to maintain the distinction between refugee and humanitarian claims. That said, human rights considerations did influence this decision in three respects. First, Lord Bingham acknowledged that the Refugee Convention, as a human rights convention, should not be given a narrow meaning, although he qualified this statement by referring to the obligation not to allow an interpretation grounded in human rights considerations to override the textual meaning of the Convention.[144] Secondly, Lord Bingham accepted that the Convention's preamble seeks to assure refugees the widest possible exercise of the fundamental rights and freedoms affirmed in the UDHR and the UN Charter.[145] Thirdly, and most importantly, the House of Lords indirectly supported a human rights-based approach to the IFA inquiry by stating that 'valuable guidance' in this respect is to be found in the UNHCR Guidelines on International Protection of 23 July 2003.[146] In doing so, Lord Bingham endorsed paragraph 28 of this document which emphasises the need to have respect

[144] Ibid [4].
[145] Ibid [4].
[146] UNHCR 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees' (23 July 2003) UN Doc HCR/GIP/03/04.

for 'basic human rights standards, in particular non-derogable rights' when determining whether an IFA is reasonable.[147]

Thus what we are left with in ***Januzi*** is a somewhat curious conclusion. On the one hand, Lord Bingham is clear in his assertion that human rights considerations (persecution apart) do not form part of the IFA inquiry but are more appropriately addressed by the framework of complementary protection. On the other hand, the importance of basic human rights, in particular non-derogable rights, in determining the reasonableness of a proposed IFA is indirectly endorsed by reference to the UNHCR guidelines. The logic behind this reference to the UNHCR's undefined standard is unclear, particularly when earlier in the judgment Lord Bingham placed emphasis on employing a textual interpretation of the Refugee Convention and insisted that the parties are 'not to be treated as having agreed something they did not agree'.[148]

The confusing nature of this decision could perhaps be attributed to the fact that Lord Bingham focused his discussion on the reasonableness of the IFA rather than the protection available in the proposed location.[149] Although this standard is, as mentioned previously, well-established in domestic jurisprudence, by framing the discussion in terms of protection, or availability thereof in Pristina, Lord Bingham could have made a stronger argument in favour of expulsion that was anchored in the terms of the refugee definition. However, on either the reasonableness or protection approach, it is submitted that the same conclusion would have been reached and Mr. Januzi would have been denied refugee status.

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[147] *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [20].
[148] Ibid [4].
[149] Jonah Eaton, 'The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive' (2012) 24 International Journal of Refugee Law 765, 25.

Subsequent jurisprudence has clarified the position in ***Januzi***. In ***Secretary of State for the Home Department v. AH (Sudan) and others*** **[2007]**, Baronness Hale viewed the UNHCR's position as no different to the approach put forward by Lord Bingham in ***Januzi***.[150] In addition, all members of House of Lords were in agreement that the test set out in ***Januzi*** did not necessitate that conditions in the IFA should infringe rights under Article 3 of the European Convention on Human Rights ('ECHR') in order to qualify as unreasonable.[151] A similar point was made in ***AK (Article 15(c)) Afghanistan CG*** **[2012]**, where it was held that it was unlikely that ***Januzi*** and ***AH (Sudan)*** intended to reject all recourse to human rights considerations.[152] Thus in determining that an IFA is unreasonable, the level of human rights violations did not have to reach the threshold of a 'severe violation of basic human rights, in particular the rights from which derogation cannot be made' as set out in Article 9(1) of the recast 2011 EC Qualification Directive.[153] Nonetheless, as Lord Brown observed in ***AH (Sudan)***, citing Brooke LJ in ***Karanakaran v. Secretary of State for the Home Department*** **[2000]**,[154] the IFA inquiry 'is still a very rigorous test'.[155] The issue at hand is whether the claimant can live a 'relatively normal life'. However if the claimant is able to bear the significant hardship experienced by a minority in the place of relocation, it may still be found to constitute an IFA.[156] This, in the words of Lord Brown, is because the 'Refugee Convention […] is really

[150] *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 [20].
[151] *The Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678 [21].
[152] *AK (Article 15(c)) Afghanistan CG [2012] UKIT 00163(IAC)* [240].
[153] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.
[154] *Karanakaran v. Secretary of State for the Home Department* [2000] All ER 449, 456.
[155] *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 [41].
[156] Ibid [42].

intended only to protect those threatened with specific forms of persecution. It is not a general humanitarian measure.'[157]

Although a welcome attempt to bring clarity to the amorphous IFA test, the jurisprudence of the United Kingdom does little to assist in overcoming the difficulties inherent in the human rights approach to the IFA inquiry as set out in the beginning of this chapter. In particular, we are still left with the question as to the content of the 'basic human rights' standard and the relationship of human rights considerations to the Refugee Convention remains unclear. The result is that decision-makers are left with a wide range of discretion when determining refugee claims, and the broader relevance of this jurisprudence is that New Zealand and the United Kingdom now have significantly contrasting interpretations on the question of what constitutes a 'reasonable' IFA. Such divergent jurisprudence will negatively impact on what should be the primary goal of states: that is, to interpret the Refugee Convention, insofar as possible, in a harmonious manner. As there does not exist a treaty monitoring body to provide an authoritative interpretation of the Refugee Convention, consistent interpretation of this instrument is of particular importance.

7. A different approach: 'Reasonableness' and 'Protection' combined?

As the above discussion illustrates, there is no clearly defined, accepted approach regarding the relevance of human rights considerations in the IFA inquiry. This stems largely from the fact that there is no reference to human rights in the refugee definition, and because it is unclear whether the primary aim of the Refugee Convention is to protect the human rights of refugees, or whether it has the more narrow, state-centric purpose of protecting only those who have a well-founded fear

[157] *The Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678 [42].

of persecution on Convention grounds. However, as outlined above, the Refugee Convention's preamble and subsequent interpretation by states indicate that it cannot be construed entirely independently of human rights considerations.

State practice to date has shown a divergence in positions between the Michigan Guidelines/ New Zealand approach, and the jurisprudence of the United Kingdom. Although both positions stem from the premise that general human rights considerations do not play a part in the IFA inquiry, they differ as to the relevance of the 'reasonableness' standard. Rather than employing the 'reasonableness' approach, the 'Michigan Guidelines/ New Zealand' approach puts forward a standard based on the rights which accrue to refugees recognised as such. The '***Januzi***' approach, on the other hand, accepts the 'reasonableness' standard and rejects the Michigan Guidelines for numerous reasons, holding that human rights considerations (persecution aside) do not generally play a part in the IFA inquiry, while at the same time indirectly endorsing the UNHCR's position that basic human rights standards, non-derogable rights in particular, are relevant to the reasonableness inquiry.

Where then does that then leave the IFA inquiry? And can either or both of these positions be reconciled with the Refugee Convention? It is submitted that primary recourse should be had to the Refugee Convention itself, and in particular to the prohibition of *non-refoulement* and the refugee definition, when determining the relevance of human rights standards in the IFA inquiry.

States are bound by the principle of *non-refoulement*, as laid down in article 33, which prohibits the return of refugees to territories where their lives or freedoms are endangered on Convention grounds. Refugee status is declaratory in nature, which means that a person does not become a refugee because of recognition as such; rather,

refugee status is recognised because the person is a refugee.[158] As asylum seekers may be refugees, the principle of *non-refoulement* also applies to them and thus they should not be returned or expelled pending a final determination of status.[159]

Article 33 is one of just two provisions in the Refugee Convention that limit the power of states to expel aliens and thus it is logical to have recourse to article 33 when determining whether an asylum seeker may be sent to an IFA. As article 33 applies to asylum seekers, it arguably expresses a general principle of protection which can and should be factored into the IFA inquiry. In employing article 33 in this manner, the question of 'reasonableness' is really an inquiry as to whether it is reasonable to expect the asylum seeker to remain in the IFA, or whether the conditions there are such as to compel return to a location where he will be exposed to persecution and thus constitute indirect *refoulement*. In this sense, the focus is anchored in the text of the Convention, and thus has a sounder basis in international law.

Secondly, a core element of the refugee definition is that the asylum seeker is unable to obtain protection from the persecution feared. This is the only qualifying condition concerning standards prevailing in the country of origin referred to in the refugee definition. Therefore in order for an IFA to exist, it must be illustrated that there exists 'protection' in the place of relocation. This may seem somewhat obvious, given that IFA refers to an internal 'protection' alternative but one should bear in mind that this term provides the crucial nexus between the requirements of the IFA and the requirements of the refugee definition.

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[158] UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (Reedited January 1992) UN Doc HCR/IP/4/Eng/REV, para 28.

[159] UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1976 Protocol' (26 January 2007), para 6.

The meaning of the term 'protection' is not elaborated upon in the Refugee Convention and therefore it is unclear what exactly will satisfy the protection element of the refugee definition. The standard of protection necessary will be intrinsically linked with the type and severity of the persecution feared and for this reason it is not possible to devise any complete or comprehensive exposition which would exhaustively define the relevant level of protection required by the Refugee Convention. The protection necessary in each case will depend on the precise circumstances of persecution.

Human rights considerations therefore form part of the IFA analysis only to the extent that respect for such rights is a necessary ingredient of protection from the persecution feared, or that such conditions may result in indirect *refoulement*.[160] Respect for the rule of law, for example, may be of relevance in this respect. In the case of ***Horvath v. Secretary of State for the Home Department***, the House of Lords held that there must be laws in force in the country which make violent attacks by perpetrators punishable by sentences commensurate with the gravity of the offences. Furthermore, there must be a reasonable willingness by law enforcement agencies to prosecute and punish offenders and the victim must not have been exempt from the protection of the law.[161] A similar standard of protection is found in article 7(2) of the Recast EC Qualification Directive.[162]

What is the relevance of those human rights provisions that do not necessarily need to be respected in order that the asylum seeker no longer fears persecution, or

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[160] Other authors have noted the relevance of indirect *refoulement*, amongst other factors, when determining the reasonableness of a proposed IFA. See, for example, Eaton; Hathaway and Foster, 'Internal Protection/ Relocation/ Flight Alternative as an Aspect of Refugee Status Determination'.
[161] *Horvath (A.P.) v Secretary of State for the Home Department* [2001] 1 AC 489.
[162] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

where a danger of indirect *refoulement* does not exist? For example, is it compatible with the Refugee Convention to require an asylum seeker to relocate to Mogadishu, for example, as outlined in the introductory section of this chapter? The evidence available concerning the situation facing IDPs indicates that although the living situation is dire, there is no suggestion that the IDPs are at risk of persecution for reasons set out in the refugee definition, or that there is a danger of indirect *refoulement*. It is submitted that this example would fall outside the remit of the Refugee Convention, as the refugee definition applies where there is no protection from the persecution feared, not necessarily where there is exposure to poor socioeconomic conditions that do not affect the extent of protection from persecution.

However, that is not to say that it is permitted under international law to return an asylum seeker to a place where such low standards of human rights protection exist. It is precisely in such situations that complementary protection can offer assistance. As the next chapter will indicate, the European Convention on Human Rights,[163] the American Convention on Human Rights,[164] the African Charter on Human and People's Rights,[165] the Convention on the Rights of the Child,[166] the Convention against Torture,[167] and EU asylum law all provide for an obligation of non-removal to a third state where certain conditions are met.[168] The precise content and scope of this obligation will be discussed in more detail in Chapter 5.

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[163] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.
[164] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144.
[165] 1981 African (Banjul) Charter on Human and Peoples' Rights 21 I.L.M. 58
[166] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[167] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[168] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9; Council Directive

8. Conclusion

There is little to be achieved in asylum determination proceedings by claiming that the IFA is not compatible with the Refugee Convention. Regardless of the IFA's basis in law, or of the underlying principles and purposes of the Convention, the IFA has clearly been established in domestic jurisprudence and now forms an inherent part of the refugee definition. However, the aspect upon which states and academic opinion has diverged is the standard of human rights protection (if any) that needs to be satisfied before an IFA can be said to exist.

What is the relevance of the above analysis in light of this thesis' core question? It is clear that certain conditions must be satisfied in order for protection of IDPs to be termed an 'IFA'. The test is not whether a person could have sought safety at the time of flight, rather, whether it is possible to return the asylum-seeker to the proposed IFA. In addition, there cannot be any legal or physical barriers to accessing the proposed IFA, it must be reasonable and not unduly harsh to expect the asylum-seeker to relocate there, and there must be protection from persecution in the area concerned.

The position regarding the relevance of human rights is more complex. This chapter has attempted to set out the differing stances that have been taken in this regard with an aim of assessing which, if any, is most compatible with the Convention. It has been illustrated that a standard of 'core' human rights norms has yet to be established in international law and that a general and undefined human rights approach to the IFA has various drawbacks. It has also been shown that while

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2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

the Guiding Principles on Internal Displacement may, at first instance, seem a logical benchmark by which to assess standards in the proposed IFA, the Guiding Principles suffer from many of the shortcomings of the human rights approach and their employment in the IFA analysis may go far beyond the intentions of the drafters of the Refugee Convention. Furthermore, the legal basis for some of the Principles is questionable and thus the use of the Principles as a legal benchmark would be inappropriate in this regard, and may go beyond what states are prepared to accept in practice.

The Michigan Guidelines approach has also been demonstrated to have questionable origins, in that they represent an attempt to apply refugee rights, albeit at a general level, to persons who remain within their country of origin. Furthermore, as they do not represent state practice (with the exception of New Zealand jurisprudence), they hold the same legal weight as academic writing in international law, which has, at most, persuasive value. These Guidelines were rejected in the House of Lords case of ***Januzi,*** which held that generally speaking, humanitarian considerations (persecution apart) did not form part of the IFA inquiry for the purposes of the refugee definition, while at the same time indirectly endorsing the approach put forward by the UNHCR as regards the relevance of human rights in the IFA inquiry.

What then, is the role (if any) of human rights considerations in the determination of an IFA? The analysis in this chapter leads to a modified and more protection-orientated version of the conclusion in ***Januzi***. The Convention as a whole is influenced by human rights considerations. However, regard must be had to the textual limits of the Convention. Human rights considerations therefore enter the IFA inquiry in two respects; first, insofar as a state is prohibited from engaging in indirect

refoulement; and secondly, to determine whether effective protection from persecution exists in the IFA. However, that is not to say that in the context of this chapter a state may send an asylum-seeker back to a place where he will be exposed to internal displacement. In addition to the Refugee Convention, states are bound by their obligations under human rights treaties and customary international law. It is in determining whether to grant leave to remain on humanitarian grounds that human rights law may complement the Refugee Convention and the standard of human rights protection in the place of relocation may therefore be of relevance in this respect.

This approach is attractive as it maintains the distinction between refugee and humanitarian claims and it is firmly based in the text of the Refugee Convention. Human rights considerations only enter the IFA inquiry where relevant to a state's obligations under the Refugee Convention. For this reason, only those who fit the refugee definition will be able to invoke the Refugee Convention to preclude expulsion and it will not be possible to invoke the Refugee Convention to provide international protection for so-called 'economic refugees'. Those who do not fit the refugee definition will nonetheless have an alternative avenue of redress under complementary protection. The benefit of using complementary protection as a benchmark is that reliance will be placed on international treaties and established international jurisprudence, rather than on the vague and undefined 'core human rights approach' which has been put forward by the UNHCR. Finally, this approach provides some clarity as to what is meant by 'reasonable' by linking it to the prohibition of *refoulement* as set out in article 33. To conclude, it is hoped that this more textual approach to the IFA analysis will add clarity to this ambiguous and undefined concept.

CHAPTER 4: THE UNHCR'S INVOLVEMENT WITH IDPS – 'PROTECTION OF THAT COUNTRY' FOR THE PURPOSES OF PRECLUDING REFUGEE STATUS?

1. Introduction

The drafters of the 1951 Convention relating to the Status of Refugees ('Refugee Convention') were responding to the fact that at that time, states were the sole repositories of power in international law, international relations, and political theory. However, modern scholarship has challenged this view and it is no longer presumed that states have exclusive control of their territories. Non-state actors ('NSAs') such as international organisations, NGOs, and quasi-states are now seen to have roles to play in both the domestic and international legal spheres.[1]

In recent years, the move away from a state-centric notion of international law has resulted in a progressive interpretation of the refugee definition.[2] An example of this may be seen in the interpretation of the term 'persecution' by domestic courts. A growing number of states now subscribe to the 'protection' theory, which maintains that persecution is not confined to actions of state authorities, but may also emanate from NSAs where the state is unable, or able but unwilling, to protect the individual from such persecution.[3] This stems from the conception of international refugee

[1] 'The Changing Role of the State Reflected in the Growing Importance of Non-State Actors', in Gunnar Folke Schuppert, *Global Governance and the Role of Non-State Actors* (1. Aufl. edn, Nomos 2006).

[2] Maria O'Sullivan, 'Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?' (2012) 24 International Journal of Refugee Law 85, 88; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [66]; Erika Feller, 'International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future' (2001) 83 International Review of the Red Cross 581, 594.

[3] See, for example, 'Moving Beyond the State: Refugees, Accountability and Protection' in Susan Kneebone, *The Refugees Convention 50 Years on : Globalisation and International Law* (Ashgate

protection as surrogate to national protection, in the sense that refugee protection is only applicable where protection is not available in the country of origin.[4] The 'protection' theory may be contrasted to the 'accountability' theory, which posits that only actions that are attributable to the state may constitute 'persecution' for the purposes of the refugee definition.[5]

In recent years, the acceptance by domestic courts that NSAs may be actors of persecution has been mirrored by the factual reality of NSAs providing protection to persons within their countries of origin. Clans, militias, and local authorities have been perceived as providing sufficient protection such that would obviate the need for international protection as encapsulated in the Refugee Convention. For example, the Canadian Federal Court held in ***Elmi v. MCI*** **[1999]** that in the situation of a complete breakdown of the state such as that which occurred in Somalia, a clan is capable of providing protection since it is acting as the 'de facto government agent of protection' in a particular area and because clan members 'traditionally look after one other'.[6] The European Court of Human Rights also seems to have accepted that clans may be able to provide sufficient protection from persecution.[7] In addition, since the

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2003); Volker Turk, 'Non-State Actors of Persecution' in Vincent Chetail and others, *Switzerland and the International Protection of Refugees : a Colloquium of the Graduate Institute of International Studies, Geneva, in collaboration with the Office of the United Nations High Commissioner for Refugees = La Suisse et la Protection Internationale des Réfugiés : Colloque de l'Institut Universitaire de Hautes Études Internationales, Géneve, en Collaboration avec le Haut Commissariat des Nations Unies pour les Réfugiés* (Kluwer Law International 2002); Walter Kälin, 'Non State Agents of Persecution and the Inability of the State to Protect' (2000-2001) 15 Georgetown Immigration Law Journal 415. For a more general discussion on the meaning of 'persecution', see Hugo Storey, 'What Constitutes Protection? Towards a Working Definition' (2014) 26(2) International Journal of Refugee Law 272.

[4] *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson* [1998] QB 929 [16]; James Hathaway, *The Law of Refugee Status* (Butterworths 1991), 135; *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437, 124 ALR 265, 441.

[5] 'Moving Beyond the State: Refugees, Accountability and Protection' in Kneebone.

[6] *Elmi v. Minister of Citizenship and Immigration* IMM-580-98.

[7] *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007).

emergence of the doctrine of 'Responsibility to Protect' in the last decade,[8] there has been an increasing acceptance that protection is not solely the responsibility of the state and that in certain circumstances, the responsibility to protect a population within a state's borders may shift to the international community. However, one of the dangers associated with such developments is that states may attempt to evade their obligations under international law by passing them on to a third party, be it another state, a private actor, or an international organisation.

A discussion on NSAs in general is beyond the scope of this chapter, and thus the focus will be on the UNHCR owing to its significant role in the protection of IDPs. This chapter will test the legality of the concern that the UNHCR's activities on behalf of IDPs could be undermining the institution of asylum by examining whether, and if so, under which circumstances, internal protection afforded by the UNHCR to IDPs constitutes 'protection' under the Refugee Convention and may thus be used by states as a reason to deny refugee status. Insofar as this author's research has revealed, this argument has not (yet) been made by states in asylum determination proceedings and the concept of 'actor of protection' is a relatively new one in refugee law.[9] The arguments raised in this chapter are therefore pre-emptive but are nonetheless pertinent, particularly in light of the fact that Article 7 of the 2011 Recast EU Qualification Directive provides that for the purposes of determining refugee status, protection against persecution may be provided by 'parties or organisations, including international organisations, controlling the state or a substantial part of the territory of the state.'[10] In 2001, the UNHCR recognised that its own international

[8] Ingo Winkelmann, *Responsibility to Protect* (Max Planck Encyclopedia of Public International Law 2012).
[9] Although there had been some precedence in German jurisprudence regarding southern Lebanon, the concept began to gain momentum when it was introduced in the 2004 Qualification Directive.
[10] Art 7(1)(b).

protection function had evolved significantly from being 'almost as a surrogate for consular and diplomatic protection' to include 'ensuring the basic rights of refugees and their physical safety and security.'[11] In addition, the UNHCR might be seen to be 'controlling the state or a substantial part of the territory of the state' if, for example, it were acting as an agent of the host state, if it were acting on the territory of a so-called 'failed state', or if it were acting in pursuance of a Security Council resolution. Moreover, because IDPs are the largest group receiving the UNHCR's protection and assistance – as many as 15.4 million at the end of 2012 - there are significant issues at stake in this analysis.[12]

2. Analogies to other areas of International Law

International Refugee Law is not the only context within which states attempt to pass their obligations onto another party, and the employment of private military and security companies ('PMSCs') and Memoranda of Understanding ('MoUs') by states serves to highlight the growth of this phenomenon. In an attempt to evade their obligations under international human rights law and international humanitarian law, states are increasingly employing PMSCs to engage in activities such as the training

[11] 'UNHCR's Protection Mandate' in UNHCR Global Report 2011 < http://www.unhcr.org/3dafdd0014.pdf > accessed 10 June 2014. Article 8 of the UNHCR statute provides that 'the High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto; (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection; (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities; (d) Promoting the admission of refugees not excluding those in the most destitute categories, to the territories of States; (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement; (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them; (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions; (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.'

[12] UNHCR 'Internally Displaced People Figures' <http://www.unhcr.org/pages/49c3646c23.html> accessed 4 January 2014.

and advising of armed and security forces, interrogation of individuals, and activities involving the potentially lethal use of force such as the staffing of checkpoints, protection of personnel and military assets, and sometimes combat functions.[13] As there is no international convention specifically dealing with this practice, states take advantage of this grey area in the law by 'contracting out' their duties to private actors.

In a similar vein, there is widespread reliance by states on MoUs to justify the extradition or deportation to third states in which torture is systematic.[14] These non-binding assurances generally specify that the individual in question will not be subjected to torture. However, the use of MoUs is of concern from a human rights protection perspective. MoUs are not legally binding, they usually remain unpublished, and because a breach of the terms of the MoU would cast both the sending and receiving state in a negative light, such a breach is likely to be kept confidential.[15] Notwithstanding these factors, the European Court of Human Rights has held that there is no absolute rule against reliance on such MoUs even where there are 'consistent and disturbing' reports of human rights abuses in the receiving state.[16]

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[13] Chia Lehnardt, *Private Military Companies* (Max Planck Encyclopedia of Public International Law 2011). See also Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge University Press 2011).

[14] Anthony Aust, Alternatives to Treaty-Making: MOUs as Political Commitments, in Duncan B. Hollis, *The Oxford Guide to Treaties* (Oxford University Press 2012), 54-58.

[15] Aust, Alternatives to Treaty-Making: MOUs as Political Commitments, in ibid 62-64.

[16] *Othman (Abu Qatada) v United Kingdom* App 8139/09 (ECHR, 26 May 2009)In this case, the Court considered that the general human rights situation in Jordan did not exclude the United Kingdom from accepting any assurances from its government. On the contrary, the Court considered that both governments had made genuine efforts to obtain and provide substantially detailed and formal assurances that the complainant would not be ill-treated upon return to Jordan. The Court relied on the fact that the assurances were approved by the Jordanian government, that the applicant's high profile would not put him at additional risk of ill-treatment, and that the assurances were made in good faith. This was notwithstanding the fact that the MoU's terms were unclear regarding the applicant's access to a lawyer during his detention, the capacity to monitor the situation, whether rendition was prohibited by the MoU, and whether the assurances were legal and enforceable.

The delegation of powers to non-state actors raises many problems, including lack of accountability for human rights violations. Many host state agreements provide for immunity of international organisations before national courts,[17] and international courts are reluctant to examine the accountability of states for actions conducted under the auspices of an international organisation. In the joined case of ***Behrami and Saramati*** before the European Court of Human Rights, the issue at hand was whether France and Norway were responsible for violations of the ECHR committed by personnel they had contributed to United Nations Interim Administration Mission in Kosovo ('UNMIK') and/ or the Kosovo Force ('KFOR').[18] The ECtHR held that the impugned action and inaction were attributable to UNMIK and KFOR which remained under the ultimate authority of the UN Security Council and not the respondent states. In addition, the ECtHR held that it was not competent rationae personae to examine the acts of the respondent states carried out on behalf of the UN, as it would interfere with the fulfilment of the UN's key mission, that is, the maintenance of international peace and security. However, this judgment has been subject to significant criticism. Breittegger, for example, states that it endangers the customary standard of effective control for attribution and may make Article 5 of the Draft Articles on the Responsibility of International Organisations (stipulating that the characterisation of an act of an international organisation as internationally wrongful is governed by international law) in practice irrelevant.[19] Milanović criticises the Court's reliance on the notion of delegation from the institutional law of

[17] See, for example, 'Agreement Between the United Nations High Commissioner for Refugees and the Government of Belize Concerning the Legal Status, Immunities and Privileges of UNHCR and its Personnel in Belize', 28 September 1992.
[18] *Behrami v France and Saramati v France, Germany, and Norway* App Nos 71412/01 & 78166/01 (ECHR, 2 May 2007).
[19] Alexander Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of Behrami & Saramati and Al Jedda' (2009) 11 International Community Law Review 155, 181-182.

international organisations to create a standard of attribution, stating that it is contrary to a significant body of authority.[20] Sari criticises the judgment as creating a precedent whereby states may transfer operational control over their armed forces to an international organisation and avoid responsibility for breaches of the ECHR that such troops may commit.[21] In her opinion, this is precisely the kind of outcome that the so-called ***Bosphorus***[22] line of jurisprudence was meant to prevent.[23] However the ECtHR distinguished ***Behrami*** from ***Bosphorous*** on the basis that a jurisdictional link did not exist in the former case (the relevant acts were carried out in a foreign territory in an international capacity) whereas it did in the latter case (the relevant acts were carried out by Irish authority on Irish territory pursuant to a decision by the Irish Minister for Transport).[24] This approach, according to Sari, is incorrect, as the location of the relevant conduct 'is immaterial given that both territorial as well as extra-territorial conduct may bring a person within their jurisdiction under Article 1 of the Convention.'[25]

The issues raised in this section set the scene for states to turn away refugees where domestic protection is available, regardless of whether such protection is actually effective. This is of particular concern in light of the fact that international organisations are not a party to human rights treaties and are not accountable under international law, as illustrated by the ***Behrami*** case before the ECtHR. This is

[20] Marko Milanović and Tatjana Papić, 'As Bad as it Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law' (2009) 58 International & Comparative Law Quarterly 267 294 – 295.
[21] Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 Human Rights Law Review 151, 169.
[22] *Bosphorus HavaYollari TurizmVe Ticaret Anonim Sirketi v Ireland* App no 45036/98 (ECHR, 30 June 2005).
[23] Sari, 169.
[24] Ibid, 168-169.
[25] Ibid, 161.

notwithstanding the fact that many international organisations, including the UNHCR, do indeed have international legal personality.[26]

3. Chapter Structure

This chapter will be formed of two parts. The first part will examine whether the refugee definition allows for protection to be provided by entities other than the authorities of the state. This will be done first, by examining the textual definition of the terms 'that country', 'protection', and 'well-founded fear' as set out in the refugee definition; secondly, by analysing relevant principles of EU law; and thirdly, by outlining how these concepts have been elaborated by relevant jurisprudence on international organisations. The second part of this chapter will analyse whether the UNHCR's activities on behalf of IDPs engage these principles, and this chapter will conclude by illustrating the reasons for which the activities of the UNHCR cannot constitute 'protection of that country' for the purposes of precluding the application of the refugee definition.

4. Providers and Content of Protection in the Refugee Definition

4.1 The Meaning of 'Protection of that Country'

Although increased IDP protection is a welcome development, it is unclear whether, and if so, how it will impact refugee protection. As the granting of refugee status is dependent on, *inter alia*, lack of available protection in the country of origin, one

[26] Ralph Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should be Subject to International Human Rights Law' (1999) 1 Yale Human Rights and Development Law Journal 107, 108.

must consider whether protection provided internally to IDPs will be interpreted by states as precluding the application of the refugee definition. Thus this chapter raises the broader issue of whether a more consistent approach and holistic interpretation should be taken of 'safety' and 'protection' across international refugee law (including the Qualification Directive).

