

Refugees and Internally Displaced Persons: Examining Overlapping Institutional Mandates of the ICRC and the UN High Commissioner For Refugees

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[I]n an age when we hear so much of progress and civilisation, is it not a matter of urgency, since unhappily we cannot always avoid wars, to press forward in a human and truly civilised spirit the attempt to prevent, or at least alleviate, the horrors of war?¹

I. INTRODUCTION

While most armed conflicts previously took place on the international plane, today most conflicts are internal,² pitting Government forces against non-state actors like rebels and militia. Nonetheless, these conflicts still lead to the large-scale displacement of men, women, and children seeking sanctuary in neighbouring states. However, the nature of forced migration is increasingly changing, as increasing numbers of people are forced to seek sanctuary within the borders of their own state, as internally displaced persons (hereafter 'IDPs'). This largely stems from the non-admission, expulsion and return of refugees by States who refuse to offer safe haven.³ Together, these two forces—internal conflict and closure of asylum doors—have turned IDPs into the 'fastest growing group of uprooted persons in the

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1 Jean Henry Dunant, founder of International Humanitarian Law, quoted by Gretchen Kewley 'Law in War' (1985) 59 *Law Institute Journal* 433 at 437.

2 See Preamble *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. (entered into force 7 December 1978) (hereafter 'Additional Protocol II'), acknowledging 'about 80% of the victims of armed conflicts since 1945 have been victims of non-international conflicts . . . fought with more cruelty than international conflicts.'

3 See IRIN Web Special on Internal Displacement, 'Legal Basis of the Guiding Principles', available at the website of the IRIN at <http://www.irinnews.org> (visited 9 April 2003). Francis Deng, the Representative of the UN Secretary-General on IDPs in an interview admits 'there are a number of governments who are not opening [asylum] doors, and this is the challenge for the United Nations and the international system' for economic, political and or racist reasons.

world'.⁴ Without specifically mentioning IDPs, the United Nations General Assembly in 1992 noted 'with concern':

The number of refugees and *displaced persons* of concern to the High Commissioner, as well of other persons whom her office had been asked to extend assistance and protection, has continued to increase and that their protection continues to be seriously jeopardized in many situations as a result of . . . threats to their physical security, dignity and well-being, and lack of respect to their physical security, dignity and well-being, and lack of respect for fundamental freedoms and human rights.⁵

At the end of 2001, UNHCR reported some 5 million IDPs.⁶

Like their refugee counterparts who receive legal protection in third States, IDPs also need protection against human rights and other abuses committed within their home States. However, as the UNHCR notes, there is a primary dilemma:

[IDPs] often face a far more insecure future. They may be trapped in an ongoing internal conflict, without a place of safety to stay. The domestic government, which may view the uprooted people as enemies of the state, *retains ultimate control over their fate*. There are no *specific international instruments covering the internally displaced*, and general agreements such as the Geneva Conventions are often difficult to apply. Until now, donors have been reluctant to intervene in internal conflicts and help this group.⁷ (*emphasis added*)

Deborah Perluss and Joan F. Hartman express similar sentiments and while comparing the plight of IDPs with their refugee counterparts add:

Unlike a refugee, a person fleeing from internal armed conflict does not seek to disestablish his ties of nationality or allegiance to

4 See UNHCR, 'Refugees by Numbers 2001 Edition', available at the website of the UN High Commissioner on Human Rights at <http://www.unhcr.ch> (visited 13 May 2002).

5 Preamble to UNGA Doc. A/RES/47/105, adopted at the 89th Plenary Meeting, 16 Dec 1982. Similarly, United Nations, 'More Information/Humanitarian Affairs' available at the website of the United Nations at <http://www.un.org> (visited 25 March 2003) acknowledges 'in the last decade, civil wars have become a central cause of emergency situations. In 1999 alone, millions were uprooted from their homes by war-1.2 million in Angola, 850,000 in Kosovo, 750,000 in Ethiopia and Eritrea, 550,000 in East Timor, 200,000 in Chechnya and countless more in other conflicts around the world'.

6 UNHCR, *Statistical Yearbook: Refugees, Asylum-seekers and Other Persons of Concern-Trends in Displacement, Protection and Solutions*, (2002) (hereafter 'UNHCR Statistical Yearbook') at 22.

7 See UNHCR, 'UNHCR and the internally displaced: questions and answers', available at the website of the UNHCR at <http://www.unhcr.ch> (visited 14 August 2002).

his country on a temporary or permanent basis ... [The] need for relief, and therefore temporary refuge, lasts only until the government can [guarantee] ... *de facto* protection.⁸

To ameliorate the suffering of victims of war, civil strife or conflict, two agencies were established—the International Committee of the Red Cross (hereafter ‘ICRC’) in 1863, and the United Nations High Commissioner for Refugees (hereafter ‘UNHCR’) in 1950.⁹ The difference between the two lies mainly in their nature. The UNHCR, an agency of the United Nations (hereafter ‘UN’), is a public international organization over which Governments have direct influence.¹⁰ In contrast, the ICRC is a unique private international organization. It is neither an inter-governmental organization nor UN organ but notwithstanding this, Governments have conferred upon it an international mandate,¹¹ distinguishing it from other NGOs. Both agencies pursue humanitarian goals, which is central to their mandate. The UNHCR is mandated to protect refugees—persons who have fled across boundaries into third States to escape from persecution.¹² In contrast, the ICRC’s original mandate was to protect victims of international armed conflicts,¹³ whether they had crossed an international frontier or not. In 1977, this mandate was extended through Additional Protocol II, Relating to the Protection of Victims of Non-International Armed Conflicts¹⁴ (hereafter ‘Additional Protocol II’) to internal wars.¹⁵

8 Deborah Perluss and Joan F. Hartman ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 Virginia J. of Int’l L. 551, at 597–598.

9 See art 1 of the *Statutes of the International Committee of the Red Cross* underscoring that the ICRC is a ‘humanitarian organization’. Similarly, art 1 of the *Statute of the Office of the United Nations High Commissioner for Refugees*, adopted by General Assembly Resolution 428 (V) of 14 December 1950 (hereafter ‘UNHCR Statute’), describes UNHCR mandate ‘to provide international protection ... to refugees ... and [seek] permanent solutions for [this] problem ... by assisting Governments and, private organizations to facilitate the[ir] voluntary repatriation ... , or assimilation within new national communities’.

10 Art 1 of the UNHCR Statute states: ‘The [UNHCR], acting under the authority of the General Assembly, shall assume [its] function[s] ... under the auspices of the [UN] ...’.

11 See ICRC, *International Humanitarian Law: Answers to your Questions* (Geneva: ICRC Productions) at 2 declaring the ICRC’s ‘mandate was handed down by the international community’.

12 See UNHCR Statute, arts. 1 and 6 (ii); United Nations *Convention Relating to the Status of Refugees* 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954) (hereafter ‘Refugee Convention’), art 1 (A)(2); and its attendant *Protocol relating to the Status of Refugees* 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967) (hereafter ‘Refugee Protocol’), art 2.

13 See the four Geneva Conventions of 12 August 1949.

14 8 June 1977, U.N.T.S. 1125, (entered into force 7 Dec 1978).

15 See also Preamble to Additional Protocol II acknowledging: ‘The only provision applicable to non-international armed conflicts before the adoption of the [Additional

The UN was established primarily to protect and safeguard all human beings on earth 'from the scourge of war' which twice-brought 'untold sorrow' and human suffering.¹⁶ However, specific reference to IDPs as a special category of displaced persons was only made in 1992. Previously, IDPs were lumped together with refugees¹⁷ who are protected by specific international treaties. This left IDPs without any effective international protection or national protection where their home state was unwilling or unable to protect them. Unlike refugees who receive international protection, IDPs were treated as falling within the 'internal affairs' of a sovereign state,¹⁸ reflecting the international community's reluctance to intervene. Nonetheless, the international community will today intervene in conflicts to prevent acts that threaten international peace and security,¹⁹ which may stem from gross human rights violations and property destruction. In this connection, various UN General Assembly Resolutions dating from 1992²⁰ have conferred a selective limited mandate to undertake humanitarian assistance and provide protection to IDPs upon the UNHCR. Hence, protecting IDPs is a 'logical extension' of its general work with refugees.²¹ Practically, it would be odd for the UN established UNHCR to assist only displaced persons who have crossed international borders but not those seeking refuge within

Protocol II] was art 3 common to all four Geneva Conventions This Article proved to be inadequate in view of the fact that about 80% of the victims of armed conflicts since 1945 have been victims of non-international conflicts