According to the Refugee Convention, a refugee is a person who:

> [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.'[27]

Neither the refugee definition nor its *travaux préparatoires* make any reference to the possibility of 'protection' being provided by an international organisation.[28] This is not surprising, considering that at the time of drafting of the Refugee Convention, the general understanding was that states had exclusive control over their territories and NSAs had little or no role to play in international law and international relations. Nonetheless, a contemporary reading of the Refugee Convention may lead to a different result. The starting point for any exercise in treaty interpretation is Article 31(1) of the 1969 Vienna Convention on the Law of Treaties 1969 ('VCLT'):

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[29]

This rule contains separate principles which must be applied together in order to close in on the true meaning of a phrase in a treaty.[30] By applying this rule, the following

[27] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A.
[28] However, Article 1D of the Refugee Convention refers to the provision of protection by international organisations other than the UNHCR. This provision is directed at the provision of protection by UNRWA to Palestinian refugees, rather than being of general applicability. For further discussion, see chapter 6, 'The Applicability of Article 1D of the Refugee Convention to IDPs.'
[29] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

paragraphs will examine the three possible angles by which protection by the UNHCR may be relevant to the refugee definition, namely (i) in the interpretation of the phrase 'that country'; (ii) in the interpretation of the phrase 'protection'; and (iii) in the interpretation of the phrase 'well-founded fear.'

4.2 The Meaning of 'that Country'

(a) '…in accordance with the ordinary meaning to be given to the terms of the treaty…'

In order to determine the meaning of 'that country', primary recourse must be had to the ordinary meaning of the term. The difficulty with this approach is that the term 'that country' has various meanings. If 'country' is synonymous with the concept of 'state', then only the authorities of the state can provide protection for the purposes of precluding application of the refugee definition. If, on the other hand, 'country' is to be understood in its geographical sense, protection provided by NSAs could potentially satisfy this requirement. One must therefore look to the other components of Article 31(1) of the VCLT to discover the true meaning of 'that country.'

(b) '[…] in their context […]'

Numerous arguments have been put forward in favour of a geographical interpretation of the term 'that country'. First, in the broader context of the treaty as a whole, various provisions explicitly refer to the 'authorities of the country' where the role of the state is concerned.[31] According to this argument, the employment of the term 'that country' in the refugee definition therefore implies that the actor of

[30] Richard K. Gardiner, *Treaty Interpretation* (Oxford University Press 2008), 142.
[31] See, for example, arts. 1E, 19, 24, 25, 31, 35, 41.

protection need not exclusively be the authorities of the state.[32] Secondly, Article 1D of the Refugee Convention supports the fact that protection may be provided by an international organisation:

> This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.[33]

Thirdly, the wording of the Refugee Convention may be contrasted to that of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment 1984 ('CAT'), which specifies that the ill-treatment in question must be attributable to the state in order to engage the state's responsibility under the CAT.[34]

However, the arguments supporting the former interpretation of the term 'that country', are more convincing. Since 'that country' forms part of a phrase, that is, the refugee definition, that phrase is the obvious initial contextual assessment that must be made. In the context of the refugee definition, 'that country' refers to the earlier term 'country of nationality' which implies that protection can only be granted by an entity which is capable of granting nationality, that is, a state.[35]

An examination of the broader contextual picture leads to the same result, as evidence for interpreting 'that country' as the state may be found elsewhere in the Refugee Convention. First, the cessation clauses also speak of re-availment of the

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[32] The concept of 'actor of protection' is a relatively new one in refugee law. Although there had been some precedence in German jurisprudence regarding southern Lebanon, the concept began to gain momentum when it was introduced in the 2004 Qualification Directive.

[33] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 1D.

[34] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 1(1).

[35] Penelope Mathew, James C. Hathaway and Michelle Foster, 'The Role of State Protection in Refugee Analysis: Discussion Paper No.2: Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002' (2003) 15 International Journal of Refugee Law 444, 457.

protection of the country of nationality.[36] Secondly, the Refugee Convention's accountability mechanisms and the obligations set out in articles 2-33, are specifically addressed to 'states'.[37] According to Mathew, Hathaway and Foster, this implies that the Refugee Convention arguably requires that protection will be by a government which may be held accountable under international law for its actions, and not by some legally unaccountable entity with *de facto* control.[38] The discussion in the following sections of this chapter will explore whether or not this is a rebuttable presumption.

Thirdly, the 'Article 1D' argument outlined above is quite weak. This argument maintains that because Article 1D refers to the possibility of protection being provided by an international organisation, such a meaning may be inferred to the term 'that county' in the refugee definition. This argument may be turned on its head by stating that the reference to protection provided by an international organisation in Article 1D excludes this possibility from other provisions of the Refugee Convention.

Fourthly, the Refugee Convention uses the term 'territory' when referring to a geographic area. This terminology appears in 19 of the Convention's 46 articles,[39] and is thus strong evidence in favour of the argument that the terminology 'protection within the territory of that country' would have been used if the term 'that state' were to be interpreted in its geographic sense.[40]

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[36] Arts. 1C (1), 1C(2), 1C(5).
[37] Mathew, Hathaway and Foster, 457.
[38] Ibid, 457; James Hathaway and Michelle Foster, 'Internal Protection/ Relocation/ Flight Alternative as an Aspect of Refugee Status Determination' (Global Consultation on International Protection, Expert Rountable Discussion organised by the UNHCR, 2001), 46.
[39] Arts. 7, 10, 11, 14, 15, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, 30, 31, 32, 44.
[40] Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff 2006), 248.

Fifthly, the meaning of the word ‘protection’ as used in the refugee definition informs the interpretation of the term ‘that country’. At the time the Refugee Convention was concluded, the term ‘protection’ in the refugee definition referred to diplomatic protection rather than protection within the refugee’s country of origin, in the sense that a refugee, being outside the country of his nationality, was unable to avail of his country’s protection abroad.[41] Diplomatic protection can only be provided by a state, which further supports the fact that ‘that country’ refers to protection provided by a state. An argument stemming from this point which supports interpreting ‘that country’ as the territory of the state is that if the meaning of ‘protection’ has changed in light of modern-day practices of states, then surely the meaning of ‘that country’ could have changed in a similar fashion. This argument can be countered by the fact that although ‘protection’ no longer exclusively refers to diplomatic protection, the nature of the actor or provider of that protection has not changed.

In line with the arguments outlined above, this chapter strongly supports interpreting ‘that country’ as the state. Although domestic courts have accepted that NSAs may be a source of persecution where the state is unable or unwilling to provide protection, the same cannot be said for the source of protection from the persecution feared. The refugee definition does not refer to whom or what may qualify as an actor of persecution. In contrast, the refugee definition does make reference to the source of protection, that is, a ‘country’. Accordingly, the range of possible actors of protection needs to be interpreted more strictly than possible actors of persecution.

[41] Antonio Fortin, ‘The Meaning of 'Protection' in the Refugee Definition’ (2000) 12 International Journal of Refugee Law.

(c) '[…]in light of its object and purpose.'

Further support for this position may be found by examining the meaning of 'that country' in light of the object and purpose of the Refugee Convention. The preamble makes reference to the 'widest possible exercise' of fundamental rights and freedoms for refugees, and the desire to extend the scope of protection afforded to refugees. It may be stated therefore that the primary aim of the Refugee Convention is to further the protection of refugees.

The obligation to interpret a treaty in good faith is set out in Article 31 of the VCLT and has been said to be an extension of the obligation to interpret a treaty 'in light of its object and purpose.' The good faith requirement is also found in Article 26 of the VCLT and it forms a general principle of international law.[42] In the words of Villiger:

> Good faith requires the parties to a treaty to act honestly, fairly and reasonably, and to refrain from taking unfair advantage. The prohibition of the abuse of rights, flowing from good faith, prevents a party from evading its obligations […][43]

The good faith argument was raised in the House of Lords case of ***R v. Immigration Officer at Prague Airport*** **[2004]**.[44] One of the issues before the Court was whether, in denying leave to enter the United Kingdom to asylum-seekers within their country of origin, the United Kingdom was seeking to avoid its obligations and thus was not implementing the Refugee Convention in good faith. The Court accepted the argument that the principle of good faith requires the state to refrain from actions which are incompatible with the object and purpose of the treaty. However it held that

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[42] *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 243, 268.
[43] Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009), 425.
[44] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55.

such an argument had to be treated with caution and it could not be used to override what the treaty itself provides.[45] As the Refugee Convention only applies to refugees, who are by definition, outside of their country of nationality, the Court held that no duty under the Refugee Convention was owed to the applicants as they had not crossed an international frontier. In the words of the Court, to argue that the United Kingdom's actions were:

> […] incompatible with the principle of good faith as they defeat[ed] the object and purpose of the treaty [would be] to argue for the enlargement of the obligations which are to be found in the Convention.[46]

Although the appellants were unsuccessful, this case supports the existence of an obligation to interpret the Refugee Convention in good faith, provided that this does not override the actual wording of the text. The Refugee Convention may be viewed 'as a general legal standard against which performance can be reviewed in the context of the regime of international protection as a whole',[47] and thus actions carried out which defeat the aim of refugee protection cannot be said to be performed in good faith. In the context of this chapter, there is a danger that states will use internal protection by international organisations, without inquiring as to its effectiveness, as a basis for turning away refugees. Such an interpretation would fall foul of the requirement to interpret the Refugee Convention in good faith, and as outlined above, would be incompatible with the meaning of the term 'that country'.

It is submitted that the good faith interpretative principle can be applied in the context of this chapter in two respects. First, as outlined above, the term 'protection of that country' refers to protection provided by the authorities of the country of

[45] Ibid [19].
[46] Ibid [64].
[47] Guy S. Goodwin-Gill, 'State Responsibility and "Good Faith"' in Magosia Fitzmaurice and others, *Issues of State Responsibility before International Judicial Institutions* (Hart 2004), 85.

origin, thus to exclude protection provided by international organisations as constituting 'protection of that country' is in conformity with the text and represents a good faith interpretation of the treaty. Secondly, as the primary aim of the Refugee Convention is to further the protection of refugees, actions carried out which defeat the aim of refugee protection cannot be said to be performed in good faith. On a cynical view, any state which cites the availability of protection by international organisations - without inquiring as to the effectiveness of that protection - as a basis for turning away refugee applicants would seem to be stretching the refugee definition beyond its parameters in order to have further excuse to limit the category of those eligible for international protection. This would fall foul of the requirement to interpret the Refugee Convention in good faith, and thus would represent an incorrect interpretation of the treaty.

(d) Article 31(4) of the Vienna Convention on the Law of Treaties 1969

This chapter has argued that 'protection of that country' in the refugee definition is to be interpreted as protection by the authorities of that country, rather than protection provided on the territory of that country. However, there is one final means by which the latter interpretation may be valid. Article 31(4) of the VCLT provides that 'a special meaning shall be given to a term if it is established that the parties so intended.' Did the parties to the Refugee Convention intend that a 'special meaning' be given to the term 'that country', so that it is to be interpreted in its broader geographical sense? In the ***Conditions of Admission*** Advisory Opinion, the

International Court of Justice stated that 'a decisive reason would be required' to displace the natural meaning of the terms used.[48]

Beyond referring to a definition article in a treaty, there is little practice showing clearly what would amount to the necessary evidence to prove the existence of a special meaning of a term. If no definition is provided it is a matter of assessing the intent of the parties in light of the available evidence. Regarding the meaning of 'that country', the refugee definition's *travaux préparatoires* do not shed light on the relevance of NSAs. The practice of interpreting this term in its geographical sense has only emerged in the last decade or so, and thus the evidence supporting this interpretation is weak, at best. It is therefore submitted that there does not exist a 'decisive reason' to consider that the interpretation of 'that country' as the authorities of a state should be displaced by a special meaning of the term.

(e) 'That Country' - Conclusions

This chapter has argued that the term 'protection of that country' in the refugee definition refers to protection provided by the state authorities. However, it must be noted that there is state practice and developments in EU law which support an interpretation to the effect that 'protection' may be provided by international organisations. Whether this is the correct interpretation as a matter of international law is of little practical relevance owing to the fact that the interpretation of the Refugee Convention is left to domestic courts, not an international body, and it is

[48] *Admission of a State to the United Nations (Charter, Art. 4)* (Advisory Opinion) [1948] ICJ Rep 57, 63.

their interpretation that will decide the fate of the individual asylum-seeker.[49] In the words of Leo Gross:

> [We] may never know, or, in some cases, we may not know for a time, which autointerpretation was correct [...] This is, for better or worse, the situation resulting from the organisational insufficiency of international law.[50]

Generally speaking, therefore, a domestic court will have the last word on the interpretation of the Refugee Convention, and this may very well be that protection provided by an international organisation may preclude refugee status. Thus while this chapter supports a more restricted meaning of the term 'that country', it is accepted that this presumption may be displaceable. Therefore, the jurisprudence of domestic courts which supports a contrary interpretation will be considered below.

4.3 The Meaning of 'Well-Founded Fear'

The second avenue by which UNHCR protection may be relevant to the refugee definition lies in the interpretation of the term 'well-founded fear.' According to Grahl-Madsen, a well-founded fear of being persecuted may be said to exist if it is likely that the person concerned will become the victim of persecution if he returns to his country of origin.[51] The adjective 'well-founded' suggests that 'it is not the frame of mind of the person concerned which is decisive for his claim to refugee status, but that this claim should be measured with a more objective yardstick.'[52]

In the context of this chapter, therefore, it could be argued that if a refugee applicant can return to his country of origin and receive assistance from the UNHCR,

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[49] On this topic generally, see Guy Goodwin-Gill, 'The Search for the One True Meaning...', in Guy S. Goodwin-Gill and Hélène Lambert, *The Limits of Transnational Law : Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press 2010), 204.
[50] Leo Gross, 'States as Organs of International Law and the Problem of Autointerpretation' in George A. Lipsky, *Law and Politics in the World Community : Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (University of California Press 1953), 77.
[51] Atle Grahl-Madsen, *Commentary on the Refugee Convention, 1951* (s.n. 1963), 175.
[52] Ibid, 173.

his fear of persecution is not well-founded and the refugee definition is not engaged. If it can be shown that the individual concerned would be protected by the NSA so that there does not exist a well-founded fear of persecution (an essential criterion for refugee status under the Refugee Convention), it should not matter if the protector does not have all the attributes and powers of a state. Nor should it matter whether the protection is actually afforded. On this approach, it would be unnecessary to engage in a debate on whether the actions of UNHCR reach the 'protection' threshold necessary to preclude refugee status, and indeed it would be unnecessary to ascertain whether the actions of UNHCR may be equated to 'protection of that country.'

4.4 The Concept of 'Protection'

So far, this chapter has argued that the term 'that country' as set out in the refugee definition, refers to the authorities of the state. However, two caveats must be borne in mind: (i) there exist domestic court decisions which interpret NSA protection as country protection for the purposes of the refugee definition; and (ii) the availability of UNHCR protection in the place of origin, or potentially in another area of the home country, may negate the 'well-founded fear' element of the refugee definition. In addition, even by interpreting 'that country' as the authorities of the state, an international organisation could perhaps be acting formally in place of 'that country', backed by Security Council authorisation for example as is the case in Kosovo. Thus the issue of international organisations as possible actors of protection must be explored further. Regardless of the meaning of the term 'that country', the most important consideration for the purposes of this chapter is whether the protection provided by an international organisation could actually satisfy the protection standard envisaged by the Refugee Convention. If the protection is ineffective, then a

well-founded fear of persecution may very well exist and the refugee definition appropriately satisfied.

The meaning of the term 'protection' is not elaborated upon in the Refugee Convention and therefore it is unclear what exactly will satisfy the protection element of the refugee definition. In the case of ***Horvath v. Secretary of State for the Home Department (2001),***[53] the House of Lords held that it was not possible to devise any complete or comprehensive exposition which would exhaustively define the relevant level of protection required by the Refugee Convention. However, there must have been laws in force in the country which made violent attacks by perpetrators punishable by sentences commensurate with the gravity of the offences. Furthermore, there must have been a reasonable willingness by law enforcement agencies to prosecute and punish offenders and the victim must not have been exempt from the protection of the law. A similar standard protection is found in the EC Qualification Directive,[54] which will be elaborated upon in more detail below.

The drafters of the Qualification Directive and the above judgment of the House of Lords were correct in indicating that it is impossible to definitively set out what is meant by 'protection' in the context of the refugee definition. This is because protection is inextricably linked to the content and form of persecution, and thus the method of protection required depends on the persecution feared. This is supported by the obligation to interpret a treaty according to the principle of effectiveness, as outlined above, which provides that the objective of treaty interpretation is to produce

[53] *Horvath (A.P.) v Secretary of State for the Home Department* [2001] 1 AC 489.
[54] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

an outcome which advances the aim of the treaty.[55] Thus it is not possible to definitively state whether an international organisation may provide protection which would satisfy that envisaged by the Refugee Convention, as the level of protection required will vary in each individual case according to the nature of the persecution feared. However, it is tentatively suggested that respect for the rule of law, as set out in the Qualification Directive and by the House of Lords, is a good indication of whether the protection from persecution is actually effective.

The UNHCR has also set out 'critical factors' for the existence of 'effective protection'.[56] Although these factors were set out in the context of return to third states, the same document stipulates that in this respect, the distinction between the so-called 'safe' third country and the country of first asylum concepts is not relevant.[57] Consequently, the notion of 'effective protection' as described with UNHCR is synonymous with its perception of 'protection' in the refugee definition.

The elements of 'effective protection' according to UNHCR are as follows: (a) no well-founded fear of persecution exists; (b) fundamental human rights are respected, including but not limited to the prohibition of torture or cruel, inhuman, or degrading treatment and the protection of the right to life and liberty of the person; (c) there is no real risk of being sent to another state where effective protection would not be available; […] (e) the third state has acceded to and is in compliance with the 1951 Refugee Convention and/or its 1967 Protocol or the third state has developed a

[55] Gardiner, 190.
[56] UNHCR 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary
Movements of Refugees and Asylum-Seekers', Lisbon Expert Roundtable (9-10 December 2002) <http://www.unhcr.org/3e5f323d7.html> accessed 11 June 2014, 3-4.
[57] UNHCR 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary
Movements of Refugees and Asylum-Seekers', Lisbon Expert Roundtable (9-10 December 2002) <http://www.unhcr.org/3e5f323d7.html> accessed 11 June 2014, 3-4.

practice akin to the aforementioned instruments; […] (g) the person has access to means of subsistence sufficient to maintain an adequate standard of living; (f) account is taken of any special vulnerabilities of the person concerned and the privacy interests of the person and his or her family are respected.[58]

As was discussed in more detail in the previous chapter relating to human rights protection in the IFA inquiry, the UNHCR's concept of 'effective protection' may go beyond that which was intended by the drafters of the Refugee Convention. In no place in the Refugee Convention is there any mention of criteria (b), (g), or (f), which seem to have their roots in human rights considerations. Although the Refugee Convention as a whole is influenced by human rights considerations, regard must be had to the textual limits of the Convention. Human rights considerations are therefore relevant to the concept of 'effective protection' in two respects; first, insofar as a state is prohibited from engaging in indirect *refoulement*; and secondly, to determine whether effective protection from persecution exists in the IFA. As was set out in ***Horvath***, such effective protection may take the form of a legal system to prevent and prosecute acts of persecution.

5. EU Asylum Law

EU law is relevant in the interpretation of international law for various reasons. First, the Member States of the EU remain bound by their obligations under international law, and therefore EU asylum law must be 'in accordance' with the Refugee

[58] UNHCR 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary
Movements of Refugees and Asylum-Seekers', Lisbon Expert Roundtable (9-10 December 2002) <http://www.unhcr.org/3e5f323d7.html> accessed 11 June 2014, 3-4.

Convention.[59] According to Battjes, this establishes a clear hierarchical relationship between EU law and international refugee law, with the latter taking precedence insofar as states' (as opposed to the EU's) obligations under international law are concerned.[60] Secondly, the EU is formed of 28 Member States, all of which are States Parties to the Refugee Convention. Thus the practice of these states is relevant for the purposes of interpreting the Refugee Convention.[61]

The term 'actors of protection' has also woven its way into EU asylum law, purportedly in response to international developments in peacekeeping.[62] Of relevance to this chapter are the measures adopted in the area of minimum standards with respect to the qualification of nationals of third countries as refugees. Article 7(1) of Council Directive 2004/83/EC ('Qualification Directive'), which has been described as 'unquestionably the most important instrument in the new legal order in European asylum',[63] provides that '[p]rotection can be provided by [...] parties or

[59] Battjes, 1.
[60] Ibid, 1.
[61] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 31(3)(b) provides that '[t]here shall be taken into account, together with the context […] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.' Subsequent practice of the parties to a treaty may be 'reflected in, or initiated by, the pronouncements of other actors, such as the practice of […] international organizations […] [such practice] of the parties by international organizations […] should not, however, be confounded with the […] practice of the parties in question.' (Georg Nolte, 'Report 3: Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-Judicial Proceedings – Third Report for the ILC Study Group on Treaties over Time', in Georg Nolte, *Treaties and Subsequent Practice* (Oxford University Press 2013)317. However, the Qualification Directive cannot constitute a subsequent agreement as per Article 31(3)(a) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 because a 'subsequent agreement' in the sense of this must involve states acting in consensus and the agreement cannot be one 'regarding the interpretation of application' of the treaty in question (Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: a Commentary* (Springer 2012), para 74). Neither criterion is satisfied by the Qualification Directive.
[62] Select Committee on the European Union, 'Defining Refugee Status and those in Need of International Protection' HL (2001-02), para 78; Kay Hailbronner, *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives* (Beck, Hart, Nomos 2010), 1050; UNHCR 'Asylum in the European Union – A Study of the Implementation of the Qualification Directive (2007), 47.
[63] Hélène Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom And International Law' (2006) 55 International & Comparative Law Quarterly 161, 161.

organisations, including international organisations, controlling the State or a substantial part of the territory of the State.'[64] Part (2) of the Article states:

> Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.[65]

Germany proposed that the Council should appreciate on a case by case basis situations where international organisations are able to provide protection.[66]As a result, the following insertion was made:

> When assessing whether an international organisation controls a state or a substantial part of its territory and provides protection as described in para. 2, Member States shall take into account any guidance which may be provided in relevant Council acts.

The following statement was adopted in the minutes of the Council meeting:

> For the purpose of applying Article 7, the Council, considering information from relevant international organisations, will endeavour to provide guidance on the question of whether an international organisation is actually in control of a State or a substantial part of its territory and whether this international organisation provides protection from persecution or suffering of serious harm, based on an assessment of the situation in the State or territory concerned.[67]

To date, no relevant guidance has been provided by the Council.

The Qualification Directive was recast in 2011,[68] with two substantive amendments made to Article 7. Parties or organisations controlling the state or a

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[64] Council Directive (EC) 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L304/12.
[65] Ibid.
[66] Council doc. No. 14083/02, 12 as cited in Hailbronner, 1049.
[67] Minutes of the 2579th meeting of the Council of the EU at 29 and 30 April 2004, Council doc. No. 8990/04 ADD 1 REV 1, 9.
[68] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary

substantial part of it can only qualify as actors of protection under paragraph 1 'provided they are willing and able to offer protection in accordance with paragraph 2.'[69] Paragraph 2 has been modified so that 'protection against persecution or serious harm must be effective and of a non-temporary nature.'[70]

The drafting history of this Article is of interest. The Council's proposed Directive included two further qualifications, notably, that the territory controlled was clearly defined and of significant size and stability, and also that the international organisations in question must be 'willing and able to give effect to rights and to protect an individual from harm in a manner similar to an internationally recognised State.'[71] The 'willing and able' criterion was re-introduced in the Recast Directive.[72] However the requirement that international organisations must protect in a manner similar to a state was not included in either the original Qualification Directive or its recast version. Nonetheless, Peers and Rogers argue that such a principle can be inferred from the final Article 7(2) of the original Qualification Directive, which does not differentiate between state and non-state protection in articulating the meaning of effective protection.[73]

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protection, and for the content of the protection granted (recast) [2011] OJ L337/9. The Recast Qualification Directive applies to all Member States with the exception of Denmark, the United Kingdom, and Ireland. The United Kingdom and Ireland continue to be bound by the 2004 Qualification Directive.

[69] Ibid, art 7(1).

[70] Ibid, art 7(2).

[71] Commission of the European Communities, Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection, COM (2001) 510 final, 12 September 2001, art 9.

[72] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art. 7(1).

[73] 'Refugee Definition and Subsidiary Protection' in Steve Peers and Nicola Rogers, *EU Immigration and Asylum Law: Text and Commentary* (Martinus Nijhoff Publishers 2006), 329.

In a reference for a preliminary ruling concerning the circumstances of cessation of refugee status, Germany requested the ECJ whether it was sufficient under Article 7 that protection can be provided only with the help of multinational troops. The ECJ held that Article 7(1) does not rule out protection from being guaranteed by international organisations, including protection ensured through the presence of a multinational force in the territory of the third country.[74] This case is discussed in more detail in chapter 5 on Complementary Protection.

The classification of international organisations as actors of protection is not seen as an entirely negative development. According to Nykänen, although the situations in which NSAs could offer truly effective protection would in practice, be very rare:

> [T]here are no legal obstacles for recognising the state of affairs [as] this approach would take the process of fragmentation of power seriously; relevant power to persecute and to protect from persecution is not held only by state authorities, but potentially also by other actors.[75]

According to Storey, the argument that it would be contrary to international law to regard *de facto* authorities as actors of protection:

> [I]s difficult to square with the prevailing – extremely minimalist – international law criteria for statehood and appears to depend on the highly dubious notion that protection can only be afforded to citizens by liberal democratic states, or at least those that have agreed to be bound by major international human rights treaties.'[76]

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[74] Joined cases C-175/08, C-176/08, C-178/08 and C-179/08, [2010] All ER (D) 54 (Mar) *Aydin Salahadin Abdulla (C-175/08), Kamil Hasan (C-176/08), Ahmed Adem, Hamrin Mosa Rashi (C-178/08) and Dler Jamal (C-179/08) v Bundesrepublik Deutschland* [75].

[75] Eeva Nykänen, *Fragmented State Power and Forced Migration: a Study on Non-State Actors in Refugee Law* (Martinus Nijhoff Publishers 2012), 201.

[76] Hugo Storey, 'EU Refugee Qualification Directive: a Brave New World?' (2008) 20 International Journal of Refugee Law 1, 25.

Hailbronner and Alt see the approach in the Qualification Directive as 'flexible […] taking into account that increasingly international organisations have assumed state like functions.'[77]

The classification of international organisations as actors of protection in the Qualification Directive is nonetheless worrying for various reasons. First, this chapter has illustrated that in applying the rules of the VCLT to the Refugee Convention, it is clear that interpreting 'that country' as an international organisation is not compatible with the wording of the Refugee Convention. Thus the inclusion of international organisations as actors of protection in the Qualification Directive is not in line with the refugee definition. However, the Qualification Directive sets a minimum standard only, and states that 'Member States [...] have the power to introduce or maintain more favourable provisions' than the standard laid down in the Qualification Directive.[78] In addition, the Qualification Directive indicates that the Refugee Convention is the primary binding instrument on Member States.[79] Thus the Qualification Directive must be interpreted in a manner that is harmonious to the obligations set out in the Refugee Convention. To interpret protection provided by an international organisation as precluding the granting of refugee status would be in compliance with the Qualification Directive, but as this chapter argues, such an interpretation would in all likelihood breach the Refugee Convention and would therefore contravene international law.

There are additional reasons why the inclusion in the Qualification Directive of international organisations as actors of protection is cause for concern. It has been

[77] Hailbronner, 1049.
[78] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, Recital 14.
[79] Ibid, Recital 3.

suggested that this decision reflected the desire of Member States to reject an influx of asylum seekers from Kosovo,[80] which was at that time, and still is, overseen by UNMIK and KFOR.[81] At the time the Directive was agreed, violence of a significant scale broke out in Kosovo, which illustrated the inability of the UN force to protect the population. A further criticism is that the EU has combined asylum with immigration, in the sense that immigration law is about controlling entry, whereas asylum is concerned with providing international protection.[82] In objecting to the inclusion of international organisations as actors of protection under EC law, NGOs have referred to numerous examples of the inadequacy of protection of international organisations, including Rwanda, Sierra Leone, and Kosovo.[83] According to Gilbert, 'actors of protection' cannot include a safe haven or a refugee camp under the auspices of UNHCR, the UN or another international organisation as such examples would not amount to adequate protection.[84]

The main objections to Article 7(2) are centred primarily on the fact that international organisations do not have the attributes of states and cannot enforce the rule of law.[85] Furthermore, the traditional view is that international organisations are

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[80] Madeline Garlick, 'UNHCR and the Implementation of Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted (The EC 'Qualification Directive')' in Karin Zwaan, *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2007) 65; UNHCR 'Asylum in the European Union – A Study of the Implementation of the Qualification Directive (2007), 47.

[81] KFOR has gradually transferred responsibilities to Kosovo police and local authorities. As of 1 December 2013, KFOR consists of 4,882 troops. 'Kosovo Force (KFOR): Key Facts and Figures' < http://www.aco.nato.int/kfor/page75051718.aspx> accessed 8 June 2014.

[82] Geoff Gilbert, 'Is Europe Living up to its Obligations to Refugees?' (2005) 15 European Journal of International Law 963, 963.

[83] Select Committee on the European Union, 'Defining Refugee Status and those in Need of International Protection' HL (2001-02), paras 73, 75.

[84] Gilbert, 976.