- 16 See preambles to *UN Charter and Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No 13, UN Doc. A/810 (1948) (hereafter 'UDHR').
- 17 For instance, see UN General Assembly quoted at *supra*, note 6.
- 18 For a further discussion of this principle, see Part IV.
- 19 See generally, UN Charter Chapter VII. The power to intervene was exercised, for instance, when the Iraqi government attacked the Kurds after the first Gulf War (1991), during the Rwanda genocide (1994) and war in the former Zaire (1996).
- 20 In discussing the juridical status of General Assembly resolutions, the US State Department asserted: As a broad statement of U.S. policy in this regard, I think it is fair to state that General Assembly resolutions are regarded as recommendations to Member States of the United Nations. To the extent, which is exceptional, that such resolutions are meant to be declaratory of international law, are adopted with support of all members, and are observed by the practice of states, such resolutions are evidence of customary international law on a particular subject matter. Quoted in David J. Harris, *Cases and Materials on International Law*, 4th ed. (London: Sweet and Maxwell, 1991) at 63.
- 21 UNHCR itself acknowledges assisting 'several millions' IDPs over the years albeit a specific formal IDP mandate. See UNHCR, 'Protecting Refugees: Questions and Answers', available at the UNHCR website at <http://www.unhcr.org> (visited 6 December 2001). See also Elizabeth E. Ruddick 'The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced' (1997) 77 (2) Boston Univ. L.R. 429 arguing that notwithstanding a formal IDP mandate the UNHCR 'acted pursuant to its flexible, extra-statutory "good offices" powers to bring IDPs within its area of concern' (at 431).

national borders and equally susceptible to conflict and human rights violations.²²

This article investigates the overlapping institutional and operational mandate of the UNHCR and ICRC with regard to IDP protection, and asks whether the 'gap' in protection has been adequately addressed. Notably, international refugee law and international humanitarian law²³ (hereafter 'IHL') were originally directed at situations of inter-state conflicts and towards trans-border population movements. This article argues that the previous paradigm cannot accommodate the fact that there are displaced vulnerable people trapped in internal armed conflict situations who need protection. Part II analyses the changing nature of the refugee problem from the Cold War era (inter-state conflict) to contemporary problems caused by internal armed conflicts. Whilst this article is located in the broader area of the problem of forced migration, it argues that international refugee law was not designed to cater for certain aspects of this flow. Part III, addressing state attitudes towards the plight of IDPs, demonstrates that unlike the Cold War era practice of offering asylum to persons fleeing from persecution, contemporary state practice has shifted towards the non-admission of potential refugees. Such practices not only force victims of persecution to seek protection within their home states, but significantly increases the size and suffering of the global IDP population. Part IV identifies inadequacies in the existing legal framework and programmes adopted by the ICRC and UNHCR to meet this problem. Generally, humanitarian intervention within a state is contingent upon that state's consent, in respecting state sovereignty.²⁴ The principle of state sovereignty is discussed in relation to possible arguments that humanitarian intervention by the ICRC and UNHCR should be allowed. Part V evaluates the Guiding Principles on Internal Displacement, a cross-fertilization between IHL and international refugee law. Part VI concludes by evaluating the existing standards and recommends increased cooperation between the two agencies in their quest to protect IDPs.

II. CHANGING NATURE OF THE REFUGEE PROBLEM: FROM THE COLD WAR TO CONTEMPORARY PROBLEMS

Originally, the UN Convention Relating to the Status of Refugees²⁵ (hereafter 'Refugee Convention'), drafted after an inter-state war,

22 See also *UDHR* art 16 guaranteeing 'everyone' the 'right to seek and enjoy . . . asylum from persecution' in third states.

23 Until Additional Protocol II.

24 Pursuant to UN Charter art 2(7).

25 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954).

contained provisions that only related to refugees whose situation was caused by pre-1951 events in Europe.²⁶ However, subsequent events, especially in Africa during the late 1950s and 1960s, necessitated the removal of this temporal and geographical limitation to allow a broader application of this convention. However, the contemporary shift from inter-state towards internal armed conflict has necessitated the drafting of pragmatic documents to meet this new situation. This section traces this development and Refugee Protective Treaties that have arisen in relation to the era of internal armed conflict to protect refugees and IDPs. It also discusses the meaning of the term ‘protection’, which repeatedly appears in ICRC and UNHCR Instruments but is not formally defined.

A. *From Cross-border Refugees to Attempts at Protecting Internally Displaced Persons*

The term ‘refugee’ referred initially to two categories of individuals. First, those recognised as refugees by the pre-1950 legal framework.²⁷ Secondly, any person who:

as a result of events occurring before 1 January 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country; or not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁸

The temporal and geographical limitations were written into the Refugee Convention since European states, then recovering from World War Two, were reluctant to saddle themselves with uncertain refugee influxes in the post World-war II era.²⁹ However, the global persistence of this problem after 1951, particularly stemming from

²⁶ Refugee Convention arts. 1A(2) and 1B(1).

²⁷ For a complete catalogue see UNHCR Statute (art 6A(i)) and Refugee Convention (art 1A(1)).

²⁸ Refugee Convention art 1A(2) and High Commissioner’s Statute art 6(ii).

²⁹ See, Paul Weis ‘The International Status of Refugees and Stateless Persons’ (1956) 1 *Journal du droit International* 4 citing a Report of the *Ad Hoc* Committee on Refugees and Stateless Persons, which drew up the Convention UN Doc E/1618, p. 38, which stated: ‘It would be difficult for Governments to sign a blank cheque and to undertake obligations towards future refugees, the origin and number of whom would be unknown’ (at 30).

the African wars of independence in the late 1950s and 1960s, necessitated a removal of these limitations.³⁰ For the Refugee Convention to remain relevant and apply as a universal treaty, it had to change its Euro-centric³¹ orientation. Consequently, the 1967 Protocol Relating to the Status of Refugees³² (hereafter 'Refugee Protocol'), was adopted³³ to enable the Refugee Convention to cater to new refugee situations on a universal basis.

Later refugee protective treaties, particular regional ones, displayed a realistic appreciation of altered armed conflicts patterns. Two examples may be cited, which both contain a more pragmatic definition of the term 'refugee'. First, the 1969 African Convention Governing the Specific Aspects of Refugee problems in Africa³⁴ (hereafter 'OAU Refugee Convention') recognised internal wars and civil strife as root causes of forced migration. Article 1(2) of the OAU Refugee Convention defined 'refugee' to include:

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 or origin or nationality.

Secondly, in 1984 certain Latin American States in the Cartagena Declaration on Refugees³⁵ (hereafter 'Cartagena Declaration') drew

30 There is a great deal of academic writing expressing similar sentiments see, for instance: Atle Grahl-Madsen 'The Emergent International Law Relating to Refugees: Past-Present-Future' in Institute of Public International Law and International Relations of Thessaloniki, *Refugee Problem on Universal, Regional and National Level*, ed., Vol. XIII (Thessaloniki, 1987) 169 at 190; Paul Weis 'The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties' (1967) *British YBIL* 39 at 40; Paul Weis 'The Office of the United Nations High Commissioner for Refugees' *Revue de Droit International et Compare* 243 at 247.

31 See, Goran Melander, 'Further Development of International Refugee Law' in Institute of Public International Law and International Relations of Thessaloniki, supra note 31, 473 at 484 arguing stating: 'The [Refugee] Convention was considered to be a European agreement, which dealt with a European problem. The African states wanted to draw up an instrument, which took into consideration the fact that in Africa there were new categories of refugees who were compelled to leave their country of origin without being persecuted for reasons mentioned in the 1951 Refugee Convention'.

32 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 Oct 1967).

33 See art 1(2).

34 Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10 Sept 1969) (entered into force 20 June 1974).

35 Adopted at a colloquium entitled: 'Coloquio Sobre la Proteccion Internacional de los Refugiados en American Central, Mexico y Panama: Problemas Juridicos y Humanitarios' held at Cartagena, Colombia from 19-22 November 1984. For an excellent comparison between the Cartagena Declaration and OAU Refugee Convention 'refugee' definitions see Eduardo Arboleda 'Refugee Definition in Africa and Latin America' (1991) 3 (2) *Int'l J. of Refugee Law* 185.

upon their 'experience' with mass influx in this region. They argued, 'it was necessary to enlarge' the definition of the term refugee beyond the Refugee Convention and Protocol and incorporate internal conflict as a root cause of forced migration. Whilst acknowledging the OAU Refugee Convention definition as a suitable 'precedent' the Cartagena Declaration defined 'refugee' more expansively to include:

persons who had fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, *internal conflicts*, massive violation of human rights . . .³⁶
(*emphasis added*)

Attempts to create a formal international mandate for IDPs began in earnest³⁷ in 1992, when the UN Economic and Social Council³⁸ (hereafter 'ECOSOC'), drew a distinction between IDPs and refugees, describing the former as:

persons who have been forced to flee their homes, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters.³⁹

Three characteristics of the IDPs may be identified from this. First, the involuntary or forced nature of the IDP movement is

³⁶ Art III(3).