[85] European Council on Refugees and Exiles, ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and others in need of International Protection (2004), 7; Select Committee on the European Union, 'Defining Refugee Status and those in Need of International Protection' HL (2001-02), paras 72, 74, 76.

not parties to human rights treaties and cannot be held accountable as a matter of international law.[86] In addition, the absence of state authority is often an indication of political instability and thus it is unlikely that an NSA could be regarded as enjoying sufficient, durable stability and as having the political, military and civil police capacity that would enable it to offer a level of protection required by the Refugee Convention.[87]

Another objection lies with the requirement that the actor of protection takes 'reasonable steps' to prevent the persecution. Although this is a requirement of conduct, which merely obliges a state to do all in its power to achieve a result, rather than to actually achieve that result, [88] it could nevertheless be argued that Article 7(2) which outlines that protection incorporates operating an 'effective legal system' sets a required standard of protection.[89]

5.1 Implementation of EU Asylum Law

In 2008, the European Council for Refugees and Exiles ('ECRE') published a survey on the implementation of the Qualification Directive in Member States and a similar survey was published by the UNHCR in 2007.[90] The ECRE study found that despite the inclusion of 'actors of protection' in the Qualification Directive, Hungary, Portugal and Sweden do not recognise that protection can stem from NSAs in asylum

[86] European Council on Refugees and Exiles, ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and others in need of International Protection (2004), 7; Select Committee on the European Union, 'Defining Refugee Status and those in Need of International Protection' HL (2001-02), paras 73, 79.
[87] Select Committee on the European Union, 'Defining Refugee Status and those in Need of International Protection' HL (2001-02), para 73.
[88] James Crawford, 'Second Report on State Responsibility' (30 April 1999) UN doc A/CN.4/498/Add. 2, para 57.
[89] Peers and Rogers, 329.
[90] European Council on Refugees and Exiles, 'The Impact of the EU Qualification Directive on International Protection' (2008); UNHCR 'Asylum in the European Union – A Study of the Implementation of the Qualification Directive (2007).

determination proceedings.[91] This is entirely in line with EC law as the Directive set a minimum standard only and it explicitly acknowledges that the primary instrument binding on states is the Refugee Convention.[92] Member States are free to employ standards that are higher or more favourable than those set out in the Qualification Directive.

The publications also examined jurisprudence in various Member States. A review of decisions in France, Germany, Greece, and Sweden revealed some evidence of the willingness on the part of decision-makers to consider international organisations as actors of protection. However in all factual circumstances the relevant international organisation was found to be unable to provide protection.[93] The French *Cour Nationale du Droit d'Asile* ('CNDA' – National Court of Asylum Law) has held that missions established by the Security Council under Chapter VII of the UN Charter (Kosovo, Bosnia) may satisfy the protection requirement, whereas missions established under Chapter VI (Democratic Republic of the Congo, Haiti) cannot.[94] This is because missions established under Chapter VII have administrative and coercive powers. However, in order for such missions to constitute actors of protection, it must be shown that the protection provided is effective.[95]

In the case of the Palestinian Authority, the CNDA stated that it can be considered an actor of protection owing to its responsibility for internal safety and

[91] European Council on Refugees and Exiles, 'The Impact of the EU Qualification Directive on International Protection' (2008).
[92] Hugo Storey, 'EU Refugee Qualification Directive: A Brave New World?' (2008) 20 International Journal of Refugee Law 1, 7; Council Directive (EC) 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L304/12, Recital 2, 16.
[93] UNHCR 'Asylum in the European Union – A Study of the Implementation of the Qualification Directive (2007), 48.
[94] European Council on Refugees and Exiles, 'The Impact of the EU Qualification Directive on International Protection' (2008), 110.
[95] European Council on Refugees and Exiles, The Impact of the EU Qualification Directive on International Protection' (2008), 110.

public order. Regarding the Ivory Coast, the Court stated that its government could not be seen as an actor of protection as it did not have any authority in the northern part of the country.[96] The Court then addressed the issue of whether the rebel groups could constitute actors of protection:

> [T]he replacement of the former administrative, military and judiciary authorities in the Northern part of the country by the coalition of war leaders who make up this alliance and the very embryonic nature of the administrative and judiciary framework that it is trying to put in place, do not allow the Alliance of the new forces to be considered as a State authority or a regional organisation able to provide the protection required.[97]

On the question of 'a substantial part of the territory of the State', German Ministry of Interior Guidelines have stated that effective control over a certain region is considered sufficient.[98] None of the decisions reviewed by UNHCR shed any light on the specific requirement that parties or international organisations control a substantial part of the territory of the state.[99]

That said, it is important not to overstate the impact of the Qualification Directive. It applies to Member States of the European Union only, and as outlined above, sets a minimum standard only. The primary instrument binding on Member States, therefore, is the Refugee Convention.

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[96] Ibid, 111.
[97] Ibid, 111.
[98] Ibid, 113.
[99] UNHCR 'Asylum in the European Union – A Study of the Implementation of the Qualification Directive (2007), 48.

6. Jurisprudence

6.1 Introduction

The jurisprudence on the role of international organisations as actors of protection is relevant to this chapter's question because judgments by national courts can constitute a form of subsequent practice relevant to treaty interpretation.[100] The jurisprudence on this topic is limited, most of which stems from the United Kingdom and deals with protection provided by international organisations in Kosovo. Nonetheless, the following paragraphs will engage in an examination of the case-law which sheds light on this issue, with particular reference to whether the jurisprudence may be applicable to UNHCR's IDP operations. Although these cases found that UNMIK and KFOR could constitute actors of protection for the purposes of the Refugee Convention, it should be noted that these cases were decided prior to the introduction of the 2011 recast Qualification Directive, which specifies that such protection should be non-temporary in nature. As UNMIK and KFOR are not permanent bodies, it is submitted that they would no longer constitute actors of protection in light of the recast Qualification Directive.

An understanding of the role and mandate of UNMIK and KFOR is essential before engaging in an analysis of relevant jurisprudence. From 24 March to 9 June 1999, NATO conducted military operations against the government of the Federal Republic of Yugoslavia ('FRY') in response to events in Kosovo, which was part of the FRY. These operations ceased on 10 June after the FRY government agreed to withdraw its forces from Kosovo in accordance with a set of principles which were

[100] Dörr and Schmalenbach , para 78; Georg Nolte, 'Report 2: Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice, Second Report for the ILC Study Group on Treaties Over Time', in Nolte, 304; Georg Nolte, 'Report 3: Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-Judicial Proceedings, Third Report for the ILC Study Group on Treaties Over Time', in ibid 310, 317.

subsequently attached to Annex 2 to the United Nations Security Council Resolution 1244 (1999).[101] The Resolution provided for the establishment and deployment in Kosovo of international and security presences, known respectively as UNMIK and KFOR.[102] The resolution did not alter the status of Kosovo as part of the FRY.

The main function of UNMIK was:

> […] to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.[103]

UNMIK's further responsibilities included (i) 'maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo'; (ii) 'protection and promoting human rights'; and (iii), 'Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.'[104] In essence, the effect of Security Council Resolution 1244 was that all legislative and executive powers, including the administration of the judiciary, were transferred to UNMIK.

The responsibilities of KFOR include 'establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered' and 'ensuring public safety and order until the international civil presence can take responsibility for this task.'[105]

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[101] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.
[102] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244, Operative Paragraph 5.
[103] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244, Operative Paragraph 10.
[104] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244, Operative Paragraph 11.
[105] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244, Operative Paragraph 9.

6.2 Jurisprudence of the United Kingdom

The jurisprudence of the United Kingdom has developed a number of general principles relevant to the capacity of international organisations to provide protection. The first principle is that the entity in question must be capable in law of providing protection. This question was dealt with in the case of ***Fadil Dyli v The Secretary of State for the Home Department*** **[2000]** ***('Dyli')***, where the Asylum and Immigration Tribunal noted that the refugee definition did not employ the term 'authorities' and thus held that it should be interpreted in its geographical sense. [106] In ***The Queen on the Application of Altin Vallaj v. a Special Adjudicator*** **[2002]** ***('Vallaj')***,[107] Dyson J accepted the submission that the agent of protection did not have to be the body which grants nationality, holding that 'the phrase "protection of that country" is capable of including protection by the authorities that have the duty to provide protection in that country.'[108]

In both of the above cases, it was held that the source of protection was irrelevant. The Court in ***Vallaj*** affirmed the opinion of Professor Christopher Greenwood:

> [...] if the protection which a person is entitled to expect is in fact being provided by a United Nations administration in the territory from which that person comes, it would be unduly formalistic and contrary to common sense to hold that, since the United Nations is not a country, that person is not able to obtain protection.[109]

A second principle which has emerged from this jurisprudence is that modern circumstances must be taken into account in the interpretation of the Refugee Convention. In ***Vallaj***, Dyson J noted that because the Convention 'should be

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[106] *Fadil Dyli v. Secretary of State for the Home Department, Appeal No: HX5171799(00TH02186)* [12].
[107] *The Queen on the Application of Altin Vallaj v A Special Adjudicator* [2002] Imm AR 16.
[108] Ibid [31].
[109] Ibid [24].

construed as a living instrument' it was necessary to take into account the fact that since 1990, the Security Council has shown 'an increased willingness to intervene in the affairs of states.'[110] A note of caution should be taken at this juncture. The 'living instrument' approach, also termed the 'dynamic' or 'evolutive' approach, is an interpretive technique common to many domestic systems and has featured significantly in the jurisprudence of the European Court of Human Rights.[111] However, this approach is not enshrined in the VCLT.[112] The 'living instrument' approach should therefore only be employed where its resulting interpretation does not conflict with the general rule of interpretation in the VCLT, namely the obligation set out in Article 31 to interpret a treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[113] As outlined in section 4 of this chapter, an application of Article 31 to the Refugee Convention leads to the conclusion that the term 'that country' refers to the authorities of the state. The conclusion reached in ***Vallaj*** that UNMIK and KFOR were capable of constituting protection of that country therefore seems to be at odds with Article 31 of the VCLT and thus represents an incorrect interpretation of the Refugee Convention. Nonetheless, for the sake of argument, the conclusion reached in ***Vallaj*** will be applied in part 3 of this chapter to the UNHCR's activities with IDPs owing to the fact that, as discussed above, in the absence of an international monitoring body, it is inevitably a domestic court that will have the last word on questions of interpretation of the Refugee Convention and therefore the conclusion in ***Vallaj*** is highly relevant to this chapter.

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[110] Ibid [25].
[111] See, for example, *Tyrer v United Kingdom* App no 5856/72 (ECHR, 25 April 1979) [31]; *Loizidou v. Turkey* App no 15318/89 (ECHR, 18 December 1996).
[112] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[113] Ibid, Article 31.

The third principle to emerge from this jurisprudence is the relevance of consent. In ***Vallaj***, despite the argument of the appellant that there was no true consent in the case of Kosovo, since the FRY was forced to submit to the terms of the Resolution,[114] Dyson J held that consent was given, citing operative paragraphs 2 and 5 of the Resolution.[115] However, Dyson J did not stipulate whether such consent was a necessary condition for the protection of UNMIK to preclude the granting of refugee status, although this was later implied in the case of ***Gardi v. Secretary of State for the Home Department*** **[2002] (‘*Gardi*’)** where it was held that the protection of the KAR could not preclude application of the refuge definition because Iraq had not ceded its protection obligations to it.[116]

The fourth principle to emerge from this jurisprudence is that the relevant entity must have assumed the international obligation to protect. In ***Vallaj*** it was held that UNMIK had accepted the protection obligation as set out in the Refugee Convention, and that such obligations had been tasked to it because such protection was not available by the host state.[117] This was later affirmed in ***Gardi***.[118]

The final issue raised by this jurisprudence is the relevance of the question of whether the entity does, as a matter of fact, provide protection against persecution in Kosovo, and for this purpose it is irrelevant whether the FRY has granted consent, or that UNMIK is vested with the international law obligation to provide such protection.[119] This argument relied on the decision of the Immigration Appeal Tribunal in ***Dyli***[120] (outlined above), which held that the means by which protection

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[114] *The Queen on the Application of Altin Vallaj v A Special Adjudicator* [2002] Imm AR 16 [32].
[115] Ibid [32].
[116] *Gardi v Secretary of State for the Home Department* [2002] EWCA Civ 750, [2002] WLR 2755.
[117] *The Queen on the Application of Altin Vallaj v A Special Adjudicator* [2002] Imm AR 16 [29].
[118] *Gardi v Secretary of State for the Home Department* [2002] EWCA Civ 750, [2002] WLR 2755.
[119] *The Queen on the Application of Altin Vallaj v A Special Adjudicator* [2002] Imm AR 16 [35].
[120] *Fadil Dyli v. Secretary of State for the Home Department, Appeal No: HX5171799(00TH02186)*.

is received, whether directly by the authorities of the state, or by another entity, is irrelevant for the purposes of the refugee definition. Although Dyson J preferred the appellant's first submission, he accepted the compelling nature of the third.[121] In his words:

> The surrogacy principle is engaged when there has been a failure in the basic duty of protection owed to the nationals of a state. The duty of protection is owed by the country of nationality, unless it is transferred, as a matter of international law, to another entity. In these circumstances, it seems to me that the better analysis is that 'protection of that country' refers to the protection by the entity that is charged with the duty of protection, and that, on the true construction of article 1A(2), a person may have a well-founded fear of persecution only if there has been a failure to protect *by that entity or its agent.*[122]

7. Application of Relevant Principles to UNHCR's Involvement with IDPs

The jurisprudence outlined in this chapter has created a number of general principles regarding NSAs as agents of protection which may be applied by analogy to the activities of the UNHCR in protecting IDPs. The role of the UNHCR in protecting IDPs is discussed in detail in Chapter 1 of this thesis.

Although UNMIK and KFOR were held to qualify as actors of protection, it should be mentioned that the human rights record of both UNMIK and KFOR has been subject to significant criticism.[123] The effectiveness of UNMIK and KFOR's protection is therefore highly questionable, resulting in a dangerous precedent being set by the House of Lords. In addition, this case raises the broader issue of the

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[121] *The Queen on the Application of Altin Vallaj v A Special Adjudicator* [2002] Imm AR 16 [36].
[122] Ibid [36] (Emphasis in original).
[123] Christine Chinkin, International Law Meeting Summary: The Kosovo Human Rights Advisory Panel, 26 January 2012 <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/260112summary.pdf> accessed 2 Jul 2014.

responsibility of international organisations for human rights violations, and the idea that effective protection cannot be provided by an entity which cannot be held accountable for violations of international law.

The above jurisprudence outlines two reasons why the term 'that country' should be interpreted in its geographic sense. The first rests on the underlying principle of refugee law, that of surrogacy,[124] which posits that refugee protection is a last resort owing to the lack of satisfactory protection in the country of origin. As stated by Greenwood in ***Vallaj*** **[2000]**, if satisfactory protection can be provided by a UN agency or body, it would be unduly formalistic and contrary to common sense to state that because the UN is not a country, refugee status should be recognised.[125]

The second factor that influences the interpretation of this term is the fact that there exists jurisprudence to the effect that the Refugee Convention is to be interpreted as a living instrument, and its interpretation is therefore influenced by recent developments. In ***Vallaj***, the Court accepted that since the 1990s, the UN Security Council had shown an increased willingness to become involved in the affairs of states and that this development should be taken into account when interpreting the refugee definition. Consequently the presence and protection by the UN within a country of origin could constitute protection for the purposes of the refugee definition.[126] As submitted above, this decision represented an incorrect interpretation of the Refugee Convention, in the sense that it privileged the 'living instrument' approach over the general rule of treaty interpretation enshrined in Article 31 of the VCLT. Nonetheless, it is appropriate to consider whether the ***Vallaj***

[124] *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson* [1998] QB 929 [16]; Hathaway, *The Law of Refugee Status* 135; *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* 441.
[125] *The Queen on the Application of Altin Vallaj v A Special Adjudicator* [2002] Imm AR 16 [24].
[126] Ibid [25].

conclusion could be applied by analogy to UNHCR's activities with IDPs. As outlined in the introductory chapters to this thesis, the UNHCR has taken the lead role in the protection, camp management and emergency shelter of IDPs since 2005 and thus the protection of IDPs is no longer solely a matter of internal affairs. Thus a 'living instrument' interpretation of the term 'protection of that country' may in fact allow for UNHCR in-country protection to constitute same. In addition, it may be argued that protection by the UNHCR would negate the 'well-founded fear' aspect of the refugee definition, so that even if protection of that country is read in its narrow sense, protection by the UNHCR would still preclude satisfaction of the refugee definition.

In deciding whether protection provided by an international organisation is 'protection' for the purposes of the Refugee Convention, the two-pronged approach employed in ***Vallaj*** is a useful starting point. First, can it be stated that an international organisation is capable in law of providing such protection? Secondly, is the international organisation capable in fact of providing such protection? It was argued that it was irrelevant whether the international organisation in question had the obligation to protect under international law, provided that such protection was in fact being provided. This argument was not rejected by the Court, and thus this chapter will consider such a possibility.

7.1 Is the UNHCR capable in law of providing such protection?

In answering the first question, the above jurisprudence has revealed numerous criteria which must be satisfied before an international organisation may be considered in law an actor of protection for the purposes of precluding application of the refugee definition. However, it must be highlighted that all of the aforementioned cases are from the United Kingdom and thus while a useful indication of how the

Refugee Convention may be interpreted, the practice of one state does not international law make. Similarly, the Qualification Directive applies to EU member states only, and without, *inter alia*, supporting state practice, it cannot be stated to represent customary international law or an authoritative interpretation of the Refugee Convention.

According to the above jurisprudence and analysis, UNMIK constituted an agent of protection because all the relevant powers and functions of the state had been transferred to an international body, and that body had assumed the international obligation to protect nationals of the state. This is supported by the ***Behrami*** decision of the European Court of Human Rights, which held that the acts of KFOR and UNMIK were to be attributed to the UN, rather than the Member States supplying KFOR and UNMIK's personnel. The worrying conclusion of these decisions is that, in theory, it is possible for a state to arrange for another body to take over all of its duties, including the protection of human rights. Although the state would not cease to be responsible under international law, it would become more difficult to ascertain the extent of that responsibility and thus it would be more challenging to receive a remedy for breaches of international obligations.

Although the relevance of the FRY's consent to UNMIK's activities was not definitely addressed by the Court, this possible criterion will also be examined by this chapter.[127] Finally, it should be noted that the recast Qualification Directive stipulates that the actor of protection should have control of the state or a substantial part of the territory of the state.[128]

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[127] Ibid; *Gardi v Secretary of State for the Home Department* [2002] EWCA Civ 750, [2002] WLR 2755.

[128] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries

The above principles may be applied to the UNHCR in the form of the following questions:

(a) Does the UNHCR act with the consent of the state concerned?

The basis of UNHCR's involvement with IDPs can be summarised in UN General Assembly Resolution 53/125 (1998), which reiterates 'support for the role of the Office of the High Commissioner in providing humanitarian assistance and protection to internally displaced persons, on the basis of specific requests from the Secretary-General or the competent organs of the United Nations and *with the consent of the State concerned* [...]' [emphasis added].[129] In addition, the UNHCR has stated that before it will become involved with IDP protection efforts, there must be consent from the state concerned and where applicable, other entities in a conflict.[130] If consent of the state concerned is a criterion in order to be considered an 'actor of protection' for the purposes of the refugee definition, it is satisfied by the UNHCR's activities on behalf of IDPs.

(b) Has the UNHCR assumed the international obligation to protect nationals of the state? If the answer is in the affirmative, have all the relevant powers and functions of the state been transferred to the UNHCR?

The UNHCR,[131] the Human Rights Council,[132] the General Assembly,[133] and the Guiding Principles on Internal Displacement have all emphasised that the primary

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of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art. 6(b).

[129] UNGA Res 53/125 (9 December 1998) UN Doc A/RES/53/125.

[130] UNHCR 'Internally Displaced Persons – The Role of the High Commissioner for Refugees' (2000), 2.

[131] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007) [25]; UNHCR EXCOM 'UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement: Policy Framework and Implementation Strategy' (4 June 2007) UN Doc EC/58/SC/CRP.18, para 19.

protection responsibility lies with states for persons within their territory or jurisdiction.[134] The UNHCR's protection activities on behalf of IDPs do not result in a delegation of responsibility from the state, and its purpose is 'not to substitute but to strengthen national efforts for protecting and assisting the internally displaced.'[135] The work of the UNHCR is 'aimed at capacitating States and affected societies to effectively address displacement challenges.'[136] In Somalia, for example, UNHCR's operations with IDPs in 2014 includes collaborating closely with the Ministry of the Interior in Puntland and south-central Somalia, and the Ministry of Rehabilitation, Resettlement and Reconstruction (MRRR) in Somaliland, and developing a broader partnership and coordination framework with appropriate ministries for the purpose of developing a long-term strategy to identify durable solutions for people of concern.[137] It logically follows, therefore, that the relevant powers and functions of the state have not been transferred to the UNHCR where it is involved with IDPs. To contrast this with the jurisprudence above, UNMIK constituted an agent of protection because all the relevant powers and functions of the state had been transferred to an international body, and that body had assumed the international obligation to protect nationals of the state. In its protection activities on behalf of IDPs, the UNHCR does not exercise such powers and therefore does not satisfy this criterion.

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[132] UN Human Rights Council Res 20 ' Human Rights of Internally Displaced Persons' (29 June 2012) UN Doc A/HRC/20/L.14.
[133] UNGA Res 62/153 (6 March 2008) UN Doc A/RES/62/153.
[134]UNCHR, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add., Principle 3.
[135] See Walter Kälin, 'Report of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons, Walter Kälin, Addendum: Framework for National Responsibility', UN doc E/CN.4/2006/71/Add. 1, 23 Dec 2005, para 49.
[136] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007) , para 26.
[137] UNHCR, '2014 Country Profiles – Somalia'<http://www.unhcr.org/pages/49e483ad6.html> accessed 5 January 2014.

(c) Does the UNHCR control the State or a substantial part of the territory of the State?

This criterion stems from the Qualification Directive,[138] which was drafted at a time when UNMIK and KFOR were providing protection in Kosovo. Kosovo was under the effective control of UNMIK and KFOR, and this was most likely the type of scenario envisaged by the drafters of the Directive which would constitute 'protection'. Unlike UNMIK and KFOR, UNHCR has not had any of the powers and functions of the state transferred to it, and nor does it control the state or a substantial part of the state. This is further underscored by the fact that often UNHCR does not have access, let alone control, of the many areas where there exist IDPs. In Afghanistan, for example, the withdrawal of the international forces this year is expected to have security implications which will negatively affect UNHCR's access to certain locations and communities.[139] The criterion of control of territory, or a significant part of territory, is therefore not satisfied by UNHCR's activities on behalf of IDPs, both in the specific case of Afghanistan and more generally in the entirety of its operations with IDPs.

7.2 Is the UNHCR in fact providing such protection?

As argued above, the standard of protection required is inextricably linked to the nature of persecution feared. Thus it is not possible to set out definitively the standard of protection necessary to preclude the granting of refugee status. Nonetheless, as the jurisprudence shows, the operation of an effective legal system for the detection, prosecution and punishment of persecutory acts is a good indication of effective

[138] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art 7(2).
[139] UNHCR, '2014 Country Operations Profile – Afghanistan' <http://www.unhcr.org/pages/49e486eb6.html> accessed 5 January 2014.

protection, and such protection must be non-temporary in nature. Is such protection being provided by the UNHCR?

(a) Is the UNHCR operating an effective legal system for the detection, prosecution and punishment of persecutory acts, and is such protection accessible?

'Protection' in the sense of UNHCR's activities, has not been defined in its statute. Nonetheless, the UNHCR has articulated that 'the challenge of international protection is to secure admission, asylum, and respect by states for basic human rights, including the principle of non-*refoulement*.'[140] This also encompasses ensuring the 'physical safety and security' of refugees.[141]

This concept of protection does not encompass operating a legal system. The operation of a legal system requires the establishment of; *inter alia*, a legislative system, a police force, a court system, and detention facilities, all of which require powers and functions which are generally attributable to states. The UNHCR is not endowed with such powers and as such, does not have the capacity to operate such a system. The UNHCR's role in this respect only extends to assisting the authorities to develop national legislation and appropriate administrative support arrangements, so as to strengthen the IDP protection framework.[142] In Afghanistan, for example, the UNHCR will be supporting the implementation of the national IDP policy in 2014,[143] and in Somalia it will provide knowledge and technical support in order to enhance the capacity of the newly-constituted Commission for Refugees, Returnees and

[140] UNHCR 'Note on International Protection' (7 July 2000) UN doc A/AC.96/930, para 9.
[141] UNHCR 'Note on International Protection' (7 July 2000) UN doc A/AC.96/930 , para 2.
[142] UNHCR 'The Protection of Internally Displaced Persons and the Role of UNHCR' (2007), para 28.
[143] UNHCR, '2014 Country Operations Profile – Afghanistan' <http://www.unhcr.org/pages/49e486eb6.html> accessed 5 January 2014.

IDPs.[144] This can be contrasted to UNMIK's mandate, which has the broader duty to provide an interim administration, to maintain civil law and order, and to protect and promote human rights. Thus the protection activities carried out by UNHCR do not indicate a standard of protection which may, in certain circumstances, preclude the granting of refugee status.

(b) Is the UNHCR's protection non-temporary in nature?

The UNHCR recognises that '[it] can only play a limited role in addressing the issue of internal displacement.'[145] UNHCR's role with IDPs in any given situation is of a transient nature, with the long-term aim being that states themselves will be able to effectively address displacement challenges. Consequently, UNHCR's protection of IDPs is not of a 'non-temporary nature', and therefore would not come within the definition of 'actors of protection' as set out in the recast Qualification Directive.

(c) Even if not the body with the legal duty to provide protection, can the UNHCR be considered an actor of protection if it is in fact providing protection?

It is submitted that this third possibility, as raised in ***Vallaj***, is inapplicable to UNHCR's activities with IDPs as the discussion above indicates that UNHCR is not in fact providing protection to an extent which would preclude the application of the refugee definition.

[144] UNHCR, '2014 Country Profiles – Somalia' <http://www.unhcr.org/pages/49e483ad6.html> accessed 5 January 2014.
[145] UNHCR EXCOM 'UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement: Policy Framework and Implementation Strategy' (4 June 2007) UN Doc EC/58/SC/CRP.18, para 20.

8. UNHCR's Operations within the Cluster System

In order to get a realistic picture of the protection available to IDPs, one must examine IDP protection as a whole taking into account the activities of the range of actors involved in IDP protection. Three case-studies were chosen in this regard: the Democratic Republic of the Congo (DRC), Myanmar, and Syria.

8.1 DRC

Since the beginning of 2012, renewed hostilities between various armed groups and the Congolese Army have created a displacement problem numbering almost 1 million IDPs. The vast majority of IDPs in the Kivu provinces live with host families, while a smaller number reside in camps coordinated by the UNHCR-led Camp Coordination and Camp Management ('CCCM') working group. [146]

Approximately half of the camps are affected by insecure conditions and exposed to serious protection risks such as attacks and looting. Sexual and gender-based violence (SGBV) and the forced recruitment of children frequently take place. UNHCR and its partners provide multi-sectoral responses to victims of SGBV, including healthcare, legal, and psychosocial support. They also undertake safety interventions and work with the relevant authorities and the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ('MONUSCO') to improve protection in camps. Basic services, such as shelter, health, water, and sanitation, are also provided for hundreds of thousands of IDPs.[147]

In 2014, UNHCR will continue to collaborate with national and international partners present in the country, and will further engage in building the capacity of partner NGOs, focusing on life-saving activities and protection-monitoring with the

[146] UNHCR 'Global Report: Engaging with Internally Displaced People' (2012), 71.
[147] UNHCR 'Global Report: Engaging with Internally Displaced People' (2012) 71.

aim of reducing the risk of SGBV. UNHCR will also focus on providing education assistance to refugees and IDPs, as well as providing for basic needs such as shelter. UNHCR will collaborate closely with Government authorities, particularly the *Commission Nationale pour les Réfugiés* (CNR) within the Ministry of Interior, assisting in the areas of refugee registration and assistance and providing technical assistance and inputs to draft legislation. The Office will also actively take part in the process detailed in UN Security Council Resolution 2098 that foresees the transfer of certain tasks from the UN mission in DRC (MONUSCO) to the UN country team.[148]

Do these activities of the cluster as a whole amount to effective protection? The answer to this question, according to the Internal Displacement Monitoring Centre, is in the negative.[149] Although the Congolese authorities have continued to take part in the cluster system, the government still struggles to meet its responsibilities as the primary provider of protection to IDPs as it lacks the necessary capacities, resources and political will. Within the cluster system, coordination remains a challenge. In North Kivu, IDPs in camps have tended to receive more humanitarian assistance than those living in host communities or informal sites. A lack of funding has also limited the international response, with some organisations forced to close their offices and interrupt or abandon their work in recent years.

8.2 Myanmar

Since June 2011, clashes between national troops and armed ethnic groups in Kachin State have displaced an additional 74,000 people. UNHCR leads the joint Camp Coordination and Camp Management ('CCCM') /shelter/ non-food items ('NFI')

[148] UNHCR, '2014 UNHCR country operations profile - Democratic Republic of the Congo', < http://www.unhcr.org/pages/49e45c366.html> accessed 13 June 2014.
[149] Internal Displacement Monitoring Centre, 'Democratic Republic of Congo: Internal displacement in brief' http://www.internal-displacement.org/sub-saharan-africa/democratic-republic-of-the-congo/summary/ accessed 13 June 2014.

cluster in both Rakhine and Kachin States. UNHCR rebuilds damaged or destroyed homes, provides emergency shelter, and leads an inter-agency protection working group focusing on freedom of movement, SGBV, and land and property rights, as well as the prevention of arbitrary arrest and detention. In south-eastern Myanmar, where there are also an estimated 230,400 IDPs, UNHCR manages efforts to improve humanitarian access and protection and monitors spontaneous IDP and refugee returns.[150]

Notwithstanding these efforts, significant protection gaps remain and thus effective protection is not yet available in Myanmar. Political reforms and increasing openness since 2010 have led to a significant increase in international humanitarian and development assistance and the response to IDPs improved in some areas in 2013, but more needs to be done.[151] In June 2013, police in Rakhine reportedly shot and killed five Muslim IDPs in camps in Parein and Kyein Ni Pyin. In November of the same year, three Muslim IDPs and a local Rakhine woman were reportedly killed in Pauktaw. Local authorities in Rakhine restricted IDPs' freedom of movement, resulting in limited employment options and access to food. IDPs in Mandalay suffered similar restrictions, as well as a shortage of medicines and water. Protection concerns for IDPs in Kachin and northern Shan include landmines, human trafficking, gender-based violence, forced recruitment and lack of psychosocial and health care.[152]

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[150] UNHCR 'Global Report: Engaging with Internally Displaced People' (2012), 71.
[151] Internal Displacement Monitoring Centre, 'Myanmar: Internal Displacement in Brief', http://www.internal-displacement.org/south-and-south-east-asia/myanmar/summary/ accessed 13 June 2014.
[152] Internal Displacement Monitoring Centre, 'Myanmar: Internal Displacement in Brief', <http://www.internal-displacement.org/south-and-south-east-asia/myanmar/summary/> accessed 13 June 2014.

8.3 Syria

Violence in Syria has escalated significantly since summer 2012. Around 3.5 million people, or 9,500 a day, we displaced in Syria in 2013 and by the end of 2013 Syria's displacement crisis had become the largest in the world.[153] Most IDPs live in host communities, while others have found refuge in some 680 collective shelters.

UNHCR joined inter-agency efforts in 2012 to assist IDPs in Syria. The UNHCR works within the framework of the national Syrian Humanitarian Assistance Response Plan to support the non-food items and shelter sectors, as well as the financial assistance, health, community services, and protection sectors.[154]

The current conflict in Syria has major implications in IDP operations, especially concerning access and operational space. Movements are restricted throughout the country, communications are frequently disrupted, and UNHCR's access to affected populations is limited. Despite the scale of the crisis, the government has refused to recognise those forced to flee the conflict as IDPs, describing them instead as 'people who have left their homes'.[155]

IDPs' physical protection needs have gone largely unaddressed and remain a serious concern. Basic needs have also often not been met. In July 2013, the UN Special Rapporteur on the Human Rights of IDPs, Chaloka Beyani, drew attention to indiscriminate attacks on civilians (including government airstrikes on displacement

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[153] Internal Displacement Monitoring Centre, *Global Overview 2014 – People Internally Displaced by Conflict and Violence* (2014), 57.
[154] UNHCR 'Global Report: Engaging with Internally Displaced People' (2012), 72.
[155] UNHCR, '2014 UNHCR country operations profile - Syrian Arab Republic', http://www.unhcr.org/pages/49e486a76.html accessed 13 June 2014; Internal Displacement Monitoring Centre, 'Syria: Internal Displacement in Brief', < http://www.internal-displacement.org/middle-east-and-north-africa/syria/summary/> accessed 13 June 2014.

camps in the north of the country), describing these acts as 'a crime against humanity and/or a war crime.'[156]

The protection of IDPs in Syria cannot be said to be effective. By failing to authorise access for relief agencies to those in need, including 240,000 besieged people in Syria's contested cities, all parties to the conflict have violated the basic rights of IDPs to request and receive assistance and protection. A lack of effective coordination makes the delivery of assistance more difficult still, especially in the areas no longer under government control. A shortage of funding hampered the humanitarian response even further as only 67.7% of the $2 billion the UN requested had been donated by the end of the year. Initiatives to find a political solution to the conflict did not move forward in 2013, either at the national or international level.[157]

9. Conclusion

The question that this chapter set out to answer was whether, in providing protection to IDPs, the UNHCR could be classified as an 'actor of protection' and thus where UNHCR protection is available in the country of origin, refugee status could be denied to persons seeking asylum abroad. As outlined above, there are numerous possibilities by which the activities of the UNHCR may be linked to the refugee definition, and thus in the first instance there is a very real possibility that activities by the UNHCR could be in conflict with the institution of asylum.

Nonetheless, in considering the refugee definition in its context, and in line with the obligation to interpret a treaty in good faith to achieve its object and purpose,

[156] 'Syria: Internal Displacement in Brief', < http://www.internal-displacement.org/middle-east-and-north-africa/syria/summary/> accessed 13 June 2014.
[157] 'Syria: Internal Displacement in Brief', < http://www.internal-displacement.org/middle-east-and-north-africa/syria/summary/> accessed 13 June 2014.

this chapter has argued that ‘that country’ cannot be interpreted as anything but the authorities of the state. The UNHCR therefore cannot in law be considered an actor of protection for the purposes of precluding the application of the refugee definition. Nonetheless, there exists jurisprudence supporting a contrary approach. In addition, the interpretation of ‘that country’ as argued by this chapter is not incompatible with a situation in which an international organisation could be acting formally in place of the state, in particular with Security Council authorisation.

The analysis in this chapter reveals that even if the term ‘that country’ is interpreted in a manner that would allow for protection to be provided by a NSA, the UNHCR is lacking certain traits that are essential for it to be considered an actor of protection in this respect. Where UNHCR provides in-country protection, the obligation to protect its nationals is not, as a matter of international law, transferred to the UNHCR and the UNHCR is not endowed with the powers and attributes of the state. In addition, the UNHCR is not in control of the state or a substantial part of the territory of the state. Put simply, the UNHCR is not capable in law as constituting an actor of protection which would preclude the application of the refugee definition.

The second question asks whether the UNHCR is capable, in fact, of providing such protection. As outlined above, it is impossible to give a definitive exposition as to the standard of protection required by the refugee definition. This is because the standard of protection required is dependent on the nature of the persecution feared. Nonetheless, the operation of a legal system for the detection, prosecution and punishment of persecutory acts is a good indication of whether protection is effective. The UNHCR does not have the capacity or legal authority to operate such a system. Furthermore, UNHCR’s protection efforts are of a transient

nature, designed to capacitate states in finding a long-term solution to the IDP problem.

This chapter has also taken into account the practical workings of the cluster approach as a whole and found that protection of the UNHCR is not effective even within an inter-agency framework of protection. It may be concluded therefore that the activities of the UNHCR on behalf of IDPs will not constitute 'protection of that state' so as to preclude the application of the refugee definition, and it is therefore not in conflict with the institution of asylum under international law.

CHAPTER 5: INTERNAL DISPLACEMENT AND COMPLEMENTARY PROTECTION

1. Introduction

In order for exposure to internal displacement in the country of origin to be a relevant consideration in refugee status determination proceedings, it must be shown, *inter alia*, that the internal displacement in question constitutes persecution as envisaged by the refugee definition.[1] In factual terms, IDPs and refugees often suffer from the same needs and fears. However, IDPs differ from refugees on the grounds that they are not outside their country of origin and because their displacement may not necessarily be a result of persecution on enumerated Refugee Convention grounds.[2] In addition, it must be demonstrated that the displacement in question was a result of state action, or that the state was unable or unwilling to prevent it. In the absence of this nexus to the refugee definition, exposure to internal displacement in the country of origin will not, *per se*, form a basis upon which refugee status is granted. Where does that then leave a person whose refugee application has failed and faces deportation to his country of origin where he will become internally displaced? Is there a legal obligation of non-removal, or is it a discretionary prerogative of each individual state and therefore without legal basis?

This chapter will focus on the protection offered by 'complementary' or 'subsidiary' protection in such circumstances. Such protection is provided by international instruments which apply notwithstanding failure to meet the refugee definition. The protection offered may be said to 'complement' the Refugee

[1] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 1A(2).
[2] According to art 1A(2) of the Convention Relation to the Status of Refugees 1951, the persecution feared must be for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Convention in the sense that it extends the categories of persons entitled to international protection. Complementary protection may be applicable in the domestic and the international sphere. A treaty will be applicable domestically in those states which are a party to it and which have taken the necessary steps, if any, to incorporate it in their domestic legal system. Certain treaties also provide for an international monitoring mechanism, such as the European Court of Human Rights (for the European Convention on Human Rights), or the Committee on the Rights of the Child (for the Convention on the Rights of the Child).

For those who risk exposure to internal displacement in their country of origin, complementary protection is of particular relevance in two situations. First, although victims of internal displacement in their country of origin may not satisfy the refugee definition, they may nonetheless be in need of international protection and a non-removal obligation may arise. Secondly, as there is no international body tasked with the monitoring or implementation of the Refugee Convention, complementary protection may be the only appeal option available to those who believe that the Refugee Convention has been misapplied or misinterpreted. Although the majority of the monitoring bodies discussed in this chapter are not competent to apply the Refugee Convention,[3] they may examine the issue of non-removal under the particular instrument that they are mandated to supervise. Such instruments may be applicable where the removal in question will result in exposure to internal displacement in the country of return.

This chapter will be formed of two strands of analysis. First, guarantees provided by various instruments which are relevant to situations of internal

[3] The Inter-American Court of Human Rights may interpret 'any treat[y] concerning the protection of Human Rights in the American States.' (American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144, art. 64.

displacement will be identified, such as the right to freedom of movement, the right to adequate housing, and the guarantee of liberty and security of the person. This discussion will be informed by the jurisprudence of various monitoring bodies. This section will be brief, because the rights that accrue to IDPs are discussed in detail in chapters 1 and 2. Secondly, this chapter will examine jurisprudence in which the issue of non-removal arose. Although the majority of instruments discussed do not explicitly provide for a non-removal obligation,[4] various interpretative bodies have implied non-removal obligations from the primary obligations in the respective instruments. Both strands of analysis will converge in a determination of the extent to which international law provides for a non-removal obligation concerning those who risk facing internal displacement in the receiving country.

The structure of this chapter will be as follows: First, the rationale underlying the obligation of non-return will be explained. Secondly, this chapter will examine the protection provided by treaties which are 'international' in nature – the CAT,[5] ICCPR[6], ICESCR,[7] and the CRC.[8] Thirdly, this chapter will analyse the protection available for those who are located within the European Union and fall within the remit of the EC Qualification Directive, the Charter of Fundamental Rights,[9] and in theory, the Temporary Protection Directive.[10] Fourthly, this chapter will examine

[4] An exception to this is Article 3(1) of the CAT.
[5] Ibid.
[6] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[7] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[8] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[9] Charter of Fundamental Rights of the European Union OJC (2010) 83/02.
[10] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9; (2001); Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the

protection available under the ECHR.[11] Fifthly, this chapter will examine the protection offered by the Inter-American Human Rights system,[12] and sixthly, by customary international law. This chapter will conclude with a comparative analysis regarding the protection available to those who, if deported, would be exposed to internal displacement in their country of origin.

1.1 Human Rights Violations and Internal Displacement

This chapter asks the question of whether the sending of an individual to a place where he or she will face displacement is contrary to international law. In order to answer this question, one must examine the treatment of IDPs in the receiving state. It is therefore important to clarify that the act of internal displacement is not yet prohibited by general international law,[13] and none of the instruments discussed in this chapter explicitly prohibit internal displacement. Likewise, the majority of the monitoring bodies discussed in this chapter have yet to state that internal displacement in itself is a violation of the instrument that it is tasked to supervise – much depends on the facts of the case.[14] In fact, the concept of the IFA (discussed in chapter 3), which many of these monitoring bodies have held as compatible with their respective instruments, is based precisely on the premise that the possibility of

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event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

[12] 1948 American Declaration on the Rights and Duties of Man O.A.S. Res. XXX.

[13] The following soft law documents contain prohibitions of internal displacement: Commission on Human Rights, 'Guiding Principles on Internal Displacement ':UN doc. E/CN.4/1998/53/Add.2, 11 February 1998 (Principle 6); The Pinhiero Principles : United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (Article 5(1)). The 2006 International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons obliges states to implement the Guiding Principles (and thus the right not to be displaced). Finally, Article 4(4) of the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('Kampala Convention') expressly lays down the right not to be displaced.

[14] The exception to this statement is the declaration by the UN Human Rights Committee that internal displacement is *prima facie* incompatible with the ICCPR (UN Human Rights Committee 'General Comment No. 27: Article 12 (Freedom of Movement)' (1999) UN Doc CCPR/C/21/Rev.1/Add.9 [7]).

relocating internally to receive protection should be exhausted before the entitlement to international protection arises.[15] Thus in some circumstances, internal displacement is not incompatible with various international instruments.

That said, a situation of internal displacement may entail violations of human rights, both economic, social and cultural; and civil and political in nature. Principle 6 of the Guiding Principles sets out that displacement should never last longer than required by the situation. Nonetheless, the majority of IDPs are in protracted displacement situations, which are described as situations in which the process for finding durable solutions is stalled and/or IDPs are marginalised as a consequence of violations or a lack of protection of human rights, including economic, social, cultural, civil, and political rights.[16] For example, IDPs in Bosnia and Herzegovina still face difficulties in accessing health and social services some 20 years after being displaced.[17] Depending on their proximity to conflict, IDPs in protracted situations may find their lives at risk, although most probably do not face immediate threats to their security. Most IDPs live in host communities, rather than in camps.[18]

Like refugees in protracted situations, IDPs find that their basic rights and essential economic, social and psychological needs remain unsatisfied after years of displacement. Protracted IDPs may face particular protection needs such as lack of permanent shelter, lack of work or livelihood, lack of documentation, no or limited

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[15] For further discussion, see Reinhard Marx, 'The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures' (2002) 14 International Journal of Refugee Law 179; Kenneth Keith, 'The Difficulties of "Internal Flight" and "Internal Relocation" as Frameworks of Analysis' (2001) 3 Georgetown Immigration Law Journal 433; Bill Frelick, 'Down the Rabbit Hole: The Strange Logic of the Internal Flight Alternative' [1999] World Refugee Survey; Lauren Sanders, 'Finding a Reasonable Alternative: An Integrated Approach to Refugee Law, Relocation and the Internal Flight Alternative' (Australian National University 2009).
[16] Brookings-Bern Project on Internal Displacement, *Expert Seminar on Protracted IDP Situations* (Geneva, 21-22 June 2007, 2007), 2.
[17] *IDPs in Protracted Displacement: Is Local Integration a Solution?* (Report from the Second Expert Seminar on Protracted Internal Displacement, 19-20 January 2011, Geneva, 2011), 2.
[18] Brookings-Bern Project on Internal Displacement, 23.

access to health and education, difficulties accessing pension rights and asserting tenancy rights, discrimination related to the fact of their displacement, and/or limitations on their free choice of durable solution.

Achieving durable solutions for these millions of IDP in long-term limbo is complicated by a range of factors, including the lack of resolution to conflicts, a long economic recovery period, inadequate community infrastructure, weak rule of law and property disputes.[19] The Framework on Durable Solutions for IDPs states that IDPs achieve a durable solution when they no longer have specific assistance and protection needs that are linked to their displacement, and can enjoy their human rights without discrimination on account of their displacement.[20] Durable solutions can be achieved through sustainable return, local integration or settlement elsewhere in the country, when they can access their rights without discrimination resulting from their displacement.

Many IDPs also live in camps, some of which have been known to accommodate up to 300,000 individuals.[21] Consequently many camps suffer from overcrowding, food shortage, restrictions on freedom of movement and inadequate access to basic services such as education, water, and sanitation.

To take a recent example, Syria now has the largest IDP population in the world, numbering 6.5 million at the end of 2013, equivalent to 32% of the

[19] Second Expert Seminar on Protracted Internal Displacement, *IDPs in Protracted Displacement: Is Local Integration a Solution?* (2011), 4.
[20] 2010 Inter-Agency Standing Committee Framework on Durable Solutions for Internally Displaced Persons, 5.
[21] 'Syria is now the world's biggest IDP crisis', < http://www.syriadeeply.org/articles/2014/05/5427/syria-worlds-biggest-idp-crisis/> accessed 26 June 2014.

population.[22] Syria also contains 270,000 Palestinian refugees forced into secondary displacement.[23] 108,000 of Syria's IDPs live in 8 camps around 25 makeshift sites near the Turkish border.[24] Many of these camps are overcrowded and dangerous, with two reports of car bombs between February and May 2014 alone.[25] Atmeh camp is host to 21,000 IDPs and has been described as 'hellish.'[26] Many IDPs spent the winter of 2013 there owing to the Turkish border closure and suffered insufficient protection from the elements. They did not have sufficient clothes and blankets to keep warm and the heavy rain that leaked into the tents turned the soil into thick slippery mud, resulting in raw sewage flowing between the tents.[27] The food that was being distributed was insufficient and of very poor quality and a large number of people complained of medical ailments for which they were receiving no treatment.[28]

It is clear therefore, that internal displacement may entail a wide range of human rights violations. These may include violations of freedom of movement, property rights, lack of security, and/or the right to food, water, education, and healthcare. Every displacement situation is different and thus it is impossible to definitively state which rights will be violated where displacement occurs. In this

[22] 'Syria is now the world's biggest IDP crisis', < http://www.syriadeeply.org/articles/2014/05/5427/syria-worlds-biggest-idp-crisis/> accessed 26 June 2014.
[23] 'Syria is now the world's biggest IDP crisis', < http://www.syriadeeply.org/articles/2014/05/5427/syria-worlds-biggest-idp-crisis/> accessed 26 June 2014.
[24] 'Syria is now the world's biggest IDP crisis', < http://www.syriadeeply.org/articles/2014/05/5427/syria-worlds-biggest-idp-crisis/> accessed 26 June 2014.
[25] 'Syria is now the world's biggest IDP crisis', < http://www.syriadeeply.org/articles/2014/05/5427/syria-worlds-biggest-idp-crisis/> accessed 26 June 2014.
[26] 'Syria's Internally Displaced – "The World Has Forgotten Us"' < http://www.amnesty.org.uk/blogs/campaigns/syria%E2%80%99s-internally-displaced-%E2%80%93-%E2%80%98-world-has-forgotten-us%E2%80%99> accessed 26 June 2014.
[27] 'Syria's Internally Displaced – "The World Has Forgotten Us"' < http://www.amnesty.org.uk/blogs/campaigns/syria%E2%80%99s-internally-displaced-%E2%80%93-%E2%80%98-world-has-forgotten-us%E2%80%99> accessed 26 June 2014.
[28] 'Syria's Internally Displaced – "The World Has Forgotten Us"' < http://www.amnesty.org.uk/blogs/campaigns/syria%E2%80%99s-internally-displaced-%E2%80%93-%E2%80%98-world-has-forgotten-us%E2%80%99> accessed 26 June 2014.

sense it can be said that a spectrum, or degrees, of displacement exist, ranging from protracted displacement outside of a camp context, to protracted encampment, to integration or displacement which has resulted in durable solutions. Thus where this chapter refers to deportation 'to face internal displacement' it should be borne in mind that whether or not such action would entail a breach of international law would depend on the specific circumstances of displacement in each case.

1.2 The Rationale Underlying a Non-Removal Obligation

As this chapter deals with the obligation of non-removal under international law, it is important to underline the distinction between a non-removal obligation and the extra-territorial application of a treaty. In the case of the latter, a treaty is generally only applicable within the territorial boundaries of the relevant State Party. However, it may have extra-territorial applicability where the State Party acts beyond its territorial boundaries.[29] This may be the case, for example, where migrants are intercepted on the high seas, or where persons are detained during military operations abroad. In contrast, the obligation of non-removal is unconcerned with activities carried out by a state beyond its territory. Rather, responsibility attaches to the act of expulsion, which occurs on the territory of the sending state. If the act of expulsion results in a human rights violation, the sending state may be responsible under the respective treaty.

In considering such cases, the relevant monitoring body may evaluate the conditions in the receiving state with reference to the particular treaty at hand. That is not to say that the monitoring body is applying that treaty in an extra-territorial manner, but rather, is engaging in a factual analysis for the purposes of assessing the

[29] For further discussion, see Marko Milanović, *Extraterritorial Application of Human Rights Treaties Law, Principles and Policy* (Oxford University Press 2011); Fons Coomans and Menno T. Kamminga, *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

consequences of the act of removal. Thus the obligation of non-removal is not concerned with attributing responsibility for the actions of one state (the receiving state) to another (the sending state). Nor is it a situation that the sending state is liable for assisting in the violation by removing the individual concerned. This is because it is only in exceptional cases that one state is responsible for the acts of another, and the removal cannot be said to be carried out 'with a view to facilitating the commission of the wrongful act.'[30] In addition, the receiving state may not even be bound by the human rights treaty in question, and thus the sending state cannot be said to be aiding or assisting it in violating that particular treaty.[31] Therefore, the responsibility assessed in these non-removal cases is that of the sending, rather than the receiving state. As the European Court of Human Rights explained in ***Soering v United Kingdom*** **[1989]**, 'there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the [ECHR] or otherwise'.[32]

The following sections will set out the extent to which international instruments provide for a non-removal obligation, where removal would result in exposure to internal displacement.

[30] James Crawford, 'Second Report on State Responsibility' (30 April 1999) UN doc A/CN.4/498/Add. 2, 148.
[31] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 76.
[32] *Soering v United Kingdom* App no 14038/88 (ECHR, 7 July 1989) [91].

2. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 1984

The Convention against Torture prohibits torture and other cruel, inhuman, or degrading treatment or punishment.[33] However, it offers little assistance for those who would seek to contest removal on the grounds of exposure to internal displacement in the country of return, as the non-removal obligation is explicitly limited to acts of torture.[34]

In addition, the definition of torture provided by the CAT is limited to acts which are attributable or which are carried out with the acquiescence or consent of state authorities.[35] Further, the acts in question must be carried out with the intention of inflicting punishment, extracting a confession, or causing intimidation or coercion. Thus the definition of torture does not encompass acts of internal displacement, and the non-removal obligation provided by the CAT is irrelevant for the purposes of this chapter.

3. International Covenant on Civil and Political Rights 1966

As outlined in Chapter 2, the ICCPR contains numerous articles that may be violated in the course of displacement. Article 12, for example, protects freedom of movement and thus, according to the Human Rights Committee in General Comment 27, forced displacement is *prima facie* unacceptable under the ICCPR.[36] Similarly, Article 26 sets forth the principles of equality and non-discrimination, while the right to liberty

[33] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 2.
[34] Ibid, art 3(1).
[35] Ibid, art 1.
[36] UN Human Rights Committee 'General Comment No. 27: Article 12 (Freedom of Movement)' (1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 7.

and security of the person is protected by Article 9. Other relevant provisions include Article 2(3) (the right to an effective remedy); Article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment); Article 17 (prohibition of arbitrary or unlawful interference of privacy, family, home or correspondence); and Article 27 (the right of minorities to enjoy their own culture, practice their own religion, and to use their own language).

That said, the ICCPR does not explicitly prohibit internal displacement and the concept of the IFA (discussed in chapter 3), which the Committee has found to be compatible with the ICCPR, is based precisely on the premise that the possibility of relocating internally to receive protection should be exhausted before the entitlement to international protection arises.[37]

It should also be noted that there is not a rigid distinction between civil and political rights and economic, social, and cultural rights notwithstanding the title of this particular instrument. The relationship between the two branches of rights was illustrated in the New Zealand case of ***BG (Fiji)*** **[2012]** ***NZIPT 800091*** which held that as a general rule, socio-economic deprivation arising from general policy and conditions in the receiving state is not to be regarded as a breach of Article 7 of the ICCPR. However, where socio-economic deprivation arising from general policy and

[37] See UN Human Rights Committee 'Concluding Observations concerning Norway' (2006), UN Doc CCPR/C/NOR/CO/5, para 11:
'[A]sylum requests may be rejected on the basis of the assumption that the person concerned can find protection in a different part of their country of origin, even in cases where information, including recommendations by UNHCR, is available indicating that such alternatives might not be available in the specific case or country of origin […] the state party should apply the so-called internal relocation alternative only in cases where such alternative provides full protection for the human rights of the individual.'

conditions amounts to specific treatment of the individual for which the state can be held responsible, this can engage Article 7 of the ICCPR.[38]

The implied obligation of non-removal under the ICCPR has been emphasised time and time again by the Human Rights Committee. In General Comment 20, the Committee, in interpreting Article 7 of the Covenant, rejected the possibility that States Parties could 'expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*'.[39] This was reaffirmed in General Comment 31, where the Committee stated that the Covenant obliges states:

> [...] not to extradite, deport, expel or otherwise remove a person from their territory [...] where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[40]

The use of the phrase 'such as' implies that the non-removal obligation is not limited to violations of Article 6 and 7. Indeed, the case of ***Kindler v. Canada*** **[1991]** illustrates that the non-removal obligation may, in theory, be invoked in conjunction with any Covenant article:

> [...] [i]f a State Party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State Party itself may be in violation of the Covenant.[41]

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[38] *BG (Fiji)* [2012] NZIPT 800091 [197].
[39] UN Human Rights Committee, 'General Comment No. 20: Replaces General Comment No. 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment' (1992) UN Doc HRI/GEN/1/Rev.1 7.
[40] UN Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) CCPR/C/21/Rev.1/Add. 13, para 12.
[41] UN Human Rights Committee, *Kindler v Canada* Communication No. 470/1991 (1993) UN Doc CCPR/C/48/D/470/1991.

This wording was reaffirmed in the case of ***Chitat Ng v Canada*** **[1993]** and ***ARJ v Australia*** **[1996].**[42] In the former case, the applicant contested the decision to extradite him to California, where he would face execution by gas asphyxiation. He argued that this would be a violation of, *inter alia*, Article 7. The Committee concluded that execution in this manner did not meet the test of 'least possible physical and mental suffering',[43] as set out by the Committee in its General Comment 20 on Article 7 of the ICCPR.[44] Thus gas asphyxiation constituted cruel and inhuman treatment in violation of Article 7 and the decision to remove the applicant was in violation of the ICCPR.[45]

There are 167 States Parties to the ICCPR. ICCPR rights will be applicable domestically in those states which are a party to it and which have taken the necessary steps, if any, to incorporate it in their domestic legal system. However, General Comments do not have the same authority. Although a General Comment is 'a general statement of law that expresses the Committee's conceptual understanding of the content of a particular provision,'[46] its authority is in the form of a guide as to the normative substance of human rights obligations, rather than binding law.[47] In a domestic court, a General Comment would be of persuasive value at best.

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[42] UN Human Rights Committee, *Chitat Ng v Canada* Communication No. 496/1991 (1991) UN Doc CCPR/C/49/D/469/1991; UN Human Rights Committee, *A.R.J. v Australia* Communication No. 692/1996 (1996) UN Doc CCPR/C/60/D/692/1996 [6.9]. See also UN Human Rights Committee *Cox v Canada* Communication No. 539/1993 UN Doc CCPR/C/52/D/539/1993 (1994) [16.1].
[43] UN Human Rights Committee, *Chitat Ng v Canada* Communication No. 496/1991 (1991) UN Doc CCPR/C/49/D/469/1991 [16.4].
[44] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 20: Non-Discrimination in Economic, Social, and Cultural Rights (art 2, para 2) (2009) UN Doc E/C.12/GC/20, para 6.
[45] UN Human Rights Committee, *Chitat Ng v Canada* Communication No. 496/1991 (1991) UN Doc CCPR/C/49/D/469/1991 [17].
[46] UN Human Rights Committee, 'Fact Sheet No. 14: Civil and Political Rights'. Available at: http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf, 24, accessed 14 July 2014.
[47] UN Human Rights Committee, 'Fact Sheet No. 14: Civil and Political Rights'. Available at: http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf, 24, accessed 14 July 2014.

The individual complaints mechanism before the Committee on Human Rights is also not without its limitations. Complaints may only be admitted against states which are parties to the Optional Protocol on Civil and Political Rights.[48] Complaints will be declared inadmissible where domestic remedies have not been exhausted (unless domestic procedures are unreasonably prolonged),[49] or where the complaint is being examined under another procedure of international investigation or settlement.[50] In addition, it may take several years for a complaint to proceed from initial submission through the series of exchanges between the parties to a final decision by the Committee. However the Committee may sometimes request the State Party to take interim measures to avoid irreparable damage to the alleged victim while the complaint is being considered.[51]

If the Committee finds a violation in a particular case, the State Party is requested to remedy that violation, pursuant to the obligation in Article 2(3) of the Covenant to provide an

effective remedy for Covenant violations. The recommended remedy may take specific form, such as the payment of compensation, the repeal or amendment of legislation, and/or the release of a detained person. Thereupon, the case is taken up by the Committee's Special Rapporteur on Follow-up to Views, who communicates with the parties with a view to achieving a satisfactory resolution to the case in the light of

[48] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. At the time of writing, the Protocol has 114 States Parties.
[49] Ibid, art 5(2)(b).
[50] Ibid, art 5 (2)(a).
[51] UN Human Rights Committee 'Rules of Procedure of the Human Rights Committee' (24 May 1994) UN Doc CCPR/C/3/Rev. 3, Rule 92.

the Committee's views.[52] However, the Committee has no legal means with which to carry out its views.