³⁷ This process may be traced back to 1990 when ECOSOC under UN Charter art 62(2) which mandates it to 'make recommendations [to the UN General Assembly] for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all', requested the UN Secretary-General to: 'initiate a United Nations system-wide review to assess the experience and capacity of various organizations in the coordination of assistance to all refugees, displaced persons and returnees and, on the basis of such review, to recommend ways of maximizing cooperation and coordination among various organizations of the United Nations system in order to ensure an effective response to the problems of refugees, displaced persons and returnees.' See Note by the Secretary-General, 'Internally Displaced Persons', UN doc. GA/48/579 (9 Nov 1993).

³⁸ ECOSOC is one of the principal organs established by the UN under art 7(1) UN Charter. Article 62 of the UN Charter outlines four functions of the ECOSOC:

- (1) [M]ake or initiate studies and reports [focussing] on international economic, social, cultural, educational, health and related matters . . .
- (2) [M]ake recommendations for the purpose of promoting respect for, observance of, human rights and fundamental freedoms for all.
- (3) [P]repare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.
- (4) [C]all . . . international conferences on matters falling within its competence.

See also Chapter X UN Charter, for its Composition, Voting rights and Procedures.

³⁹ Francis Deng 'The International Protection of the Internally Displaced' (1995) special issue *International Journal of Refugee Law* 74 at 76. See also UN Charter art 62(2) mandating ECOSOC to 'make recommendations [to the UN General Assembly] for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'.

acknowledged. Second, the major root causes of this displacement stems from armed conflict, internal strife, systematic human rights violations and natural or human-made disasters. Third, IDPs are located *within* the confines of their *own* country. A Representative of the UN Secretary-General on IDPs (hereafter 'IDP Representative') was appointed in 1992 and in 1998, after various discussions and improvements,⁴⁰ defined IDP thus:

persons or groups of persons who have been forced or obliged to flee or leave their homes of habitual residence, in particular, as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violation of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.⁴¹

The IDP Representative's definition is similar to the ECOSOC one. As Parts V and VI demonstrate, this definition is gradually gathering force of law through application by States and other agencies seeking to ameliorate the plight of IDPs.

B. 'Protection' within the Ambit of UNHCR and ICRC operations

The UNHCR and ICRC predominantly discharge their refugee mandate through 'protection', a term repeatedly used but not formally defined in the working and statutory languages of these agencies.⁴² Even so, what amounts to 'protection' in Europe or Africa may differ in Asia today or America tomorrow. 'Protection' is a term of art rather than a legal expression capable of precise definition. Its meaning, however, will change depending on who is being protected and where they are located. While this flexible understanding allows the accommodation of unforeseen contingencies, the lack of certainty creates a fear that the term may be abusively deployed. Nonetheless, at least two elements of 'protection' can be identified. The first may be derived from the two agencies' working language. For example, the ICRC considers

... "to protect" implies preserving victims of conflicts who are in the hands of an adverse authority from the dangers, sufferings and

40 See Note by the Secretary General, 'Internally Displaced Persons', UN doc. GA/54/409 (29 Sept 1999) chapter II.

41 Principle 2, Guiding Principles on Internal Displacement, 1998 (hereafter 'Guiding Principles').

42 See ICRC statute art 4 and UNHCR statute art 1.

abuses of power to which they may be exposed, defending them and giving them support.⁴³

The second draws upon a general reading of Refugee Treaties, and the additional Protocols⁴⁴ to the 1949 Geneva Conventions. The term ‘protection’ by inference means employing legal and administrative mechanisms to guard and preserve the vulnerable lives of human beings against the dangers arising from ‘military operations’⁴⁵ and natural causes. Minimally, ‘protection’ requires the maintenance of human life to a level that is as normal as possible, regardless of whether an individual fleeing persecution is situated within their native state or is within a third state.