4. International Covenant on Economic, Social and Cultural Rights 1966

The Committee on Economic, Social and Cultural rights has yet to consider a non-removal obligation in relation to this Covenant. The Committee may consider individual complaints against those states that have ratified the Optional Protocol.[53] However, this Protocol came into force recently (on 5 May 2013), and thus has not produced any jurisprudence to date. In addition, there is very little literature on the question of whether an obligation of non-removal can be implied into the ICESCR.[54]

An argument against the existence of a non-removal obligation in relation to ESCR rights is that these rights are often said to lack immediate or binding obligations. Therefore, it could be impossible to determine when removal would result in a breach of these obligations. This argument is countered by the discussion by the Committee on Economic, Social and Cultural rights on the nature of States Parties' obligations under the Covenant. According to the Committee, although the Covenant does indeed allow for progressive realisation of rights and acknowledges constraints due to the limits of available resources, it also imposes various obligations that are of immediate effect.[55]

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[52] UN Human Rights Committee 'Rules of Procedure of the Human Rights Committee' (24 May 1994) UN Doc CCPR/C/3/Rev. 3, Rule 101.
[53] To date, those states are: Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Portugal, Slovakia, Spain, and Uruguay.
[54] See, for example, Michelle Foster, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) 2 New Zealand Law Review 257.
[55] Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, par 1)' (1990) UN Doc CESCR-E/1991/23, para 1.

Two are of particular importance: first, the 'undertaking to guarantee' the relevant rights without discrimination and secondly, the obligation 'to take steps.'[56] In addition, the Committee has identified:

> [...] a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.[57]

The Committee has identified certain articles that are immediately binding, and others that although not binding *per se*, imply certain immediately binding obligations. These include Article 2(2) (non-discrimination);[58] Article 3 (equality);[59] Article 6 (the right to work);[60] Article 7(a)(i) (the right to fair wages and equal remuneration for work of equal value without distinction);[61] Article 8 (the right to form trade unions);[62] Article 9 (the right of everyone to social security);[63] Article 10(3) (special protection and assistance for children and young persons);[64] Article 12 (the right of everyone to

[56] Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, par 1)' (1990) UN Doc CESCR-E/1991/23, paras 1-2.
[57] Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, par 1)' (1990) UN Doc CESCR-E/1991/23, para 10.
[58] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 20: Non-Discrimination in Economic, Social, and Cultural Rights (Art 2, para 2) (2009) UN Doc E/C.12/GC/20, para 7.
[59] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social, and Cultural Rights (art 3) (2005) UN Doc E/C.12/2005/4, paras 16, 32, 40; Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, par 1)' (1990) UN Doc CESCR-E/1991/23, para 5.
[60] UN Committee on Economic, Social, and Cultural Rights 'General Comment No. 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights' (2006) UN Doc E/C.12/GC/18, para 33.
[61] Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, par 1)' (1990) UN Doc CESCR-E/1991/23, para 5.
[62] Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, par 1)' (1990) UN Doc CESCR-E/1991/23, para 5.
[63] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 19: The Right to Social Security (art 9) (2008) UN Doc E/C.12/GC/19, para 40.
[64] Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, par 1)' (1990) UN Doc CESCR-E/1991/23, para 5.

the enjoyment of the highest attainable standard of physical and mental health);[65] Article 13 (the right of everyone to education);[66] and Article 15 (the right to take part in cultural life, to enjoy the benefits of scientific progress, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author).[67]

The Committee has also highlighted those rights and obligations that are of particular significance for IDPs. In relation to the obligation of non-discrimination, the Committee is of the view that this is of immediate effect, and applies to IDPs in the sense that equal treatment should not be conditional on place of residence.[68] In relation to Article 9 (the right of everyone to social security), the Committee has indicated that IDPs should receive specific attention in this regard and that they should not suffer discrimination in relation to the provision of social security.[69] IDPs should also receive special protection in relation to the right to water,[70] and concerning the right to food, the Committee is of the view that states have joint and individual responsibility *vis-à-vis* IDPs.[71] The Committee stated that some obligations

[65] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (art 12)' (2000) UN Doc E/C.12/2000/4, para 30.
[66] UN Committee on Economic, Social, and Cultural Rights 'General Comment No. 13: The Right To Education (Art 13)' (1999) UN Doc E/C.12/1999/10, paras 31, 43, 51; Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, par 1)' (1990) UN Doc CESCR-E/1991/23, para 5.
[67] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 21: The Right of Everyone to Take Part in Cultural Life' (2009) UN Doc E/C.12/GC/21 para 44; UN Committee on Economic, Social and Cultural Rights 'General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which he is the Author (art. 15(1)(c)) (2005) UN Doc E/C.12/GC/17, para 39; Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations (Art 2, par 1)' (1990) UN Doc CESCR-E/1991/23 para 5.
[68] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 20: Non-Discrimination in Economic, Social, and Cultural Rights (Art 2, para 2) (2009) UN Doc E/C.12/GC/20, para 34.
[69] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 19: The Right to Social Security (art 9) (2008) UN Doc E/C.12/GC/19 paras 31, 39.
[70] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 15: The Right to Water (arts 11 and 12)' (2002) UN Doc E/C.12/2002/11, para 16(f).
[71] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 12: The Right to Adequate Food (Art 11)' (1999) UN Doc E/C.12/1999/5, para 38.

concerning the right to food are more immediate than others, but has not specified exactly what these obligations are.[72]

The General Comment on adequate housing (forced evictions) is of particular relevance to IDPs. Here, the Committee defined forced evictions as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.'[73] Such situations will often be synonymous with internal displacement. The Committee further articulated that 'the State's obligation to ensure respect for [this] right is not qualified by considerations relating to its available resources.'[74] Thus although the Committee did not explicitly say that the right to adequate housing is immediately binding, the fact that forced evictions cannot be justified by financial constraints implies that it creates an immediately binding obligation for States Parties. In the words of Foster:

> [...] we can see that once it is possible to identify that there is a foreseeable risk of an ICESCR violation taking place or continuing in the receiving state on return, it is arguable that either the sending state's duty to respect ICESCR rights (ie to not carry out the crucial link in the causal chain) or its duty to protect (ie to take steps of due diligence) could prevent it from sending a person back to their home state.[75]

It should be noted at this juncture that like the views of the Committee on Civil and Political Rights, the views of the Committee on Economic Social and Cultural Rights do not bind states. However, they are of persuasive value. In light of the fact that the

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[72] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 12: The Right to Adequate Food (Art 11)' (1999) UN Doc E/C.12/1999/5 , para 16.
[73] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 7: The Right to Adequate Housing (Art 11.1): Forced Evictions' (1997) UN Doc E/1998/22 , annex IV, para 4.
[74] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 7: The Right to Adequate Housing (Art 11.1): Forced Evictions' (1997) UN Doc E/1998/22, annex IV, para 9.
[75] Michelle Foster, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) 2 New Zealand Law Review 257, 282.

Committee is of the view that certain ICESCR rights are immediately binding, and because many of these rights are of special relevance in a situation of internal displacement, it is argued that where provisions of the ICESCR form part of municipal law, it may provide domestic protection to those contesting removal on the grounds that they would be exposed to internal displacement in the receiving state.

5. Convention on the Rights of the Child 1989

The Convention on the Rights of the Child is the most widely-ratified international treaty and Article 3(1) of the Convention provides that 'in all actions concerning children [...] the best interests of the child shall be a primary consideration'. McAdam argues that the best interests of the child, 'reflect[s] an absolute principle of international law [and] is highly relevant in determining whether or not a child needs international protection.' The Committee on the Rights of the Child is similarly of the view that this principle 'must be respected during all stages of the displacement cycle',[76] which includes deportation proceedings. Thus, a child may not be returned to a country where there is a 'reasonable risk' that such return would result in the violation of the fundamental human rights of the child, and in particular, the principle of non-*refoulement*.[77] Relevant factors include the safety, security, and other conditions, including socio-economic conditions, awaiting the child on return; the availability of care arrangements for the child; the child's level of integration in the host country; the child's right to preserve his or her identity, including nationality, name and family relations (Article 8); the protection of the right to life in the country

[76] UN Committee on the Rights of the Child 'CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin' (2005) UN Doc CRC/GC/2005/6, para 19.
[77] UN Committee on the Rights of the Child 'CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin' (2005) UN Doc CRC/GC/2005/6, para 84.

of return (Article 6); the risk of exposure to torture or other cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of liberty in the country of return (Article 37); and the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background (Article 20).[78] Neither the Committee nor the Convention make any distinction regarding the weight or hierarchy to be attributed to these rights. Thus the non-removal obligation in the CRC applies to a very broad range of rights, and individual complaints can now be made concerning violations of the Convention owing to the recent entry into force of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.

In terms of the question posed by this chapter, reliance on the CRC as a source of complementary protection is not without its drawbacks. The CRC is limited in its applicability to children (under 18 years of age), and possibly by extension to the parents of a child, where removal of that parent would conflict with the best interests of the child.

6. European Convention on Human Rights 1950

6.1 Internal Displacement and the ECHR

As outlined in Chapter 2, the European Court of Human Rights ('ECtHR') has found violations of various provisions in examining situations of internal displacement, notwithstanding the fact that internal displacement is not expressly prohibited by the ECHR. These provisions include Article 8 (respect for private and family life, home

[78] UN Committee on the Rights of the Child 'CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin' (2005) UN Doc CRC/GC/2005/6, para 84.

and correspondence),[79] Article 3 (the prohibition of torture and inhuman or degrading treatment or punishment),[80] Article 13 (right to an effective remedy),[81] and Article 1 of Protocol 1 (the right to peaceful enjoyment of possessions).[82]

However, the Court has not gone as far as explicitly stating that internal displacement, *per se*, is incompatible with the ECHR. As a matter of fact, it has considered the IFA, as outlined above, as compatible with the ECHR.[83] Thus in many circumstances, internal displacement has not been found to be inconsistent with the ECHR.

6.2 Non-Removal and the ECHR

The Court has interpreted the concept of 'jurisdiction' under Article 1 of the Convention to include the possibility of application to extradition or expulsion of a person by a contracting state to the territory of a non-contracting state. As stated in ***Soering v. United Kingdom* [1989]**:

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[79] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Xenidin-Arestis v Turkey* App no 46347/99 (ECHR, 22 December 2005); *Demades v Turkey* App no 16219/90 (ECHR, 31 October 2003); *Mentes and Others v Turkey* App no 58/1996/677/867 (ECHR, 28 November 1997).

[80] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Yoyler v Turkey* App no 26973/95 (ECHR, 24 July 2003); *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011); *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007); *Dulas v Turkey* App no 25801/94 (ECHR, 30 January 2001).

[81] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Yoyler v Turkey* App no 26973/95 (ECHR, 24 July 2003); *Dogan v Turkey* App no 29361/07 (ECHR, 27 May 2010); *Dulas v Turkey* App no 25801/94 (ECHR, 30 January 2001).

[82] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Xenidin-Arestis v Turkey* App no 46347/99 (ECHR, 22 December 2005); *Demades v Turkey* App no 16219/90 (ECHR, 31 October 2003); *Yoyler v Turkey* App no 26973/95 (ECHR, 24 July 2003); *Dogan v Turkey* App no 29361/07 (ECHR, 27 May 2010); *Dulas v Turkey* App no 25801/94 (ECHR, 30 January 2001).

[83] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011); *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007).

> [i]n so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee.[84]

In ***Chahal v United Kingdom***, the Court confirmed the principle's application to expulsion cases also.[85] However, whether or not this principle applies to persons who will face internal displacement in their country of origin is unclear.

(a) The Grounds for Non-Removal: Article 3

Nearly all non-removal cases that have come before the Court so far have been decided on the basis of Article 3, which prohibits torture and inhuman or degrading treatment or punishment. The meaning of torture is not relevant for the purposes of this chapter. However inhuman treatment has been described by the Court as 'at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation, is unjustifiable.'[86] In ***Pretty v United Kingdom*** **[2002]**, degrading treatment was described as treatment that:

> [H]umiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance […][87]

When dealing with expulsion cases involving Article 3, the Court tends to reiterate the following principles applicable to such cases:[88] First, it restates the principle that Contracting States have the right, under international law and the ECHR, to control the entry, residence, and expulsion of aliens. In addition, the right to political asylum is not contained in either the ECHR or its protocols. Nonetheless, in exercising the

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[84] *Soering v United Kingdom* App no 14038/88 (ECHR, 7 July 1989) [85].
[85] *Chalal v United Kingdom* App no 22414/93 (ECHR, 15 November 1996).
[86] *The Greek Case* 12 Yearbook 1.
[87] *Pretty v United Kingdom* App no 2346/02 (ECHR, 29 July 2002) [52].
[88] *D v United Kingdom* App no 30240/96 (ECHR, 2 May 1996) [46]-[50]; *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007); *Sufi and Elmi v the United Kingdom* [212]-[214]; *N v United Kingdom* App no 265/65 (ECHR, 27 May 2008) [42]-[45].

right to expel aliens, Contracting States must bear in mind Article 3 of the ECHR which 'enshrines one of the fundamental values of democratic societies and prohibits in absolute terms torture or inhuman or degrading treatment or punishment.' The expulsion of an alien may give rise to an issue under this provision where 'substantial grounds have been shown' that expulsion would result in a 'real risk of being subjected to treatment contrary to Article 3 in the receiving country.' Thus it is the act of removal by the sending state that may attract responsibility under the ECHR, rather than the actions of the receiving state. In this manner, the Court is careful not to appear to impose obligations on states that are not party to the ECHR, in line with the generally recognised rule in international law that a treaty cannot bind third parties.[89]

The requirement of illustrating 'substantial grounds' adds an additional hurdle to that required to establish a violation of the ICCPR, which requires only that a 'real risk' of violation exists. The establishment of responsibility of the expelling state before the ECtHR involves an assessment of conditions in the receiving country against the standards of Article 3 of the ECHR, and the Court must assess the issue in light of all the material placed before it. This examination is not for the purposes of attributing liability to the receiving state, but rather to assess the consequences of the actions of the sending state with reference to the ECHR.

Prior to the decision of ***Salah Sheekh v Netherlands*** **[2007]** the position of the Court was that a mere possibility of ill-treatment was not in itself sufficient to give rise to a breach of Article 3. An applicant had to show the existence of 'special distinguishing features' – something that would make him, as an individual, a likelier

[89] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 34.

target of ill-treatment. However, this was departed from in ***Salah Sheekh*** where the Court held that the existence of a general risk was sufficient:

> [...] the applicant cannot be required to establish the existence of further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk [...] It might render the protection offered by that provision illusory if, in addition to the fact of his belonging to the Ashraf [...] the applicant were required to show the existence of further special distinguishing features.[90]

(b) Article 3 and Socio-Economic Considerations

The Court has also dealt with cases of expulsion to states in which socio-economic standards were low, but has narrowly circumscribed linking such circumstances to the prohibition in Article 3. Two tests have been applied in such cases. For the purposes of this chapter, these tests will be termed the 'compelling circumstances' and 'inability to cater for basic needs' tests, respectively. The case of ***D v the United Kingdom*** **[1997]** employed the 'compelling circumstances' test. This case dealt with a HIV-positive applicant who was contesting removal to St. Kitts on the grounds that the standard of medical treatment available to him in the United Kingdom was not available in St. Kitts. He argued that expulsion would condemn him to spend his last days in pain and suffering in conditions of isolation, squalor, and destitution. The Court noted that the applicant was in the advanced stage of terminal illness, and that his removal to St. Kitts would have dramatic and distressing consequences for him. The only family member he had in St. Kitts was a cousin, and there was no evidence as to whether this person would be able or willing to attend to his needs. On the issue of Article 3, the Court concluded:

> […] in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be

[90] *Salah Sheekh v Netherlands* App no 1948/08 (ECHR, 11 January 2007) [148].

> concluded that the implementation of the decision to remove the applicant would be a violation of Article 3.[91]

The applicant had also raised issues under, *inter alia*, Article 2 (right to life) and Article 8 (right to respect private life). The Court held that having regard to its finding that the removal of the applicant would violate Article 3, it was unnecessary to examine these articles.[92]

N v United Kingdom **[2008]** also involved the application of the 'compelling circumstances' test. In this case, the applicant, who was HIV-positive, claimed she would not have access to the required medical treatment if returned to Uganda and that this would violate articles 3 and 8 of the Convention. The Court held that:

> While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on Contracting States.[93]

The Court noted that although the applicant applied for, and was refused, asylum, she did not complain that sending her back would put her at risk of deliberate, politically motivated, ill-treatment, i.e. she would not face a violation of civil or political rights. Her claim under Article 3 was based solely on her serious medical condition, which was stable. In addition, antiretroviral medication was available in Uganda; although through lack of resources it was received by only half of those who needed it. Humanitarian conditions would therefore only reach the Article 3 threshold in very exceptional cases where the grounds against removal were 'compelling' and this case '[did] not disclose very exceptional circumstances, such as in ***D v the United***

[91] *D v United Kingdom* App no 30240/96 (ECHR, 2 May 1996) [54].
[92] *D v United Kingdom* App no 30240/96 (ECHR, 2 May 1996) [59]; [64].
[93] *N v United Kingdom* App no 265/65 (ECHR, 27 May 2008) [44].

Kingdom.'[94] The Court also relied on the fact that neither the applicant's naturally-occurring illness nor the inferior medical facilities were caused by any act or omission of the receiving state or of any non-state actors within the receiving state and did not entail a violation of Article 3. Regarding Article 8, the Court did not consider that it was necessary to examine that complaint, as no separate issue arose from it.

The case of ***MSS v Belgium and Greece*** **[2011]** concerned an asylum seeker who had been transferred from Belgium to Greece, and it was in this case that the test of 'inability to cater for basic needs' was applied for the first time. While in Greece, he had no means of subsistence and lived in a park in Athens for months on end without any access to sanitary facilities. He was also in constant fear of being robbed and attacked. The Court attached particular weight to the applicant's status as an asylum-seeker and thus 'a member of a particularly underprivileged and vulnerable population group in need of special protection.'[95] It reiterated its holding in the case of ***Budina v Russia*** **[2009]**, where it had not excluded the possibility that the responsibility of the state may be engaged under Article 3 'where an applicant, who was wholly dependent on state support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.'[96] It found that this threshold was met in the present case, holding that the Greek authorities had not had due regard to the applicant's vulnerability as an asylum seeker, and must be held responsible for the situation that he found himself in. The Court held that 'such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving,

[94] *N v United Kingdom* App no 265/65 (ECHR, 27 May 2008) [51].
[95] *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011) [251].
[96] *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011) [253].

[had] attained the level of severity required to fall within the scope of Article 3 of the Convention.'[97] The Court also found that Belgium had violated Article 3 because, *inter alia*, it had transferred the applicant to Greece and therefore knowingly exposed him to such conditions.

The Court has grappled with the question of expulsion to face internal displacement in the cases of ***Salah Sheekh v Netherlands*** **[2007]** and ***Sufi and Elmi v United Kingdom*** **[2011].**[98] These cases are of particular relevance to this thesis, and in neither case did the Court take the opportunity to state that internal displacement was, in itself, contrary to the ECHR. In fact, the Court stated that Contracting States are not precluded from relying on the existence of an IFA in assessing whether to return an applicant to a country of origin. However in doing so, a Contracting State has a responsibility to ensure that the applicant will not, as a result of the decision to expel, be exposed to treatment contrary to Article 3 of the ECtHR.

In ***Salah Sheekh***, the applicant was a Somali national, who originally hailed from Mogadishu and belonged to the minority Ashraf clan. His application for asylum was refused in the Netherlands on the basis that he could return to Somalia and settle in one of its 'relatively safe' areas. The applicant argued that not having any clan or family ties in these 'relatively safe' areas, there was every possibility that he would be forced to live in an IDP camp and that conditions in these camps were inhumane. Thus he argued that his expulsion would violate Article 3 of the ECHR.

According to the Court, the preconditions for a viable IFA are that the applicant must be able to travel there, to gain admittance, and to settle there.[99] The

[97] *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011) [263].
[98] *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007); *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011).
[99] *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007) [141].

Court found that without clan ties, it was unlikely that the applicant would be able to settle in these areas, and that he would end up in 'miserable settlements for IDPs, with no real chance of proper integration.'[100] IDPs in those so-called 'relatively safe' parts of Somalia lived in squalid conditions below the poverty line. Referring to the Dutch government's country report of 2004 and two UNHCR publications,[101] the Court stated that IDPs in these 'relatively safe' areas had very limited access to physical and legal protection and basic services such as education and healthcare. IDPs in these areas were also vulnerable to crime, sexual and labour exploitation, eviction, and destruction and confiscation of assets. Consequently, IDPs were amongst the most vulnerable groups of people in Somalia and held a marginal and isolated place in society.

In addition, the Court found that there would be a real chance that the applicant would be removed, or have no alternative but to go to areas that both the government and the UNHCR consider unsafe, i.e. there was a risk that indirect *refoulement* would occur. In this sense, the focus of the Court was on the possibility of return to the original danger, and thus it was not displacement itself that was contrary to the ECHR, but the resulting harm. Expulsion to Somalia was therefore found to constitute a breach of Article 3 ECHR.

The issue of deportation to face encampment was also before the Court in the case of ***Sufi and Elmi v United Kingdom***. This case concerned two Somali nationals, whose asylum claims were refused by the United Kingdom. They argued, *inter alia*, that if returned to Somalia, they would be at real risk of ill-treatment contrary to

[100] *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007) [57].
[101] The ECtHR referred to these publications as 'November 2005 Advisory of Return of Somali Nationals to Somalia' and 'January 2004 Position Paper on the Return of Rejected Asylum Seekers to Somalia.'

Article 3 and Article 2 of the ECHR. The Court found it more appropriate to deal with the complaint under Article 2 in the context of its examination of the related complaint under Article 3. The Court referred to the 'compelling circumstances' test set out in ***N v United Kingdom***, which applies where the alleged future harm was not attributable to the state. Referring to the facts of ***Sufi and Elmi***, the Court noted that the crisis was predominately due to the direct and indirect actions of the parties to the conflict, which resulted in widespread displacement and the breakdown of social, political and economic infrastructures.[102] Consequently, the Court did not consider the approach adopted in ***N v United Kingdom*** to be appropriate and instead opted for the 'inability to cater for basic needs' test set out in ***MSS v Belgium***.

The Court examined in detail the conditions imposed upon IDPs in the proposed relocation area, referring to government reports from the United Kingdom, the United States and Norway; UN reports, NGO reports, and various news reports.[103] The Court found that the conditions for IDPs in southern and central Somalia were 'dire.'[104] Prior to the failure of the rains, over half of Somalia's population was dependent on food aid and over a quarter of the population of Somalia faced a humanitarian crisis. Despite the crisis, Al-Shabaab continued to deny international NGOs access to areas under its control.[105]

[102] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [282].
[103] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011), 19-45.
[104] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [282].
[105] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [284].

Concerning the Afgooye Corridor, where up to 410,000 IDPs lived, the Court noted that it was extremely difficult for aid agencies to access the area.[106] There were also reports that IDPs were forced to return to Mogadishu in search of food and water and that IDPs in the camps were vulnerable to exploitation, crime, sexual violence, and forced recruitment.[107] In addition, there was little prospect of the situation improving within a reasonable timeframe.[108] Accordingly the Court found that any returnee forced to find refuge in the Afgooye Corridor would be at real risk of Article 3 ill-treatment on account of the dire humanitarian conditions there.[109]

Although there was a sparse information available regarding the situation in other IDP settlements in Somalia, the Court found little reason to believe that conditions would be any better than those in the Afgooye Corridor.[110] If anything, the situation in other settlements was likely to be worse as there was less publicity concerning the plight of their inhabitants and therefore less chance that inhabitants might receive humanitarian assistance.[111] The situation facing IDPs generally in Somalia was therefore sufficiently dire to amount to a violation of Article 3 ECHR.[112]

The conclusions in the above two cases are authority for the proposition that the cumulative conditions inherent in encampment, at least in Somalia at the time these cases were decided, constitute a violation of Article 3 of the ECHR. However,

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[106] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [285].
[107] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [285].
[108] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [291].
[109] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [292].
[110] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [292].
[111] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [292].
[112] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [284].

the employment of two tests in ***Sufi and Elmi*** based on the attribution of the violation to the receiving state is problematic. Take for example, the fictional case of applicant X who contests deportation to a country in which he would probably end up in an IDP camp in dire living conditions, similar to the facts in ***Sufi and Elmi***. If the situation of internal displacement is attributable to the receiving state, X's case may very well succeed. However if the internal displacement is not attributable to the state, as would be the case following a natural disaster, for example, X's case would fail under the test employed in ***Sufi and Elmi*** and ***MSS***, notwithstanding the fact that X, in all likelihood, would be 'unable to cater for his most basic needs',[113] and as an IDP, would be a 'member of a particularly underprivileged and vulnerable population group in need of special protection'.[114] From a factual perspective, it would matter little to X to whom his displacement can be attributed. In this sense, the workability of the both tests may be questioned, as the state arguably has an obligation to protect its nationals (insofar as it can) from harm, whatever the source may be - a political crisis, national disaster, an endemic, or otherwise. However, from a legal point of view the question of attribution could make the difference between removal and non-removal and thus attribution to the receiving state is a crucial factor to engage responsibility before the ECtHR.

The logic behind this position is straightforward – the Strasbourg Court does not wish to place an obligation of non-removal on a Contracting State in order to alleviate socioeconomic disparities between it and receiving states. A finding to the contrary would place too great a burden on Contracting States, and may hinder their cooperation with the Court. However, Mantouvalou makes the argument that

[113] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [283].
[114] *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011) [251].

budgetary considerations have not in previous cases prevented the ECtHR from establishing a breach of the ECHR and the Court has rejected the argument that limited resources may exempt a state from its obligations:[115]

> The implications of accepting [the 'floodgates' argument] in the present case would be that, even if Ms N had a right to remain in the UK, even if the UK had a duty to not to deport her, it might have been relieved from this correlative duty, had there been concrete evidence that the decision would lead to waves of medical asylum seekers wishing to benefit from treatment available in the country.[116]

It is argued therefore that the implied 'floodgates' argument has its foundations in policy, not law, and therefore should not have been a factor in the Court's decision.

In addition, it is difficult to see how the criterion of attribution to the receiving state in the ***Sufi and Elmi*** decision is compatible with the logic by which the ***Soering*** principle is applied. In theory, the ECHR does not apply extraterritorially, that is, it does not apply outside the jurisdiction of its Contracting States. It is the act of removal that exposes the applicant to violations of ECHR rights, rather than the violations of the rights themselves in the receiving states that attracts responsibility of the sending state under the ECHR. Thus the issue of attribution to the receiving state should not, therefore, be a relevant consideration when applying the ***Soering*** principle. In a similar vein, it is highly questionable whether requiring attribution to a receiving state is compatible with the absolute nature of Article 3, which has been reiterated by the Court time and time again.[117] It will be interesting to see how the Court will square the decision in ***Sufi and Elmi*** with the absolute nature of Article 3,

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[115] Virginia Mantouvalou, 'N v UK : No Duty to Rescue the Nearby Needy?' (2009) 72 The Modern Law Review 815, 825.
[116] Ibid, 826.
[117] *Soering v United Kingdom* App no 14038/88 (ECHR, 7 July 1989) [88]; *N v United Kingdom* App no 265/65 (ECHR, 27 May 2008) [24]; *D v United Kingdom* App no 30240/96 (ECHR, 2 May 1996) [47]; *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007) [135]; *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [212].

if the factual circumstances mentioned above, in X's example, come before the Court. In all likelihood, it would revert to the test employed in ***N v UK***, where humanitarian conditions would only reach the Article 3 threshold in very exceptional cases where the grounds against removal were 'compelling.' Whether exposure to internal displacement in the country of origin would satisfy this very high threshold remains to be seen.

N v. UK may not be the last word on such 'non-removal' cases. The jurisprudence on this issue took a modest step forward in the form of the Separate Opinion of judges Tulkens, Jociene, Popović, Karakas, Raimondi, and Pinto de Albequerque in the case of ***Yoh-Ekale v Belgium,*** which cast strong criticism on the ***N*** approach. The judges stated that the high threshold employed in ***N*** (as followed in ***Yoh-Ekale***) was difficult to square with the letter and spirit of Article 3, which is an absolute right and one of the most fundamental in the ECHR. The judges were of the opinion that the difference between a person who is near death and one who has more time to live appeared to be very slight in terms of humanity, and thus recommended that the Court would one day review its jurisprudence on this point. In light of the criticism outlined in this section, this author strongly supports this suggestion.

(c) Other Rights

As aforementioned, most cases concerning non-removal have been decided on the basis of Article 3 ECHR. The approach of the ECtHR is to consider the Article 3 complaint first, and if this ground is successful then the usual practice is that the other grounds will not be addressed. Nonetheless, the House of Lords has held that in the right factual circumstances, any ECHR provision could give rise to a non-*refoulement*

obligation.[118] However, in the admissibility decision ***F v United Kingdom***, the ECtHR emphasised that the compelling considerations that attach to Articles 2 and 3 'do not automatically apply under other provisions of the Convention.'[119] The Court explained that on a practical basis, 'it cannot be required that an expelling Contracting State only return an alien to a country that is in full and effective enforcement of all the rights and freedoms set out in the Convention.'[120]

In ***Bader v Sweden*** **[2005]**,[121] the Court considered that an issue may arise under Article 2 (right to life) if a Contracting State deports an alien who may suffer a flagrant denial of fair trial in the receiving state, the outcome of which is likely to be the death penalty. In addition, the Court has held that the expulsion of a person to a country where there is an officially recognised regime of slavery might, in certain circumstances, raise an issue under Article 3, without excluding the possibility that Article 4 (prohibition of slavery) may engage separately the responsibility of the Contracting State.[122] Regarding Article 6 (right to a fair trial), the Court held in ***Soering v. the United Kingdom*** that an issue may arise where there is a risk of 'suffering a flagrant denial of a fair trial in the receiving country.'[123] This was applied for the first time in the case of ***Othman (Abu Qatada) v the United Kingdom*** **[2012]**, where the Court held that the term 'flagrant denial of justice' is synonymous with a trial that is manifestly contrary to the provisions of Article 6 or the principles embodied therein.[124] The ***Othman*** case also held that Article 5 (right to liberty and security of the person) may prevent removal where there is a danger that a flagrant

[118] *Ullah v Secretary of State for the Home Department* [2004] UKHL 26 [21], [43].
[119] *F v United Kingdom* App no 17304/03 (ECHR, 22 June 2004).
[120] *F v United Kingdom* App no 17304/03 (ECHR, 22 June 2004).
[121] *Bader v Sweden* App no 13284/04 (ECHR, 8 November 2005).
[122] *Ould Barar v Sweden* App no 42367/98 (ECHR, 19 January 1999).
[123] *Soering v United Kingdom* App no 14038/88 (ECHR, 7 July 1989) [113].
[124] *Othman (Abu Qatada) v United Kingdom* App 8139/09 (ECHR, 26 May 2009.

breach of that right will occur.[125] Regarding Article 8 (private and family rights), in ***Bensaid v the United Kingdom* [2001]**, the Court acknowledged that treatment falling short of the Article 3 threshold could nevertheless breach a right to private life under Article 8 'where there are sufficiently adverse effects on physical and moral integrity.'[126] This was applied in ***El-Masri v Macedonia* [2012],** where the Court held that the applicant's secret and extrajudicial abduction and arbitrary detention had violated his rights under Article 8.[127]

Further, in ***Z and T v. United Kingdom***, the applicants contested removal to Pakistan on the grounds that they would be unable to live openly as Christians if returned there, invoking Article 9. The Court concluded that:

> While the Court would not rule out the possibility that the responsibility of the returning state might in exceptional circumstances be engaged under Article 9 of the Convention where the person concerned ran a real risk of flagrant violation of the Article in the receiving state, the Court shares the view of the House of Lords in the Ullah case that it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3 of the Convention.[128]

(d) Conclusion

As can be seen from the above jurisprudence, the Court has been reluctant to prohibit removal on grounds other than articles 2 or 3 ECHR. While the triggering mechanism for Article 3 or 2 is that there exist 'substantial grounds' that there is a 'real risk' of treatment contrary to those articles, the threshold for other articles of the ECHR has been much higher, in that a 'flagrant denial' of the right in question must be shown. The Court's previous jurisprudence has found that situations of internal displacement

[125] *Othman (Abu Qatada) v United Kingdom* App 8139/09 (ECHR, 26 May 2009) [233].
[126] *Bensaid v United Kingdom* App no 44599/98 (ECHR, 6 February 2001) [46].
[127] *El-Masri v the Former Yugoslav Republic of Macedonia* App no 39630/09 (ECHR, 13 December 2012) [248]-[249].
[128] *Z and T v United Kingdom* App no 27034/05 (ECHR, 28 February 2006), 7.

in Contracting States have resulted in violations of articles 3,[129] 8,[130] and 13 of the ECHR,[131] and Article 1 of Protocol 1.[132] As the decision in ***Sufi and Elmi*** has shown, the general conditions in Somali IDP camps at that time were found to fall foul of Article 3 of the Convention,[133] but this standard only applies where the situation of internal displacement is attributable to the receiving state.[134] Although in ***Bensaid v United Kingdom***, the Court acknowledged that treatment falling short of the Article 3 threshold could nevertheless breach the right to private life under Article 8 'where there are sufficiently adverse effects on physical and moral integrity,'[135] a non-removal case has yet to be successful on the grounds of Article 13 or Article 1 Protocol 1, both of which may be infringed in circumstances of internal displacement.

For persons who will face internal displacement if removed,[136] a deportation decision can be challenged under the ECHR on three grounds. First, if the displacement is not attributable to the state, a claim may be based on Article 3, relying on the decisions of ***Sufi and Elmi*** and ***MSS v Belgium***. Secondly, if the

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[129] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Yoyler v Turkey* App no 26973/95 (ECHR, 24 July 2003; *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011); *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 23 May 2007).

[130] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Xenidin-Arestis v Turkey* App no 46347/99 (ECHR, 22 December 2005); *Demades v Turkey* App no 16219/90 (ECHR, 31 October 2003.

[131] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998); *Yoyler v Turkey* App no 26973/95 (ECHR, 24 July 2003; *Dogan v Turkey* App no 29361/07 (ECHR, 27 May 2010); *Dulas v Turkey* App no 25801/94 (ECHR, 30 January 2001)

[132] *Ayder and Others v Turkey* App no 23656/94 (ECHR, 8 January 2004); *Bilgin v Turkey* App no 23819/94 (ECHR, 16 November 2000); *Selcuk and Asker v Turkey* App no 12/1997/796/998-999 (ECHR, 24 April 1998; *Xenidin-Arestis v Turkey* App no 46347/99 (ECHR, 22 December 2005); *Demades v Turkey* App no 16219/90 (ECHR, 31 October 2003) *Dogan v Turkey* App no 29361/07 (ECHR, 27 May 2010).

[133] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [284].

[134] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [282].

[135] *Bensaid v United Kingdom* App no 44599/98 (ECHR, 6 February 2001) [46].

[136] In the sense of the discussion in section 5.2.

displacement is attributable to the state, a claim could be made relying on ***N v UK***, that the humanitarian grounds against removal are exceptionally compelling. Finally, an argument could be made that other rights would be violated in the receiving state, such as Article 8 (respect for private and family life); Article 13 (right to an effective remedy) and Article 1 of Protocol 1 (right to peaceful enjoyment of possessions). However, it would need to be shown that displacement would result in a flagrant denial of these rights, and in the case of Article 8, that there would be 'sufficiently adverse effects on physical and moral integrity.' However, as the dissenting opinion in ***Yoh-Ekale*** has illustrated, future jurisprudence may well change the ECtHR's position on such non-*refoulement* cases.

Despite the far-reaching jurisprudence of the ECtHR, there are a number of considerations that should be taken into account when evaluating the effectiveness of the ECHR as a means of complementary protection. First, it should be noted that although all ECHR rights may be invoked in domestic courts (insofar as ECHR rights have been incorporated into domestic law), there is an enormous backlog of applications before the European Court and it often takes years before a decision on the merits is made. Secondly, the ECHR is limited in its applicability to its Contracting States, although the jurisprudence of the Court has been influential in non-removal decisions that have come before other regional courts.[137] Thirdly, a successful claim under the ECHR will not result in legal status, as was the case of Sharif Hussein Ahmed, whose proposed removal from Austria to Somalia was deemed by the European Court of Human Rights to constitute a breach of Article 3.[138] Austria refused to provide him with a residence permit, permission to work, or any

[137] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [80].
[138] *Ahmed v Austria* App no 25964/94 (ECHR, 17 December 1996).

other assistance and eventually Mr Ahmed took his own life on Human Rights Square, Graz. Despite the unfortunate outcome in this case, ***MSS v Belgium*** now provides some authority for the proposition that regardless of recognition as refugee or beneficiary of EU subsidiary protection, asylum seekers should benefit from a minimum level of economic and social rights.[139]

Finally, even where a non-removal determination has been made, there is little in the way of enforcement mechanisms to carry out a decision of the ECtHR. Thus although the European Convention has gone to great lengths in providing protection from removal from Europe, there are significant drawbacks to relying on the Convention as a source of complementary protection.

7. EU Law

7.1 The EC Qualification Directive 2011[140]

The Qualification Directive was adopted in 2004,[141] and its recast version in 2011. The Directive does not create a new system of protection *per se*, but rather harmonises the existing 'best' domestic practices of EU member states. The rationale for this was to provide less incentive for applicants to choose their country of destination based on the level of rights and benefits available there. The Directive set a minimum standard only and it explicitly acknowledges that the primary instrument

[139] Francesco Messineo, 'Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?' in Satvinder Juss (ed), *Research Companion to Migration Theory and Policy* (Ashgate 2011), 149.
[140] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) [2011] OJ L337/9.
[141] Council Directive (EC) 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted OJ L304/12.

binding on states is the Refugee Convention,[142] thus Member States are free to introduce more favourable provisions into their domestic legal systems.

According to Article 2(f) of the Directive:

> [a] person eligible for subsidiary protection means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

A general exposure to human rights violations is not sufficient to trigger the application of the Directive. According to Gil-Bazo, this is 'disappointing, as it does not include all individuals who are not removable under international human rights law grounds.' She continues:

> Given that Member States remain under an *obligation* of international law not to remove those broader categories of individuals, and they often do so by granting them some formal status, the Directive goes against its stated objective 'to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection' by creating a category of persons protected by EC law, in *addition* to those that shall remain protected by the national legal orders of Member States in *fulfilment of their international obligations*. As Gilbert has pointed out, the Directive as drafted is seriously misleading about the scope of the Member States' international legal obligations, as it seems to suggest that *all* those outside the scope of application of the Directive are allowed to remain by Member States on purely compassionate or humanitarian grounds (recital 9) rather than on the basis of their international obligations.[143]

However, as originally drafted, the Directive had a much broader human rights scope. Deleted paragraph 15(b) provided that 'serious harm' included a 'violation of a

[142] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2).
[143] María-Teresa Gil-Bazo, 'Refugee Status, Subsidiary Protection, and the Right to be Granted Asylum under EC Law' (2006) 136 New Issues in Refugee Research 11.

human right, sufficiently severe to engage the member states' international obligations.'[144] According to Article 15 as it now stands, 'serious harm' is limited to (a) the death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. For the purposes of this chapter, only 15(b) is relevant.

The legislative history of the Qualification Directive indicates that qualification of 'in a country of origin' in Article 15(b) serves to excludes 'humanitarian grounds' cases from the scope of subsidiary protection. The explanation to a draft of Art 15(b) of the Qualification Directive explicitly states that the requirement that the ill-treatment occur in the country of origin serves 'to avoid the inclusion of such compassionate grounds cases' as ***D v UK***.[145] Thus, according to Battjes, Article 15(b) deals with harm as meant in Art 3 CAT, 7 ICCPR and 3 ECHR, with the exception of harm in humanitarian cases.

The question of the correct interpretation of Article 15(b) has never come before the European Court of Justice. In ***Elgafaji v. Staatssecretaris Van Justitie* [2009]**,[146] However, although the issue at hand was the interpretation of Article 15(c), the Court made the following observations in relation to Article 15(b). First, it held that Article 15(b) corresponds, in essence, to Article 3 of the European Convention on Human Rights.[147] Secondly, the Court stated that Article 15(b) is intended to cover situations where the applicant is specifically exposed to the risk of a particular type of

[144] Commission of the European Communities, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM (2001) 510 final.
[145] Council document no. 12148/02, Asile 2002/43, 20 September 2002, 6.
[146] Case C-465/07 *Elgafaji v. Staatssecretaris van Justitie*.
[147] Ibid [28].

harm, as opposed to Article 15(c) which covers a more general risk of harm.[148] Finally, the Court observed that Article 15(b) requires a clear risk of individualisation.[149]

Thus to claim protection under the EC Qualification Directive on the grounds that deportation will result in exposure to internal displacement, it must be shown that the internal displacement will constitute 'inhuman or degrading treatment or punishment' as set out in 15(b). Similar to the ECHR, the standard of proof necessary to attract protection under the Qualification Directive is that there exist 'substantial grounds' for believing serious harm will occur.[150] The applicability of the Qualification Directive to situations of internal displacement will therefore depend on the facts of the case at hand. Nonetheless, if applicable, this Directive will entitle one to legal status and a range of rights, including family unity,[151] residence permits,[152] access to employment,[153] social welfare,[154] healthcare,[155] and access to integration facilities.[156] Entitlement to subsidiary protection will last until the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.[157]

The Qualification Directive is not without its limits, as it applies to third country nationals and stateless persons only,[158] as opposed to the majority of other

[148] Ibid [32].
[149] Ibid [38].
[150] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art 2(f).
[151] Ibid, art 23.
[152] Ibid, art 24.
[153] Ibid, art 26.
[154] Ibid, art 28.
[155] Ibid, art 29.
[156] Ibid, art 33
[157] Ibid, art 16
[158] Ibid, art 2(f).

instruments discussed in this chapter that apply to all persons within a state's jurisdiction.[159] Thus a risk of being internally displaced within an EU Member State will not qualify a person for subsidiary protection, which may raise cause for concern as regards members of the Roma community. In addition, it is worrying that some EU candidate countries have significant internal displacement problems.[160] If these countries are admitted to the EU, the risk of exposure to 'serious harm' in the form of internal displacement in these countries will not trigger the application of subsidiary protection on the sole ground that those countries would be EU Member States. In addition, the Qualification Directive is only applicable amongst the majority of EU Member States, which is significantly less than the States Parties to many of the instruments discussed in this chapter.[161]

7.2 Temporary Protection Directive 2001[162]

Protection could, in theory, also be claimed under the Temporary Protection Directive where expulsion could result in exposure to 'systematic or generalised violations' of human rights.[163] Temporary protection is defined in Article 2(a) as an exceptional procedure to provide immediate and temporary protection in the event of a mass influx or imminent mass influx of displaced persons from third countries who cannot return to their country of origin. Articles 8-16 set out the substantive rights applicable to those with temporary protection status, which include the issuing of residence

[159] The Convention on the Rights of the Child is limited in its applicability to those under eighteen years of age (Article 1).
[160] Candidate countries Serbia, Macedonia and Turkey all have significant IDP populations. Internal Displacement Monitoring Centre, 'Internal Displacement in Europe' http://www.internal-displacement.org/8025708F004CE90B/(httpRegionPages)/89DF093F3A3371D6C125786A00495575?opendocument accessed 18 June 2013.
[161] The Recast Qualification Directive applies to all Member States with the exception of Denmark, the United Kingdom, and Ireland. The United Kingdom and Ireland continue to be bound by the 2004 Qualification Directive.
[162] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.
[163] Ibid, art 2(c)(ii).

permits, rights relating to employment, education, social welfare, accommodation and family unity.

In order for exposure to internal displacement in the country of origin to attract protection under the Temporary Protection Directive, two conditions must be met. First, the Council of the EU would have to declare, following a proposal by the Commission, that a mass influx exists.[164] This is because the Directive is not self-executing and will not take effect until this condition is fulfilled. To date, the Council has not determined a situation of mass influx to exist. Thus the Temporary Protection Directive is not yet a viable protection option for those who wish to contest removal. Secondly, internal displacement would have to be considered as an example of 'systematic or generalised violations' of human rights.[165] The Directive gives no indication of what constitutes 'systematic or generalised violations' of human rights, and unsurprisingly (as the Council has not yet declared the existence of a mass influx), the question has not come before the ECJ. Thus it is unclear whether persons in danger of being exposed internal displacement would fall within its protection remit.

Even if the Directive is applicable, the duration of temporary protection is one year, and it may be extended by a maximum of one more year.[166] In this time, it is presumed that the recipient of protection would apply for refugee status. However, as exposure to internal displacement does not, *per se*, qualify one as a refugee; it is likely that once temporary protection status ceases, deportation will occur.

[164] Ibid, Recital 14.
[165] Ibid, art 2(c)(ii).
[166] Ibid, art 4(1).

8. Charter of Fundamental Rights of the European Union[167]

The Charter of Fundamental Rights became binding in December 2009 when the Lisbon Treaty entered into force. Article 4 and Article 19(2) are of relevance to this chapter's question. Article 4 of the Charter provides that no-one shall be subjected to torture or to inhuman or degrading treatment and Article 19(2) provides that no-one may be removed to a State where there is a serious risk of exposure to, *inter alia*, inhuman or degrading treatment or punishment. The Charter applies to EU institutions such as the CJEU and all EU Member States' national courts but only when they are acting within the scope of EU law, which would include application of the abovementioned directives.

9. African (Banjul) Charter on Human and Peoples' Rights 1981[168]

As outlined in Chapter 2, the Banjul Charter does not explicitly prohibit internal displacement. However, similar to the ICCPR, numerous provisions protect rights that may be violated in the course of displacement. In case ***279/03-296/05: Sudan Human Rights Organisation & Centre for Housing Rights and Evictions (COHRE)/ Sudan***,[169] the African Commission on Human and People's Rights found that the internal displacement by Sudan of the indigenous black tribes in the Darfur region violated numerous provisions of the Banjul Charter. These included the prohibition of cruel, inhuman or degrading punishment and treatment (Article 5); the obligation to respect the liberty and security of the person (Article 6); the right to be heard (Article 7); the right to freedom of movement (Article 12); the right to property (Article 14); the right to enjoy the best attainable state of physical and mental health (Article 16); protection of family rights (Article 18); and the right of all peoples to

[167] Charter of Fundamental Rights of the European Union (2010) OJC 83/02.
[168] 1981 African (Banjul) Charter on Human and Peoples' Rights 21 I.L.M. 58.
[169] *Sudan Human Rights Organisation & Centre for Housing Rights and Evictions (COHRE) v Sudan*, 209/03 – 296/05, African Commission on Human and People's Rights (13-27 May 2009).

economic, social and cultural development (Article 22). In addition, the Court has the broadest jurisdiction of all the supervisory bodies discussed in this chapter, as it can consider 'any other relevant human rights instrument ratified by the States concerned'.[170]

Similar to the position of the Committee on Human Rights regarding the ICCPR, the African Commission on Human and Peoples' Rights has also held that deportation to a state that would result in exposure to violations of the Banjul Charter would be a violation of the sending state's obligations under the Charter.[171] The facts of this case that are of relevance to the present chapter, is that the complainant, Mr. John K. Modise, was deported four times to South Africa, and on all these occasions, he was rejected. He was forced to live for eight years in the 'homeland' of Bophuthatswana, and then for another seven years in 'No Man's Land', a border strip between the former South African Homeland of Bophuthatswana, and Botswana. The Commission held that these acts exposed him to personal suffering and indignity in violation of the right to freedom from cruel, inhuman or degrading treatment, and thus found Botswana had violated Article 5 of the Banjul Charter. This was the only violation that the Commission found in this case regarding consequences that occurred outside the territory of Botswana. However, the Commission did not give any indication that responsibility under the Convention in such circumstances are limited to violations of Article 5.

At the time of writing, there are 39 States Parties to the Banjul Charter, and the provisions of the Charter may be invoked before domestic courts in those states in

[170] 1998 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, Oau Doc. Oau/Leg/Exp/Afchpr/Prot (Iii).
[171] *John K. Modise v Botswana*, 97/93_14ar, African Commission on Human and People's Rights (23 October – 6 November 2000).

which the Charter forms part of domestic law. Since the Charter recognises the competence of the African Commission to hear complaints,[172] the Commission may consider a complaint directed at any of the Banjul Charter's State Parties, provided the complaint is admissible. A criterion of admissibility is that domestic remedies have been exhausted. However this is not applicable where domestic procedures are unduly prolonged.[173]

There are limits to the powers of the Commission. The mandate of the Commission is quasi-judicial and as such, its final recommendations are not in themselves legally binding on the states concerned.[174] However, these recommendations are included in the Commissioner's Annual Activity Reports, which are submitted to the OAU Assembly of Heads of State and Government in conformity with Article 54 of the Charter. If they are adopted, they become binding on the States Parties and are published. Nevertheless, there is no mechanism that can compel states to abide by these recommendations and much depends on the good will of the states.

10. The Inter-American System of Human Rights

The two primary pillars of the Inter-American System of Human Rights are the American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969).[175] Although the Declaration in itself is not binding under international law, it is nonetheless 'a source of international legal

[172] 1981 African (Banjul) Charter on Human and Peoples' Rights 21 I.L.M. 58 (1982), Art. 45.
[173] 1981 African (Banjul) Charter on Human and Peoples' Rights 21 I.L.M. 58 (1982), Art 50.
[174] African Commission on Human and Peoples' Rights, 'Communications Procedure' http://www.achpr.org/communications/procedure/ accessed 18 June 2013.
[175] 1948 American Declaration on the Rights and Duties of Man O.A.S. Res. XXX.

obligations related to the Charter of the Organization.'[176] In addition, Inter-American instruments must be interpreted in light of new developments in international law, which may be drawn from other international and regional human rights instruments, thereby greatly enhancing the Declaration's normative value.[177]

The Convention and the American Declaration currently function as two distinct but complementary international instruments.[178] Both have the Inter-American Commission on Human Rights (IACommHR) as a supervisory organ, which has the competence to examine communications from individuals and states and to issue recommendations. If the state fails to comply with the IACommHR's recommendations, the IACommHR decides whether to publicise the report (which would end the procedure for states that are not a party to the American Convention on Human Rights or have not recognised the jurisdiction of the Inter-American Court on Human Rights), or refer it to the IACtHR within three months. The judgments of the IACtHR are final and binding.[179]

10.1 The American Convention on Human Rights 1969

As outlined in Chapter 2, the Inter-American Court on Human Rights and Inter-American Commission on Human Rights has found multiple violations of the Convention in situations concerning internal displacement. These rights include Article 5 (right to humane treatment),[180] Article 7 (right to personal liberty),[181] Article

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[176] *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,* Advisory Opinion OC-10/89 Inter-American Court of Human Rights Series A No 10 (14 July 1989) [42].
[177] Grossman CM, *American Declaration of the Rights and Duties of Man (1948)* (Max Planck Encyclopedia of Public International Law 2010), para 21.
[178] Ibid, para 18.
[179] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144, art 67.
[180] *Case of the Moiwana Community v Suriname*, Inter-American Court of Human Rights Series C No 124 (15 June 2005); *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *La Granja, Ituango v Colombia*, Inter-American Commission of Human Rights Report No 5700 (2 October 2000).

11(2) (protection of honour and dignity),[182] Article 19 (protection of the child),[183] Article 21 (right to property),[184] Article 22 (freedom of movement),[185] and Articles 8 and 25 of the Convention (judicial guarantees and judicial protection) in relation to Article 1(1) (obligation to respect rights).[186] The American Convention on Human Rights also contains an obligation of non-removal in Article 22(8):

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

This obligation of non-removal mirrors, for the most part, the obligation of non-*refoulement* in Article 33 of the Refugee Convention. In considering whether this provision is invoked, the focus is on the danger to life or personal freedom in the receiving state, rather than on the general list of rights contained in the Convention. The enumeration of these two particular grounds implies that other grounds are excluded from being invoked in non-removal decisions. This is supported by the fact that the contents of the right to life are set out by the Convention in Article 4. Nonetheless, an argument could be made that violations of 'personal freedom' require

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[181] *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005).

[182] *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *La Granja, Ituango v Colombia,* Inter-American Commission of Human Rights Report No 5700 (2 October 2000).

[183] *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *La Granja, Ituango v Colombia,* Inter-American Commission of Human Rights Report No 5700 (2 October 2000) .

[184] *Case of the Moiwana Community v Suriname,* Inter-American Court of Human Rights Series C No 124 (15 June 2005); *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *La Granja, Ituango v Colombia,* Inter-American Commission of Human Rights Report No 5700 (2 October 2000).

[185] *Case of the Moiwana Community v Suriname,* Inter-American Court of Human Rights Series C No 124 (15 June 2005); *Case of the 'Mapiripán Massacre' v Colombia*, Inter-American Court of Human Rights Series C No 134 (15 September 2005); *La Granja, Ituango v Colombia,* Inter-American Commission of Human Rights Report No 5700 (2 October 2000)

[186] *Case of the Moiwana Community v Suriname,* Inter-American Court of Human Rights Series C No 124 (15 June 2005); *La Granja, Ituango v Colombia,* Inter-American Commission of Human Rights Report No 5700 (2 October 2000).

reference to the other rights contained within the Convention, as the Convention does not specifically provide for a right to personal freedom. In addition, respect for the rights contained in the Convention as a whole is arguably what was envisioned by the drafters to be a precondition for the exercise of personal freedom. Nonetheless, the violation of rights in the country of return would have to be linked to the reasons of race, nationality, religion, social status or political opinions, and thus the applicability of this provision to situations of internal displacement is circumscribed. In particular, internal displacement due to natural disaster would most likely not fall within the remit of this provision, nor would displacement due to indiscriminate violence. Article 22(8) is further limited by the fact that it may be derogated from in times of 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party.'[187] Thus for those who face internal displacement upon return, the remit of complementary protection provided by this Convention leaves much to be desired.

10.2 The American Declaration on the Rights and Duties of Man 1948

As outlined in Chapter II, the American Declaration also contains rights that may be violated in situations of internal displacement. These include Article 5 (the right to the protection of personal honour and reputation, and to private and family life), Article 6 (the right to a family and protection thereof), Article 8 (the right to residence and movement), Article 9 (the right to inviolability of the home), Article 23 (the right to property), and Article 11 (right to the preservation of health and well-being).

The case of ***Mortlock v USA*** **[2008]** appears to be the only case before the Inter-American Commission on Human Rights in which a non-removal obligation

[187] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144, art 27.

under the American Declaration was considered. This complaint concerned a Jamaican national who remained under threat of deportation from the USA to Jamaica, the result of which would deny her medication critical to her treatment for HIV. She claimed a violation of Article XI (right to health) and XXVI (protection from cruel, infamous and unusual punishment) of the American Declaration of the Rights and Duties of Man. The Commission noted that States Parties have a right, as a matter of well-established international law, to control the entry, residence and expulsion of aliens. However, regard must be had to certain protections that enshrine fundamental values of democratic societies. Immigration policy must guarantee to all an individual decision with the guarantees of due process, it must respect the right to life, physical and mental integrity, family, and the right of children to obtain special measures of protection. The execution of this immigration policy cannot give rise to cruel, degrading and inhumane treatment nor discrimination based on race, colour, religion or sex.[188]

According to the Commission, the applicable standard consisted of whether the deportation would create extraordinary hardship to the deportee and her family and could well amount to a death sentence given two principal considerations (i) the availability of medical care in the receiving country and (ii) the availability of social services and support, in particular the presence of close relatives.[189]

The Commission found that knowingly sending Ms. Mortlock to Jamaica with the knowledge of her current healthcare regime and the country's sub-standard access to similar healthcare for those with HIV would violate her rights and would constitute

[188] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [78].
[189] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [87].

a *de facto* sentence to protracted suffering and premature death.[190] Consequently, it found a violation of Article XXVI but not Article XI, as it found that Ms. Mortlock was not denied access to medical care in the US.[191]

The influence of the jurisprudence of the ECtHR can be seen throughout the text of this decision, both explicitly and implicitly. In reference to the applicant's reliance on the ECtHR jurisprudence, the Commission remarked that while the organs of the Organisation of American States are not bound to follow the ECtHR, the jurisprudence of such international supervisory bodies can provide constructive insights into the interpretation and application of rights that are common to regional and international human rights systems.[192] The test employed to determine a violation of the Convention contained some of the same criteria employed by the ECtHR – the nature of the applicant's illness and the availability of medical care and support in the country of return.[193] This was notwithstanding the fact that the ECHR refers to 'treatment or punishment',[194] while the ACHR refers to 'punishment' only. In streamlining its approach with that of the ECtHR, the Commission remarked that a change in status quo to the detriment of an alien subject to a deportation procedure could constitute 'punishment' within the meaning of the ACHR.[195] Notably, the Commission did not employ the fourth factor taken into account by the ECtHR – whether the sub-standard medical care in the receiving state could be attributed to that

[190] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [94].
[191] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [95].
[192] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [80].
[193] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [87].
[194] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art. 3.
[195] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [85].

state.[196] It is submitted that this approach is preferable to that of the ECHR, as it is more compatible with the fact that Declaration rights 'enshrine fundamental values of democratic societies',[197] and as aforementioned, if the ECtHR were to take a similar approach it would be more compatible with the absolute nature of Article 3.

The final decision of the Commission merits further analysis. The Commission was willing to find a violation of Article XXVI (protection of cruel, infamous, or unusual punishment) but not of Article XI (right to health). The fact that the Court engaged in an examination, albeit brief, of articles invoked other than Article XXVI signals a departure from the approach taken by the ECtHR, which has generally been that once a determination is made that Article 3 has been violated (the corresponding ECHR Article to Article XXVI), the Court does not engage in an examination of further grounds of the application.[198] It is refreshing that the Commission is willing, albeit briefly, to engage with other grounds of contesting non-removal.

The Commission's decision regarding Article XI is nonetheless a curious one. The reason for failing to find a violation of Article XI, according to the Commission, was that medical care had not been denied to the applicant in the US. This was despite the fact that, in the Commission's words, Jamaica's 'health care system [was] insufficient to meet Ms. Mortlock's needs',[199] and that the case was one whose 'humanitarian appeal [was] so powerful that it could not reasonably be resisted by the

[196] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 November 2011) [282].
[197] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [78].
[198] An exception to this general approach was the decision of *El-Masri v the Former Yugoslav Republic of Macedonia* App no 39630/09 (ECHR, 13 December 2012).
[199] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [93].

authorities of a civilized State.'[200] Further, it seems difficult to square with the statement by the Commission, in the same decision, that immigration policy must guarantee to all an individual decision that respects, *inter alia*, the right to life, physical, and mental integrity. Thus it seems that insofar as Article XI is concerned, only violations occurring within the territorial jurisdiction of the State may attract its responsibility, and violations occurring as a consequence of removal do not come within the scope of this Article, or at least, a higher threshold than that of Article XXVI applies.

Regarding the focus of this chapter, non-removal to face internal displacement, ***Mortlock v USA*** offers limited assistance. On the one hand, the interpretation of the term 'punishment' to apply to an alien facing a deportation order will allow this jurisprudence, in theory, to be invoked by those facing internal displacement as a result of removal. On the other hand, the fact that the Commission was unwilling to find a violation of Article XI seems as though, like the ECHR, the prohibition in Article XXVI is the most likely ground of success when contesting a deportation decision. It may be more difficult to successfully invoke other relevant rights, such as Article I (right to life, liberty and personal security), Article V (right to protection of honour, personal reputation, and private and family life), or Article VIII (right to residence and movement). As the facts of ***Mortlock v USA*** dealt with healthcare in the country of return, the specific test applied is not readily applicable to the case of a person who would face internal displacement on return. Nonetheless, an argument could be made that Article XXVI is applicable on the basis that the facts come within the more general test set out by the Commission that 'the humanitarian

[200] *Mortlock v USA*, Inter American Commission of Human Rights Report No.63/08 Case 12.534 (25 July 2008) [91].

appeal of the case is so powerful that it could not reasonably be resisted by the authorities of a civilized State.'[201]

There are further difficulties in bringing a case before the Commission. It may take years before a decision on the merits is reached, and the legal weight attached to the recommendations and reports is contentious. This is of particular relevance concerning those states that have not ceded jurisdiction to the Inter-American Court, because in those cases, the Commission will be the final recourse for relief.

11. Customary International Law

There is substantial scholarship on the notion of a customary norm of non-removal. However there is lack of consensus as to the content of such a norm. There is ample state practice and *opinio juris* in favour of the proposition that Article 33 of the Refugee Convention, the prohibition of non-*refoulement*, is a customary norm and this position is supported by the majority of academic writings on the subject. However, this prohibition, is limited in its protection remit to threats to life or freedom based on race, religion, nationality, membership of a particular social group or political opinion. It does not apply to failed asylum seekers, and thus is not directly relevant for the purposes of this chapter. Similarly, the corresponding non-*refoulement* obligation to the customary prohibition of torture is inapplicable to this discussion, as acts of torture are not synonymous with instances of internal displacement.

[201] *El-Masri v the Former Yugoslav Republic of Macedonia* App no 39630/09 (ECHR, 13 December 2012) [91].

However, the proposition has been put forward that there exists a broader norm of non-return, which encompasses return to face cruel, inhuman, or degrading treatment and punishment.[202] Such a norm could possibly be applicable where removal would result in exposure to internal displacement. As all states are bound by customary international law, the existence of such a rule would minimise the importance placed on the treaty-based obligations of non-removal, the scope and applicability of which varies according to the content of the treaty in question. Can it be stated, then, that this broader notion of non-*refoulement* has customary status?

Lauterpacht and Bethlehem answer this question in the affirmative. They formulate this customary norm in the following terms:

> No person shall be rejected, returned or expelled in any manner whatsoever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman, or degrading treatment or punishment. This principle allows of no limitation or exception.[203]

Lauterpacht and Bethlehem's analysis stems from the premise that the prohibition of torture or cruel, inhuman or degrading treatment or punishment forms part of customary law. They point to, *inter alia*, the fact that over 150 states are party to at least one convention prohibiting such acts, and that it is thus of 'fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.'[204] They argue that non-*refoulement* is a fundamental component of this customary norm, because it is a fundamental component of the prohibition of torture and thus by implication applies to other conventional expressions of the

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[202] Lauterpacht and Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion', in Erika Feller and others, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003).
[203] Lauterpacht and Bethlehem, ‚The Scope and Content of the Principle of Non-Refoulement: Opinion', in ibid para 253.
[204] *North Sea Continental Shelf* (*Federal Republic of Germany v Netherlands, Federal Republic of Germany v Denmark*) (Judgment) [1969] ICJ Rep 3 [72].

prohibition.[205] Thus 'the evidence points overwhelmingly to a broad formulation of the prohibition as including torture or cruel, inhuman or degrading treatment or punishment.'[206]

Goodwin-Gill and McAdam describe this position as 'contentious', and point to the difficulty in finding sufficient evidence of state practice to support such an argument.[207] In their opinion, the defining factor is the *legal* meaning of 'cruel, inhuman or degrading treatment or punishment' as set out by international and regional jurisprudence (emphasis in original).[208] The approach of the European Court of Human Rights, as outlined above, has been narrowly circumscribed, and only in the most severe circumstances will Article 3 prevent removal where sub-standard human rights protection exists in the receiving state. In addition, state practice has differed regarding the scope of the non-*refoulement* obligation. Most western states prohibit removal in the cases of exposure to torture or cruel, inhuman or degrading treatment or punishment, while the United States limits *refoulement* to torture.[209]

Goodwin-Gill, in a recent 2014 publication, puts forward a different position with regard to the notion of 'temporary refuge'.[210] He describes this concept as distinct from the principle of non-*refoulement,* although non-*refoulement* and 'temporary refuge' may sometimes be applicable in the same factual

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[205] Lauterpacht and Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in Feller and others, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 155-158.
[206] Lauterpacht and Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in ibid para 223.
[207] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3 edn, Oxford University Press 2011), para 348.
[208] Ibid, para 350.
[209] Ibid, para 351.
[210] Guy S. Goodwin-Gill, 'Non-Refoulement, Temporary Refuge and the "New" Asylum Seekers' in David Cantor and Jean-Francois Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014), 433.

circumstances.[211] He identifies the relevant obligations inherent in the notion of 'temporary refuge' as admission and non-return, and deems 'temporary refuge' to be applicable to persons outside their country of nationality who are seeking refuge from armed conflict, massive violations of human rights and/or indiscriminate violence.[212] His publication reviews the customary international law foundations for this proposal and concludes that the core obligations of the principle of 'temporary refuge' operates across a broader spectrum than non-*refoulement* and that it is firmly rooted in customary international law.[213]

The existence of a broader customary norm of non-*refoulement* is thus far from settled. On the one hand, the argument that there exists a prohibition to return someone to a place where they will face cruel, inhuman, or degrading treatment and punishment is countered by a lack of supporting state practice.[214] In addition, the above discussion shows that amongst treaties, the content of the non-removal obligation varies and indeed the formulation of the prohibition of cruel, inhuman and degrading treatment and punishment is not textually uniform. On the other hand, Goodwin-Gill argues that the concept of temporary refuge is of customary status where, *inter alia*, massive violations of human rights are taking place in the country of origin. Even if we accept Goodwin-Gill's position as correct, in order for this to be applicable to a situation of internal displacement in the country of origin it would first have to be established that internal displacement constitute 'massive violations of human rights.' As this chapter has argued, internal displacement is not prohibited by

[211] Ibid, 436.
[212] Ibid, 458, 459.
[213] Ibid, 458.
[214] Some commentators, such as Hailbronner and Hathaway, deny the existence of even a narrow customary norm of non-*refoulement*.

any legally binding international instrument,[215] and thus it does not constitute a violation of human rights law, let alone a 'massive violation'. Thus the position of this chapter is that the existence of a broader norm of non-*refoulement* is not firmly established, and even it we accept that 'temporary refuge' is of customary status, it is not doubtful that it would apply to a situation of internal displacement.

12. Conclusion

The above discussion illustrates the various forms of protection available to those who wish to contest a deportation decision on the grounds that they will face internal displacement in the country of return. As discussed in section 5.2, every displacement situation is different and thus it is impossible to definitively state which rights will be violated where displacement occurs. In this sense it can be said that a spectrum of displacement exists, ranging from protracted displacement outside of a camp context, to protracted encampment, to integration or displacement which has resulted in durable solutions. Thus where this chapter refers to deportation 'to face internal displacement' it should be borne in mind that whether or not such action would entail a breach of international law would depend on the specific circumstances of displacement in each case.

As the previous section illustrated, a broader customary norm prohibiting removal to cruel or inhuman treatment has yet to be established in international law. Recourse must therefore be had to complementary protection in the form of treaty law. Of those treaties that are 'international' (as opposed to regional), the CAT is

[215] The 2006 International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons obliges states to implement the Guiding Principles (and thus the right not to be displaced) and Art 4(4) of the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('Kampala Convention') expressly lays down the right not to be displaced..

inapplicable in this context, as it only applies to instances of torture. The ICCPR has the broadest protection remit, containing a wide range of rights relevant to IDP situations which apply to all persons within the jurisdiction of its 167 States Parties, insofar as the ICCPR forms part of domestic law. In addition, the protection offered by the ICCPR concerning removal decisions extends to all rights within the Covenant. Nonetheless, complaints may only be brought before the Committee on Human Rights where the state concerned has ratified the Optional Protocol to the ICCPR, and even then, it may take several years before a decision is reached. Although states are bound to provide an effective remedy for Convention violations, the Committee has no enforcement mechanism in this regard. Thus although textually, the ICCPR's protection is wide-ranging, practically, much depends on the will of states.

The ICESCR may also provide protection to those facing displacement upon return. Although the ICESCR's rights are sometimes seen as being of a non-binding nature, a number of rights are indeed immediately binding, including those that have particular relevance to situations of internal displacement.

The third 'international' instrument discussed in this chapter is the CRC. The CRC is the most widely-ratified international instrument, and its requirement that the 'best interests of the child' be taken into account in proceedings concerning children has meant that non-removal may be contested on this ground. However, as its name suggests, rights under the CRC are only applicable to children, although parents, for example, could contest a removal decision on the grounds that their removal would not be in the best interests of the child.

Regarding regional instruments, the ECHR offers protection to those whose removal would result in a real risk of exposure to treatment contrary to Article 3. This Article incorporates cruel, inhuman or degrading treatment, and is absolute in nature. It must be shown that 'substantial grounds' exist of a 'real risk' of violation of Article 3. Where the internal displacement situation is not attributable to the state, the Court examines the ability of the applicant to cater for his most basic needs, such as food, hygiene and shelter. This standard has been referred to by this chapter as the 'inability to cater for basic needs test'. Where the internal displacement situation is attributable to the state, the more difficult 'compelling circumstances test' applies and it must be illustrated that the facts in question are very exceptional. This chapter has argued that this criterion of attribution is incompatible with the absolute nature of Article 3, and that it is difficult to reconcile this approach with the very logic by which the ***Soering*** principle is applied. Finally, it has been illustrated that the Court is hesitant to find a violation of rights other than Article 3 in removal decisions, and in order for such grounds to be successful; it must be shown that a 'flagrant breach' will occur if removed. Although a favourable decision from the European Court will prohibit the state from removing the applicant, the applicant will not be granted a legal status and will have no further rights in the host country.

The EC Qualification Directive, although not a treaty, represents binding law among the Member States of the European Union.[216] The Qualification Directive provides the most effective protection of all instruments discussed in this chapter. If an applicant can illustrate that his removal would result in exposure to 'inhuman or degrading treatment', and that there is a 'clear risk of individualisation', the Directive

[216] The Recast Qualification Directive applies to all Member States with the exception of Denmark, the United Kingdom, and Ireland. The United Kingdom and Ireland continue to be bound by the 2004 Qualification Directive.

will apply. The advantage of falling within the Directive's protection remit is that it results in entitlement to legal status and a range of rights, including family unity, residence permits, access to employment, social welfare, healthcare, and access to integration facilities. The Temporary Protection Directive may in theory provide protection against removal. However, its application has yet to be triggered by the European Council and thus it is not a practical avenue of protection for those contesting removal. However, in applying the aforementioned directives, the Charter of Fundamental Rights of the European Union must be considered by the CJEU and EU Member States.

The Banjul Charter also contains provisions that provide protection to those who have been the victims of internal displacement. In addition, the African Commission on Human and Peoples' Rights has held that deportation to face a situation of internal displacement is a violation of the Charter. Individual complaints may be taken against all 39 members of the Charter to the Commission, and if the OAU Assembly of Heads of State and Government adopts the recommendations of the Commission, they become binding on the States Parties and are published.

Regarding the Inter-American system of human rights protection, both the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man provide protection against internal displacement. The American Convention has a non-*refoulement* obligation and it is arguable that this obligation applies to all rights set out in the Convention. In addition, the Commission has held that deportation resulting in extraordinary hardship for the deportee may result in violation of Article XXVI (protection of cruel, infamous, or unusual punishment) of the American Declaration of the Rights and Duties of Man, although as this chapter as argued, the Commission seemed reluctant to find a deportation decision would

result in violation of other articles of the Declaration. As regards customary international law, a broader norm of non-*refoulement* has yet to be firmly established as a binding obligation.

In conclusion, it is clear that both the substantive and geographical remit of protection from removal provided by the various instruments discussed in this chapter is fragmented. Despite a general consensus that the Refugee Convention is the key international instrument applicable for those who cannot or should not be expected to return to their country of origin, it is clear that the refugee definition is very narrow and often excludes many in need of international protection. However, the availability of other instruments of protection that do not entail the same level of rights or obligations as the Refugee Convention could tempt decision-makers to classify an applicant as falling within the scope of the latter instruments, rather than the Refugee Convention, where the question of refugee status is unclear.

That said, although the enforcement mechanisms of many of the aforementioned instruments are weak or non-existent, it must be remembered that there is no international body which monitors the Refugee Convention, or to which complaints can be submitted.

Thus although the powers of the various monitoring bodies discussed in this chapter leave much to be desired, their mere existence provides a safety net for those cases in which the Refugee Convention has been misapplied, and for which there is no further domestic remedy. For those who face internal displacement upon removal, complementary protection is possibly the only means by which this fate can be avoided.

CHAPTER 6: THE APPLICABILITY OF ARTICLE 1D OF THE REFUGEE CONVENTION TO IDPS

1. Introduction

Article 1D of the Refugee Convention sets out as follows:

> The Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
>
> When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.[1]

A similar provision is found in paragraph 7 of the UNHCR statute, which provides that 'the competence of the High Commissioner […] shall not extend to a person […] who continues to receive from other organs or agencies of the United Nations protection or assistance.'[2]

As is well-established in the literature and jurisprudence on this topic, Article 1D was drafted with one group of persons in mind – Palestinian refugees receiving protection from UNRWA. It was not intended to be 'an exhaustive code that would govern every case in which an international body assumed responsibility for providing protection against persecution in a country.'[3] However, the terms of Article 1D do not make this fact explicit and the possibility therefore exists that Article 1D may be interpreted in a manner different from that which was originally intended. States may overlook the historical context of the Convention and explore instead the

[1] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2).
[2] UNGA 'Statute of the Office of the United Nations High Commissioner for Refugees', Annex to Res 428/V (14 December 1950) UN Doc A/RES/428(V).
[3] *R. (on the application of Vallaj) v Special Adjudicator* [2001] EWCA Civ 782; [2001] INLR 342.

idea of the Convention as a 'living instrument' – an interpretative approach that is common in many domestic legal systems but is not explicitly contained in the 1969 Vienna Convention on the Law of Treaties (VCLT). In the context of IDP protection for example, there are numerous reasons why, in theory, Article 1D could be triggered by protection activities by UN organs or agencies on their behalf. First, various 'agencies of the United Nations' are cluster leaders or co-leaders within the cluster approach of IDP protection. Such agencies include the UNHCR, the World Food Programme (WFP), World Health Organization (WHO), United Nations Children's Fund (UNICEF), the Office for the Coordination of Humanitarian Affairs (OCHA), the United Nations Development Programme (UNDP), the Office for the High Commissioner of Human Rights (OHCHR), and the Food and Agriculture Organization (FAO).[4] This has created a concern on behalf of the UNHCR that involvement with IDPs within an inter-agency collaborative framework could lead to an interpretation by receiving states that Article 1D of the Convention is applicable and that refugee status should not be recognised.[5]

Secondly, it is evident that the activities the above-mentioned organisations satisfy the criteria of providing 'protection or assistance' to IDP populations. The WFP is responsible for emergency telecommunications and logistics; the WHO is responsible for health, UNICEF is responsible for education, nutrition, and disaster-induced IDPs (with OHCHR and UNHCR); OCHA is responsible for humanitarian coordination; UNDP is responsible for early recovery; OHCHR is responsible for

[4] Tim Morris, 'UNHCR, IDPs and Clusters' (2006) 25 Forced Migration Review 54.
[5] See UNHCR Policy Development and Evaluation Service and Division of Operational Services, 'UNHCR's Expanded Role in Support of the Inter-Agency Response to Situations of Internal Displacement' (November 2006), UN Doc PDES/2006/06, 9; Erika Feller, 'UNHCR's Role in IDP Protection: Opportunities and Challenges' (2006) Forced Migration Review 11.

disaster-induced IDPs (with UNICEF and UNHCR); and the FAO is responsible for agriculture.[6]

Thirdly, recent jurisprudence dealing with the role of international organisations offering internal protection has not excluded the possibility that Article 1D could be invoked in a modern-day context. In assisting IDPs therefore, the international community could be undermining the institution of asylum.

The structure of this chapter will be as follows: First, this chapter will set out a brief history of the Palestinian question within the UN and will illustrate why a special regime was felt to be necessary for Palestinian refugees. This chapter will then engage in an interpretative analysis of Article 1D, illustrating its inapplicability to broader IDP protection activities. Finally, this chapter will conclude by setting out the reasons why Article 1D has no application outside of its historical context.

2. The UN and the Palestinian Question

On 29 November 1947 the General Assembly voted in favour of the partition of Palestine in two, forming separate Arab and Jewish states.[7] On 15 May 1948, the day after the British mandate over the territory ended, the Jewish community proclaimed the state of Israel. Between December 1947 and May 1948 civil and guerrilla warfare erupted, during which 750,000 Palestinians fled the territory. These Palestinian refugees were denied a right to return, and were retroactively deprived of their citizenship by Israel.

[6] Morris.
[7] UNGA Res 181 (III) (29 November 1947) UN Doc A/RES/181 (11).

In recognition of the denial of statehood and nationality to Palestinians, and because of the UN's partial responsibility for this, a special regime was provided for Palestinians. In May 1948, Count Folke Bernadotte, President of the Swedish Red Cross, was appointed to the newly-established position of United Nations Mediator for Palestine.[8] He made suggestions to the Israeli government that a limited number of refugees should be given permission to return. However, his suggestions were not acted upon. He also indicated in his reports to the UN that the refugees' right to return should be affirmed.[9] However, his mediation attempts came to an abrupt halt when he was assassinated by Jewish terrorists on 17 November 1948.

Two days after his assassination, the General Assembly established the United Nations Relief for Palestine Refugees fund (UNRPR), a new $32m relief plan.[10] On 11 December of that same year, the General Assembly established the UN Conciliation Commission for Palestine (UNCCP), which was instructed to take steps to assist the governments and authorities concerned to achieve a final settlement and to facilitate the repatriation, compensation, resettlement, and economic and social rehabilitation of the refugees as set out in paragraph 11 of General Assembly Resolution 194 (III).[11] France, Turkey and the United States were subsequently appointed to the Commission.

UNCCP made various failed efforts regarding the implementation of paragraph 11, such as an attempted repatriation scheme with Israel. Aside from progress in the recovery of property belonging to Palestinian refugees, UNCCP made no further substantial contribution to the implementation of paragraph 11.

[8] UNGA Res 186 (S-2) (14 May 1948) UN Doc A/RES/186(S-2).
[9] UNGA 'Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations' (16 September 1948) UN Doc A/648, para 14.
[10] UNGA Res 212 (III) (19 November 1948) UN Doc A/RES/212 (III).
[11] UNGA Res 194 (III) (11 December 1948) UN Doc A/RES/194 (III).

On 8 December 1949, UNRWA was established with the dual mission of providing direct relief and establishing a 'works programme' for Palestinian refugees.[12] UNRWA's present working definition of a refugee is 'any person whose normal place of residence was Palestine and during the period of 1 June 1946 to May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict.'[13] It also applies to the children of all such persons and its territorial scope extends to Lebanon, Syria, Jordan, the West Bank, the Gaza Strip, and Egypt. The assistance function of UNRWA relates only to the Palestinian refugee's daily needs, such as primary and vocational education, primary health care, relief and social services, infrastructure and camp improvement, microfinance, and emergency response.[14] However, the Refugee Convention and UNHCR statute provide a more comprehensive scheme of protection for refugees that fall within their respective definitions.

3. A Special Regime for Palestinians – Article 1D

There were numerous reasons why the drafters of the Refugee Convention provided a special regime for Palestinian refugees. First, during the drafting process, the American representative warned that the inclusion of Palestinian refugees in the general refugee regime 'would present Contracting States with an undefined problem, and so reduce the number of states in Europe that would find it possible to sign the Convention.'[15] Secondly, it was felt by the drafters that owing to the UN's role in contributing to the Palestinian refugee problem, it should bear responsibility for their

[12] UNGA Res 302 (IV) (8 December 1949) UN Doc A/RES/302 (IV).
[13] UNRWA, 'Palestine Refugees', http://www.unrwa.org/palestine-refugees accessed 7/10/2013.
[14] UNRWA, 'What We Do', http://www.unrwa.org/what-we-do accessed 2/10/2013.
[15] James Hathaway, *The Law of Refugee Status* (Butterworths 1991), 207; UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting, 26 November 1951, statement of Mr. Warren of the USA, U.N. Doc. A/CONF.2/SR.19, [23].

well-being.[16] Thirdly, there was a general recognition that Palestinians as a group met the persecution requirement of the refugee definition. However their plight was unique because a member of the UN (Israel) was preventing their return.[17] Fourthly, the drafters did not want the position of Palestinian refugees to be 'submerged […] and relegated to a position of minor importance.'[18] Finally, it was envisaged that the plight of the displaced Palestinians would be resolved within a short timescale on the basis of UN General Assembly Resolution 194 (III), particularly through compensation and repatriation in accordance with paragraph 11.[19] Palestinian refugees were therefore regarded as meriting special protection than that afforded to other refugees and it was for that reason that Article 1D was included in the Convention text.

It is therefore argued here, as it is by many well-established academics in this field, that Article 1D is limited in its applicability to those which its drafters intended – Palestinian refugees receiving protection from UNRWA. However, for the sake of argument this chapter will be open to the possibility of it applying to other groups of persons, and that proposition will be examined in detail below.

4. Article 1D – Interpretation and Application

According to Article 31 of the Vienna Convention on the Law of Treaties 1969 (VCLT) '[a] treaty shall be interpreted in good faith in accordance with the ordinary

[16] Guy S Goodwin-Gill and Susan M. Akram, 'Foreword to Amicus Brief on the Status of Palestinian Refugees Under International Refugee Law' (2000) 11 The Palestine Yearbook of International Law Online, 219; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3 edn, Oxford University Press 2011), 157; Susan M. Akram, 'Palestinian Refugees and their Legal Status: Rights, Politics, and Implications for a Just Solution' XXXI Journal of Palestine Studies, 40.
[17] Akram, 40.
[18] Ibid, 40; Lex Takkenberg, *The Status of Palestinian Refugees in International Law* (Clarendon 1998), 62.
[19] Akram, 40; Goodwin-Gill and McAdam, *The Refugee in International Law*, 155.

meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'[20] In addition, Article 32 sets out that 'recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' to assist in interpretation where the meaning resulting from Article 31 is unclear or unreasonable.

The drafting history of the Refugee Convention indicates that Article 1D is inapplicable to IDPs in a general sense, given that the drafters intended it to apply solely to Palestinian refugees receiving protection from UNRWA. However, that is not to say that states will not employ an alternative interpretation in order to further limit the category of those eligible for refugee status. Whether this is the correct interpretation as a matter of international law is of little practical relevance owing to the fact that the interpretation of the Refugee Convention is left to domestic courts, not an international body, and it is their interpretation that will decide the fate of the individual asylum-seeker. In the words of Leo Gross:

> [We] may never know, or, in some cases, we may not know for a time, which autointerpretation was correct [...] This is, for better or worse, the situation resulting from the organizational insufficiency of international law.[21]

Therefore, for the sake of argument, the following paragraphs will also examine whether, disregarding its historical context, Article 1D could be applied in a general manner to those who have received protection as IDPs.

[20] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[21] Leo Gross, 'States as Organs of International Law and the Problem of Autointerpretation' in Lipsky 76, 77.

4.1 The first sentence of Article 1D: 'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.'

(a) 'The Convention shall not apply to persons [...]'

The meaning of 'shall not apply' is relatively straightforward – the Refugee Convention will be inapplicable to those falling within the scope of Article 1D. The phrase 'to persons' in Article 1D refers to a category or group of persons, rather than to individuals.[22] This is supported by the general recognition at the time of drafting that Palestinians as a group were presumed to fall within the refugee definition.[23]

However, it could be argued that the term IDPs also indicates a category or group of persons. This may be a somewhat obvious observation, given the fact that they are described in terms of internally displaced 'persons' rather than in terms of internally displaced 'individuals'. Thus the interpretation of the term 'to persons' set forth in this section does not necessarily exclude IDPs from Article 1D's application.

(b) '[…]who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees[…]'

There has been some disagreement within the academic community as to the time to which 'at present receiving' refers. According to Grahl-Madsen, it refers to the date the Convention was signed because if any other date was intended, it would have been stated in the Convention.[24] On this interpretation, only organs or agencies existing in 1951, and their possible successor bodies, come within the scope of the Refugee Convention.

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[22] Atle Grahl-Madsen, *The Status of Refugees in International Law* (A.W. Sijthoff 1966) 265; Hathaway, 208.
[23] Akram, 40.
[24] Grahl-Madsen, 264.

Hathaway agrees with this interpretation.[25] He refers to the statement of the United Kingdom's representative, which set out that '[paragraph 1D was intended] to exclude persons who […] at the time when the Convention came into force were receiving protection or assistance from United Nations organs or agencies.'[26] Takkenberg also supports this interpretation, opining that although the Convention was drafted in general terms, its intention was to provide for existing groups of refugees (those who had become refugees as a result of events occurring before 1951) and there is therefore no reason to believe that this was different in respect of Article 1D.[27]

However, the UNHCR's handbook favours an alternative interpretation. It states that the correct date is the date of application in a particular case:

> Exclusion under this clause applies to any person who is in receipt of protection or assistance from organs or agencies of the United Nations, other than the United Nations High Commissioner for Refugees. Such protection or assistance was previously given by the former United Nations Korean Reconstruction Agency (UNKRA) and is currently given by the United Nations Relief and Works Agency for Palestine Refugees In the Near East (UNRWA). There could be other similar situations in the future.[28]

This sentence clearly leaves open the possibility that Article 1D is applicable outside of its historical context. However, Goodwin-Gill and Akram describe this interpretation as 'almost certainly incorrect.'[29] They set out four reasons supporting this contention. First, the *travaux préparatoires* indicate that the drafters intended to make arrangements for existing groups of refugees. Secondly, the reference to Korean

[25] Hathaway, *The Law of Refugee Status*, 208.
[26] 'UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting', statement of Mr. Warren of the USA (26 November 1951) UN Doc A/CONF.2/SR.19, para 20.
[27] Takkenberg, 97.
[28] UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (Reedited January 1992) UN Doc HCR/IP/4/Eng/REV.1, para 142.
[29] Goodwin-Gill and Akram, 'Foreword to Amicus Brief on the Status of Palestinian Refugees Under International Refugee Law', 233.

refugees is incorrect. As pointed out by Grahl-Madsen and Hathaway, since South Korea considered Korean refugees as citizens, the war refugees did not fall within the scope of the Refugee Convention.[30] Thirdly, the reference in the second sentence to 'the settlement of those persons' reinforces the contention that Article 1D referred to one category of refugees concerning which the UN had adopted resolutions – that is, Palestinian refugees. Finally, the drafting history of the Convention illustrates that the only situation discussed in reference to Article 1D was that of the Palestinian refugees.

'At present receiving' should therefore be understood to mean 'persons who were and/or are now receiving' protection or assistance from organs or agencies (and their successor bodies) of the UN other than the UNHCR that were in existence at the time the Convention was signed.[31] Although the ordinary meaning of the phrase 'organs or agencies' need not be restricted to one particular entity, Article 31(4) of the VCLT provides that 'a special meaning shall be given to a term if it is established that the parties so intended.' It is clear that the drafters intended for Article 1D to be limited in its applicability to Palestinian refugees and therefore the term 'organs or agencies of the United Nations' refers solely to UNRWA. In practical terms, therefore, Article 1D applies to all those who received protection and/or assistance from UNRWA in 1951, as well as – in what has been later termed the 'continuing

[30] Ibid, 234; Hathaway, *The Law of Refugee Status*, 234; Grahl-Madsen, *The Status of Refugees in International Law*, 265.

[31] The UNHCR has clarified its position and described two groups which fall within Article 1D: (i) "Palestine refugees" within the meaning of resolution 94 (III) and other relevant resolutions, who were displaced from that part of Palestine which became Israel and have been unable to return there; and (ii) Palestinians who are 'displaced persons' within the sense of General Assembly resolution 2252 (ES-V) and later resolutions, and who have been unable to return to the Palestinian territories occupied by Israel since 1967. See UNHCR 'Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees' (October 2009) [4].

effect'[32] - Palestinians who have subsequently become the concern of UNRWA thereafter, either by birth or by decisions of competent bodies such as the General Assembly. This is because General Assembly resolutions are made by State Parties to the Convention and are therefore evidence of 'subsequent practice' in the application of the treaty and indicate how the concept of a Palestinian refugee and the extent of UNRWA's mandate should be interpreted.[33] These resolutions were necessary to extend UNRWA's mandate, as its actions were originally conceived as a solution to a short-term problem. The current UNRWA mandate runs until June 2017.

The 'continuing effect', termed as 'a very considerable distortion' of the Convention's text by Laws LJ in ***El-Ali***,[34] has been described by Goodwin-Gill as reconciling any apparent discrepancy between the first and second paragraph of Article 1D, minimising ambiguity, avoiding arbitrary distinctions, and is the interpretation most consistent with the original intentions of the states and with later General Assembly resolutions.[35]

The historical context of the term 'organs or agencies of the United Nations other than the UNHCR' therefore clearly refers to protection or assistance given by UNRWA. However, setting the historical context aside, could the plain meaning of the words apply to agencies involved in IDP protection? Indeed, in the case of ***R. (on the application of Vallaj) v. Special Adjudicator*** **[2001]**, the Court did not rule out that protection activities by organs or agencies aside from UNRWA could trigger the application of Article 1D.[36] In order to answer this question it must be ascertained which, if any, organs or agencies of the UN which were in existence in 1951 are still

[32] See the judgment of Laws LJ in *El-Ali v Secretary of State for the Home Department* [2002] EWCA Civ 1103.
[33] Goodwin-Gill and McAdam, *The Refugee in International Law*, 157.
[34] *El-Ali v Secretary of State for the Home Department* [2002] EWCA Civ 1103 [33].
[35]Goodwin-Gill and McAdam, *The Refugee in International Law*, 157-158.
[36]*R. (on the application of Vallaj) v Special Adjudicator* [2001] EWCA Civ 782; [2001] INLR 342.

in existence at present and providing protection or assistance to IDPs. Within the cluster approach of IDP protection, the FAO, established in 1945, is the cluster lead for agriculture; the WHO, established in 1948, is the cluster lead on health; UNICEF, established in 1946 is the cluster lead for education and nutrition and is also the co-lead (with UNHCR and OHCHR) for disaster-induced IDPs.[37] Therefore, an interpretation of Article 1D which ignores its historical context leads to the conclusion that protection efforts provided by the FAO, WHO and UNICEF for IDPs could possibly trigger the application of Article 1D as they were in existence in 1951 and are still providing protection to IDPs in the present time.

(c) '[…] protection or assistance.'

The plain meaning of the word 'or' indicates that those *de facto* refugees who are not receiving either protection or assistance require the alternate protection scheme of the 1951 Convention triggered by Article 1D, second sentence.

4.2 The second sentence of Article 1D: 'When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of the Convention.'

(a) 'When such protection or assistance has ceased for any reason [...]'

The term 'when such protection or assistance has ceased' has been interpreted by Laws LJ in ***El Ali*** as being restricted to the cessation of UNRWA assistance overall. This is on the grounds that it would not have been intended by the drafters to provide

[37] Morris.

such a wide range of rights, as provided in Article 1D, second sentence, unless the class of recipients was clearly set out.[38]

The interpretation in ***El Ali*** ignores the words 'for any reason' which indicates the cessation of UNRWA assistance under any circumstances,[39] including where a Palestinian refugee has left UNRWA's area of operations by choice, where there is interference by the state with the provision of protection or assistance by UNRWA, or where a Palestinian is unable to return to UNRWA's area of operations legally. This reading accords with the historical context of the Convention's drafting, during which the Palestinian problem was treated as a short-term issue. This interpretation is supported by the UNHCR, which has stated that if a person is outside UNRWA's area of operations, he or she no longer enjoys the protection or assistance of UNRWA and therefore falls within the scope of Article 1D.[40] This is supported by the broader purpose of Article 1D, which was intended to ensure continued protection and assistance to Palestinian refugees at all times, either through the distinct framework combining UNCCP and UNRWA or an alternative regime comprised of UNHCR and the Refugee Convention.

Some states are unwilling to accept the application of Article 1D to those who have left UNRWA's area of operations by choice. Such states take the position that Article 1D did not have as its purpose to give individuals a choice between UNRWA benefits and protection under the Refugee Convention. Goodwin-Gill and Akram see this argument as 'weak', considering that the motivation underlying the drafting of Article 1D was the heightened protection for IDPs. To suggest that Palestinians

[38] *El-Ali v Secretary of State for the Home Department* [2002] EWCA Civ 1103 [50]
[39] Goodwin-Gill and McAdam, *The Refugee in International Law*, 158, 159.
[40] UNHCR 'Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees' (October 2009), para 8.

should not be given a choice between assistance or protection ignores the fact that they were recognised as deserving and requiring both.[41]

What is the significance of this discussion for IDPs? The term 'at present receiving' implies that in order to preclude the application of the refugee definition, an individual would have to be within the area of operations of UNRWA at the same time that the question of refugee status arises. Logically, it seems as though these two conditions cannot co-exist. First, being outside of one's country of nationality is a precondition for satisfying the refugee definition, and secondly, according to the Guiding Principles on Internal Displacement, a person does not qualify as an IDP once an internationally-recognised state border has been crossed. An analogous situation arose in the case of ***Dyli v Secrtary of State for the Home Department*** **[2000]**. The question of the applicability of Article 1D arose in the context of an asylum seeker who had available to him protection from UNMIK in his place of origin, Kosovo. The Court held:

> UNMIK operates only within Kosovo, itself part of the Federal Republic of Yugoslavia. Insofar as UNMIK offers assistance to citizens of the Federal Republic of Yugoslavia, it follows that that assistance is not being offered to persons who might otherwise be refugees: they cannot be, because they are not outside their country of nationality. In our view, as they could not in any event be entitled to the protection of the Convention, Article ID does not apply to them.[42]

Generally speaking therefore, and even disregarding its historical context, Article 1D cannot be triggered by IDP protection activities, as the recipients of that protection will have not crossed an international frontier and thus the question of refugee status does not arise.

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[41] Goodwin-Gill and Akram, 'Foreword to Amicus Brief on the Status of Palestinian Refugees Under International Refugee Law', 240.
[42] *Fadil Dyli v. Secretary of State for the Home Department, Appeal No: HX5171799(00TH02186)* [46].

However, one question which remains open is the legal status of an individual who is outside of his country of nationality, but has been internally displaced in the receiving country and is 'at present receiving' protection or assistance from an organ or agency of the UN other than the UNHCR. Although such persons would not, strictly speaking, fall within the description of an IDP within the Guiding Principles,[43] the Guiding Principles do not provide a legal definition of an IDP and furthermore, many such persons would fall within the remit of IDP protection activities provided by international actors. UNRWA, for example, has provided protection to Palestinian refugees in Syria, Jordan, and Lebanon, who are in situations of internal displacement.[44] Thus it is clear that UNRWA extends 'protection or assistance' to IDPs who are technically outside of their country of nationality. Could such 'protection or assistance' be relied upon by a receiving state to trigger the applicability of Article 1D, and thus preclude the granting of refugee status?

Where the individual remains within UNRWA's area of operations, and is 'at present receiving' such protection or assistance, Article 1D is applicable and that individual does not qualify as a refugee. However this is the purpose for which Article 1D was intended and it will only be applicable for the duration of which such protection or assistance is being provided. On the other hand, the term 'at present receiving' indicates that Article 1D is not applicable outside of UNRWA's area of operations. Similarly, for a state that would wish to cast aside a historical interpretation of Article 1D and to apply it on the basis of protection or assistance provided by an agency other than UNRWA, Article 1D would be inapplicable once the individual was outside that agency's area of operations. Where the individual is

[43] UNCHR 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add para 2.
[44] See UNRWA website <http://www.unrwa.org/etemplate.php?id=4> accessed 12 August 2013.

inside the agency's area of operations but outside his country of nationality, there may be an argument (albeit a weak one) that Article 1D has been triggered. However, this would be based on a total disregard of Article 1D's drafting history and thus it is argued that it would fly in the face of Article 31 of the VCLT which sets out that the object and purpose of a treaty has to be taken into account when interpreting a treaty provision. Furthermore, in light of the fact that Article 1D was designed to provide a special status for a specific category of refugees, it would be contrary to the principle of good faith to interpret this Article in a manner that contravenes its original purpose and further narrows the category of those eligible for international protection.

A second issue that is often raised with regard to the meaning of the phrase '[…] when such protection or assistance has ceased for any reason […]' is whether it is necessary to have actually availed of UNRWA's assistance or protection activities to fall within the remit of Article 1D, or is it sufficient to be eligible to receive protection or assistance. This question came before the CJEU in the form of a preliminary ruling in the ***Bolbol*** case, where the Court was asked to interpret Article 1D in its context of forming part of EU law by virtue of Article 12(1)(1) of the Qualification Directive 2004.[45] The Court, referring to the 'clear wording of Article 1D' supported this former interpretation.[46] However, it is submitted that this interpretation was incorrect. The fact that Article 1D applies to a class or category of persons as a whole implies that the wording 'receiving protection or assistance' do not require that a person would receive for himself or his family actual support from the organisation in question. In the same vein, and as was correctly held in ***Bolbol***, registration with UNRWA is not a necessary prerequisite for falling within Article

[45] Council Directive (EC) 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L304/12.
[46] Case C-31/09 *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* [51].

1D.[47] Registration is of a declaratory nature confirming rather than establishing that the individual falls within UNRWA's mandate.[48] Therefore whether or not protection or assistance is actually received is irrelevant – what counts is whether they have the possibility of requesting such protection or assistance.

> *(b) '[…] without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations […]'*

'Such persons' are the persons referred to by the first sentence of Article 1D, which as this chapter has illustrated, is Palestinian refugees receiving protection or assistance from UNRWA. The reference to 'the relevant resolutions adopted by the General Assembly' was a reference to Resolution 194 (III) which states that refugees have the right to be repatriated and compensated for their losses.[49] As no final status talks have commenced, no Palestinian refugee can be described as 'definitively settled' for the purpose of Article 1D until as a group they are repatriated and compensated for their losses.[50] This is reflected by the fact that UNRWA's current mandate towards Palestinian refugees has been extended to June 2014. This further supports the interpretation that Article 1D was intended to apply solely to Palestinian refugees receiving protection or assistance from UNRWA.

[47] Ibid [46].
[48] Takkenberg, 100.
[49] UNGA Res 194 (III) (11 December 1948) UN Doc A/RES/194 (III)
[50] Goodwin-Gill and Akram, 'Foreword to Amicus Brief on the Status of Palestinian Refugees Under International Refugee Law', 243.

(c) '[…] these persons shall ipso facto be entitled to the benefits of this Convention.'

Once outside UNRWA's area of operations, or when protection or assistance has ceased within UNRWA's area of operations, the second sentence of Article 1D will apply. This sentence is open to two interpretations: first, that the individual will automatically be entitled to refugee status, or second, that the individual will be eligible to be considered for refugee status.

In order to determine the correct interpretation of this provision, we must look at the nature of Article 1D. Although it excludes from refugee status those who are in receipt of protection and assistance from UNRWA, and despite the fact that it is placed in the Convention directly before the provisions which regulate inapplicability of, and exclusion from, refugee status (Article 1E and 1F, respectively), Article 1D should not be described as such. Rather, as a contingent inclusion clause,[51] (or a 'suspensive clause'),[52] the basic premise of its second sentence is to set out those Palestinian refugees who will be entitled to the benefits of the Refugee Convention should certain events occur. Its intention was not exclusion from protection, but rather to provide a heightened protection regime to a category of persons who fit the refugee definition and it functions as a type of exception to an exclusion clause.

Thus, Article 1D does not exclude one from refugee status – rather, it provides that refugee status will be automatically granted to Palestinian refugees should certain events occur. However, the UNHCR handbook gives a somewhat different interpretation:

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[51] Goodwin-Gill and McAdam, *The Refugee in International Law*, 153; Susan M. Akram, 'Palestinian Refugees and their Legal Status: Rights, Politics, and Implications for a Just Solution' XXXI Journal of Palestine Studies, 39.
[52] Grahl-Madsen, 263; Takkenberg, 93.

> […] a refugee from Palestine who finds himself outside [the UNRWA area] does not enjoy assistance mentioned and may be considered for determination of his refugee status under the criteria of the Refugee Convention.[53]

The language 'shall ipso facto be entitled to the benefits of the Convention' indicates that those persons, by the very fact alone that their protection and assistance has ceased and their position has not been definitively settled, should automatically qualify as a refugee and be able to invoke those rights set out in the Convention, that is, Articles 3-33. This interpretation is supported by the judgment of Laws LJ in the ***El-Ali*** case and in the interpretation of the CJEU of Article 12(1)(1) of the Qualification Directive in the ***Abed El Karem El Kott*** case.[54] In this sense, the function of the 'ipso facto' language was to provide Palestinian refugees with continuity of protection, albeit under various organisations and instrumentalities. Consequently, those persons shall be considered as refugees.

This interpretation further supports the contention that Article 1D cannot possibly apply to IDPs. Article 1D is clearly designed to provide a privileged position under international law to whomever falls within its scope of application. In the case of Palestinian refugees, there are numerous reasons, as outlined above, why the international community felt a special responsibility towards this category of persons. On the other hand, owing predominantly to sovereignty concerns, the IDP issue has been left to the protection of national governments, which may, but by no means necessarily, be the very entity that has caused a particular group of IDPs to flee in the first place. The latest effort of the international community to create an IDP - protection framework - the Guiding Principles on Internal Displacement – is the soft

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[53] UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (Reedited January 1992) UN Doc HCR/IP/4/Eng/REV.1, para 143.

[54] Case C-364/11 *Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági*, [71]; *El-Ali v Secretary of State for the Home Department* [2002] EWCA Civ 1103 *; Daraz v Secretary of State for the Home Department* [2002] EWCA Civ 1103 [49].

law product of the reluctance of the international community to create 'hard' rights for IDPs. To suggest that IDPs, in a general sense, fall within the scope of Article 1D of the Refugee Convention would give those persons a range of rights far beyond that which was envisaged by the drafters of the Refugee Convention, or indeed what is intended nowadays by the international community. In addition, the fact that refugee status is conferred automatically on those falling within the scope of Article 1D when protection of assistance has ceased is a reflection of the fact that Palestinian refugees were regarded as a group as falling within the refugee definition. IDPs, as a group, do not have many of the necessary criteria for qualification as a refugee, including: (i) IDPs, generally speaking, have not crossed an international frontier; and, (ii) IDPs need not necessarily have fled their place of origin owing to fear of persecution based on race, religion, nationality, membership of a particular social group or political opinion. Thus, based on the rationale underlying the second sentence of Article 1D, it is unlikely that this provision can be triggered by protection provided to IDPs.

5. Conclusion

This chapter has argued that Article 1D applies to persons who were and/or are now receiving protection or assistance from organs or agencies (and their successor bodies) of the UN other than the UNHCR that were in existence at the time the Convention was signed. The historic context of the Convention indicates strongly that the only group of persons to which Article 1D was directed was Palestinian refugees receiving protection or assistance from UNRWA. This includes those who were receiving protection at the time the Convention was completed as well as their descendants and those who have become a concern of UNRWA through General Assembly resolutions or otherwise. When such protection or assistance has ceased for

whatever reason, those persons qualify by that very reason for refugee status and are entitled to the corresponding benefits as set out in the Refugee Convention.

Notwithstanding this interpretation, which is supported by numerous well-established academics, there has been a fear voiced by the UNHCR that involvement with IDPs by agencies of the UN other than the UNHCR could trigger the application by states of Article 1D. However, further examination of Article 1D outside of its historical context leads to the conclusion that it is inapplicable to those who have received protection within their country of origin. This is because the issue of Article 1D's applicability only arises at the same time as the question of refugee status arises, and logically, an IDP cannot be termed as such once outside his country of nationality and eligible to be considered as a refugee. For those who become internally displaced outside of their country of nationality, it is possible that Article 1D could be applied. If the persons in question are Palestinian refugees receiving protection from UNRWA, that is in line with the object and purpose of Article 1D. To interpret Article 1D in this sense as applying to all IDPs receiving protection or assistance from agencies other than the UNRWA would be setting aside entirely the relevance of the drafting history of Article 1D and, as argued by this chapter, it would be contrary to the obligation to interpret a treaty in good faith.

Furthermore, the reference to 'such relevant resolutions' is clearly a reference to Resolution 194 (III), which dealt with the Palestinian issue. There were no resolutions concerning IDPs generally on the UN agenda at that time.

Finally, the bundle of rights granted in Article 1D to those who cease to receive protection from organs or agencies of the UN other than UNHCR could not possibly apply to IDPs. This is because IDPs have not been given legal status and

have not been singled out in international law terms as deserving a special legal regime. This can be contrasted to refugees generally, and Palestinian refugees specifically, the latter of which were presumed to qualify as a group as refugees.

To summarise, Article 1D cannot be triggered by activities of organs or agencies of the UN apart from the UNHCR in the context of the cluster approach to IDP protection. There are two reasons for this. First, and most importantly, the historic context of the treaty leads to the conclusion that Article 1D is only applicable in the context of UNRWA protection or assistance to Palestinian refugees. Secondly, even when the historic context is disregarded, it is illogical to apply Article 1D in the context of inter-agency IDP protection activities for the reasons set out above. It is therefore safe to say that the cluster approach to IDP protection will not, or at least should not, allow states to apply Article 1D outside of its historical context.

CHAPTER 7: CONCLUSION

The aim stated at the outset of this thesis was to explore some of the current challenges in the relationship between the protection of IDPs and international refugee law. Five key challenges were identified in this respect.

The first challenge identified was that of drawing the attention of the international community to the plight of IDPs. As the *travaux préparatoires* of the Refugee Convention illustrate, the drafters were not concerned with the provision of protection within countries of origin. However, the IDP issue gained significant momentum in the post-Cold War era, when the recognition of refugees was no longer seen as a political act highlighting the failure of the country of origin to protect its nationals. In 2014, accounts of the plight of IDPs in Iraq, Gaza, and Syria frequently make headline news, and the focus of 2013 High Commissioner's Dialogue on Protection Challenge was on the protection of the Internally Displaced. In an institutional sense, IDPs are protected under the cluster system by various agencies such as the UNHCR, OHCHR, WFP, UNDP, and UNICEF. In addition, the Special Rapporteur on the Human Rights of IDPs, Professor Chaloka Beyani, is responsible for promoting respect for the human rights of IDPs; engaging in dialogue with governments, NGOs, and other actors; strengthening the international response to internal displacement; and mainstreaming the human rights of IDPs within the UN system.

A related second key challenge in the relationship between IDPs and refugees is the development of an appropriate legal protection framework as regards the former. As chapters 1 and 2 have illustrated, IDPs benefit from protection under International Human Rights Law, International Humanitarian Law, and International Criminal Law. However, this protection is based on their status as human beings, rather than being specific to their

needs as IDPs. In recent years, soft law instruments have been concluded which are of relevance to IDPs, such as the London Declaration of International Law Principles on Internally Displaced Persons, the United Nations Principles on Housing Restitution for Refugees and Displaced Persons ('the Pinheiro Principles') and the Guiding Principles on Internal Displacement. The latter has been referenced in various resolutions of the General Assembly and several states have adopted laws and policies that have been influenced by the Guiding Principles. In addition, IDPs in certain African states can benefit from protection under the 2006 Pact on Security, Stability and Development in the Great Lakes Region and the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. The conclusion of treaties specific to the needs of IDPs is a remarkable step forward, considering that at the time the Guiding Principles were drafted in the mid-1990's, the prevailing opinion was that states would be unwilling or would entirely reject committing to binding obligations *vis a vis* IDPs.

Although this shift in focus to the protection of IDPs is a welcome development, it is not without its drawbacks. As discussed in Chapter 1, examples such as the closing of the Turkey/Iraq border in 1991, the establishment of so-called 'safe havens' in Bosnia in 1992, 'Operation Turquoise' in Rwanda in 1994, and the closure of the Afghanistan/ Pakistan border in 2000 serve to illustrate that the increased support for IDP assistance was to do in large part with a desire to curb refugee flows. Indeed, the curbing of refugee flows inevitably worsens an IDP situation, as such IDPs have no choice but to remain displaced within their states. Thus the third challenge in the relationship between IDP protection and International Refugee Law is ensuring that internal protection is not used as a substitute for asylum.

This challenge is all the more pertinent in light of the practice by states of declining refugee status on the basis that an 'Internal Flight Alternative' is available in the country of origin. Chapter 3 discusses whether this practice could be applied to IDP protection measures and argues that human rights considerations enter the IFA inquiry in two respects; first, insofar as a state is prohibited from engaging in indirect *refoulement*; and secondly, to determine whether effective protection from persecution exists in the IFA. As internal displacement may not necessarily be a form of persecution, effective protection from displacement may not necessarily be a factor in determining the existence of an IFA. Thus refugee status may be declined notwithstanding the fact that an individual may face internal displacement in his country of origin. However for those who will return to their country of origin and be exposed to internal displacement, complementary protection may offer protection from removal and this is discussed in more detail in Chapter 5.

The challenge of ensuring that internal protection is not seen as a substitute for asylum has a second aspect, namely, whether the UNHCR's activities on behalf of IDPs could undermine its primary mandate, that of refugee protection. In this sense, the UNHCR could be perceived by states as an 'actor of protection' where it assists IDPs in a country of origin, and thus refugee status could be denied to persons seeking asylum abroad. In considering the refugee definition in its context, and in line with the obligation to interpret a treaty in good faith to achieve its object and purpose, Chapter 4 has argued that 'that country' cannot be interpreted as anything but the authorities of the state. The UNHCR therefore cannot in law be considered an actor of protection for the purposes of precluding the application of the refugee definition. Nonetheless, there exists jurisprudence supporting a contrary approach, which accepts that NSAs, in certain circumstances, may constitute actors of protection for the purposes of declining refugee status.

The analysis in this thesis reveals that even if the term ‘that country’ is interpreted in a manner that would allow for protection to be provided by a NSA, the UNHCR is lacking certain traits that are essential for it to be considered an actor of protection in this respect. Where UNHCR provides in-country protection, the obligation to protect its nationals is not, as a matter of international law, transferred to the UNHCR and the UNHCR is not endowed with the powers and attributes of the state. In addition, the UNHCR is not in control of the state or a substantial part of the territory of the state. Put simply, the UNHCR is not capable in law as constituting an actor of protection which would preclude the application of the refugee definition.

This thesis also asks whether UNHCR is capable, in fact, of providing such protection. It is impossible to give a definitive exposition as to the standard of protection required by the refugee definition. This is because the standard of protection required is dependent on the nature of the persecution feared. Nonetheless, the operation of a legal system for the detection, prosecution and punishment of persecutory acts is a good indication of whether protection is effective. The UNHCR does not have the capacity or legal authority to operate such a system. Furthermore, UNHCR’s protection efforts are of a transient nature, designed to capacitate states in finding a long-term solution to the IDP problem. Finally, Chapter 4 took into account the practical workings of the cluster approach as a whole and found that protection of the UNHCR is not effective even within an inter-agency framework of protection.

The fourth challenge explored by this thesis focuses on the relationship between internal displacement in the country of origin and eligibility for refugee status and/or complementary protection. As this thesis has shown, IDPs differ from refugees on the grounds that they are not outside their country of origin and because their displacement

may not necessarily be a form of persecution. Where does that then leave a person whose refugee application has failed and faces deportation to his country of origin where he will become internally displaced?

As this thesis has illustrated, a broader customary norm prohibiting removal to cruel or inhuman treatment has yet to be established in international law. Recourse must therefore be had to complementary protection in the form of treaty law. Chapter 5 illustrated that both the substantive and geographical remit of protection from removal provided by the various instruments discussed in this thesis is fragmented. Despite a general consensus that the Refugee Convention is the key international instrument applicable for those who cannot or should not be expected to return to their country of origin, the refugee definition is very narrow and often excludes many in need of international protection. Thus although the powers of the various monitoring bodies discussed in Chapter 5 leave much to be desired, their mere existence provides a safety net for those cases in which the Refugee Convention has been misapplied, and for which there is no further domestic remedy. For those who face internal displacement upon removal, complementary protection is possibly the only means by which this fate can be avoided.

The fifth and final challenge explored by this thesis is whether protection activities on behalf of IDPs from agencies other than UNHCR could trigger the application of Article 1D of the Refugee Convention, which would render the Refugee Convention inapplicable to those persons. This thesis argues that Article 1D cannot be triggered by activities of organs or agencies of the UN apart from the UNHCR in the context of the cluster approach to IDP protection. The historic context of the treaty leads to the conclusion that Article 1D is only applicable in the context of UNRWA protection or assistance to Palestinian refugees. Further, even when the historic context is disregarded, it is illogical to apply

Article 1D in the context of inter-agency IDP protection activities as an IDP will not be outside his or her country of origin and thus the question of refugee status should not arise. It is therefore safe to say that the cluster approach to IDP protection will not, or at least should not, allow states to apply Article 1D outside of its historical context.

This thesis has therefore shown that IDP protection cannot be a substitute for granting refugee status unless it constitutes effective protection from persecution and there is no danger of *refoulement*. However, some challenges remain. The standard set out for the IFA inquiry sets a very low bar in terms of the acceptable living conditions in the IFA. Refugee status could be declined on the basis that there exists a safe place of relocation in the country of origin, notwithstanding the fact that conditions there are dire. Complementary protection, of course, may prevent removal. However, complementary protection generally does not grant any rights apart from the right to stay in a country, so a person may not necessarily be any better off by staying in the receiving state.

Further, this thesis is not the final say on the relevance of internal protection in refugee status determination proceedings. States often employ a wide array of restrictive language and border control measures to justify limiting the number of persons they recognise as refugees. As previously mentioned, there is domestic jurisprudence to the effect that protection from international organisations can preclude the granting of refugee status and thus there remains the possibility that this (highly questionable) line of jurisprudence will be followed in future. However moving forward, the arguments put forward in this thesis will be of valuable assistance to those who wish to contest such an approach, such as refugee advocates, NGOs, and the UNHCR.

The conclusions of this work represent an original contribution to knowledge. In a general sense, the issue of IDP protection has traditionally been neglected, both in factual

terms and in scholarship. This work represents the first legal analysis of the relationship between IDP protection and International Refugee Law. In addition, each chapter of this thesis explores new ground and develops the related literature on the respective topic. For example, Chapter 3 focuses on the controversial issue of the role of human rights considerations in the IFA inquiry and puts forward a new proposal in this respect. Similarly, Chapter 5 analyses the lesser-known jurisprudence of non-European regional bodies such as the IACHR and the ACHPR and the question of UNHCR as an actor of protection as discussed in Chapter 4 has not to date been explored. The discussion in Chapter 6 on the possibility of Article 1D being triggered by the activities of UNHCR on behalf of IDPs also represents an original contribution to existing literature on the topic of Palestinian refugees.

However, this thesis is not without its limitations. First, it is limited in terms of its timespan. The concept of internal protection as a replacement for international protection did not come to prominence until the 1990s and thus the issue that this thesis deals with is only about 25 years old. It is anticipated that future developments will largely impact and build upon this thesis' work. Secondly, there is limited jurisprudence on the concept of internal protection, mainly stemming from the ECtHR, the United Kingdom, Canada, Australia, New Zealand, Germany, and France. Future case law may very well change the position of this thesis, especially in light of the fact that forced displacement, in terms of numbers, is rapidly growing. It will be particularly interesting to see how the jurisprudence on non-removal cases concerning those with poor health will be developed by the European Court of Human Rights and how the concept of 'actor of protection' within the EC Qualification Directive will be interpreted in future. Thirdly, this thesis is primarily of a legal nature and does not discuss in detail the logistics involved in the relationship between the protection of IDPs and International Refugee Law. This is because the author is of a

legal background and is thus more suited to conduct an analysis of this nature. In addition, to comprehensively take into account logistical considerations would expand the results of this research far beyond that which would fit into a doctoral thesis. For the sake of completeness, logistical considerations are nonetheless briefly discussed in the literature review in Chapter 1 and policy reports are referred to throughout the thesis in order to assess the effectiveness of IDP protection on the ground.

This thesis has also provoked some interesting questions that, owing to time constraints and their overall relevance to this thesis' core question, have not been explored in detail but would nonetheless be suitable for further research. Such questions include whether the right to freedom of movement under international law entails that internal displacement is in itself a human rights violation. In addition, it would be interesting to explore the question of whether the denial of refugee status owing to the availability of internal protection by clans is compatible with the Refugee Convention. This thesis has also left open for further research the broader topics of non-*refoulement* resulting in exposure to socioeconomic rights violations, the role of international organisations in the protection of human rights, and accountability for human rights violations where statehood is contested. The latter topic will be the focus of this author's postdoctoral research.

This work has shed light on the legal implications of the activities of various stakeholders in IDP protection and will be highly relevant to their work. In particular, the Refugee Status Determination Unit at UNHCR has already shown significant interest in this research and has requested a copy of this thesis once completed. This thesis has also questioned various bases upon which states deny or may deny refugee status and will thus be of interest to adjudicators in refugee status determination proceedings, policy-makers, and refugee advocates.

At a time where there are more than 33.3 million IDPs in the world, it is unfortunate that an analysis of this nature has not been carried out to date. The nature of the relationship between IDP protection and refugees is thus timelier than ever and it is anticipated that this work has laid the foundation for further debate on this topic.

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