With respect to refugees, perhaps the rights generally accorded to citizens may be an appropriate standard to use in evaluating what ‘protection’ requires in concrete terms, excepting specific citizens’ rights.⁴⁶ It is unlikely, though, that the drafters of the Universal Declaration of Human Rights (hereafter ‘UDHR’) had in mind refugees when drafting the text. Even so, an analogy can be drawn from the Refugee Convention read together with the UDHR in terms of minimal protective rights to a refugee. Namely, rights and freedom to life, religion, marry and found a family, nationality, and seek and enjoy asylum; and prohibition against *refoulement*,⁴⁷ torture, arbitrary arrest rape, forced prostitution and indecent assault of women, torture, blackmail and bribery, and slavery. Admittedly, events causing refugees and internal displacement are quite similar. Analogically, IDPS should minimally be granted protection, before, during and after flight, but without the application of the *non-refoulement* principle as they remain within their home state borders. However, a potential problem may arise with regard to IDPs. The Refugee Convention relates to obligations of the international community and the host (third) state, while IDPs may actually be victims of the home State or non-State actors therein. If the home State is unable or unwilling to provide aid or protection, this creates a gap. The situation may further be complicated by state sovereignty issues, discussed in Part IV.

43 ICRC ‘The ICRC, the League and the Report on the Re-Appraisal of the Role of the Red Cross’ (March–April 1978 to January–March 1979) Int’l Rev. of the Red Cross 1.

44 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* 8 June 1977, 1125 U.N.T.S. (entered into force 7 Dec 1978) (hereafter ‘Additional Protocol I’) and Additional Protocol II.

45 See Additional Protocol I art 51.

46 For instance, rights to social security, free public education, property ownership, and issuance of passports.

47 That is, prohibition against forceful expulsion or return of a refugee to their state of origin where they face threats of persecution (Refugee Convention art 33).

III. DOMESTIC POLITICS AND ASYLUM: FROM ADMISSION TO “KEEP-OUT” POLICIES AND PRACTICES

This section examines policies that have been advanced or adopted in Western States facing an influx of asylum seekers, to justify denial of entry into their territory. Such policies and practices, crafted by domestic politics, directly affect the global IDP population. First, the Australian ‘Interception and Deflection’ policy is examined, followed by the French and Dutch ‘we are overloaded’ argument.

A. *Interception and Deflection Policies: The Australian case*

What is today known as the ‘Tampa’ saga⁴⁸ in Australia refers to the problem of unauthorised boat arrivals, which began on 26th August 2001 with Australia’s refusal to accept 438 people rescued at sea (hereafter ‘rescuees’),⁴⁹ by a Norwegian-registered container ship, MV *Tampa* (hereafter ‘Tampa’). Subsequently, a standoff ensued between Australia and Norway. Australia insisted the rescuees be returned to Indonesia—their original port of departure. Norway’s considered that Australia was morally obliged to take them in. After all, it was where the rescuees indicated they wished to go to seek asylum as refugees. While public interest litigants—among them the Victorian Council for Civil Liberties Incorporated and the Human Rights and Equal Opportunities Commission—brought proceedings against the Government, the standoff was internationally resolved through adopting the ‘Pacific Solution’.

Prior to the *Tampa* saga, Canberra allowed asylum seekers arriving by boat to land in Australian territory where their asylum claims were processed. Under the ‘Pacific Solution,’ asylum seekers are no longer allowed to set foot onshore. Instead, boats are intercepted at sea and asylum seekers trans-shipped to neighbouring Pacific States such as Nauru and Papua New Guinea (hereafter ‘PNG’), for claim processing. The Australian Government is of the opinion that this will deter

48 For a full text of the case see: *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297 (11 Sept 2001) overruled by *Minister for Immigration and Multicultural Affairs and Others v Victorian Council for Civil Liberties Incorporated and Others* [2001] FCA 1329 (18 Sept 2001). See also the final appeal to the High Court, *Minister for Immigration and Multicultural Affairs and Others v Victorian Council for Civil Liberties Incorporated and Others* [2001] FCA 1865 (21 Dec 2001).

49 Justice North, *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297 (11 Sept 2001), coined this term, as a neutral term, to describe the 438 people rescued from the MV *Tampa*.

illegal migration⁵⁰ or 'queue jumpers'.⁵¹ Further, even those found to be genuine refugees are not automatically admitted into Australian territory.⁵² They may be sent to other States willing to admit them as refugees. When Australia sent a message to other states to share this burden,⁵³ only Ireland and New Zealand responded positively pledging to take only 150⁵⁴ and 50⁵⁵ rescuees respectively. This remains a drop in the bucket considering, as of February 2002, there were 446 detainees in Manus Island, PNG and 1118 in Nauru.⁵⁶

The Pacific Solution is best understood from a political dimension. 2001 was an important elections year in Australia. Before the *Tampa* saga, opinion polls revealed that Prime Minister Howard's Government trailed the opposition in terms of popularity. Justice North, of the Federal Court, handed down the first decision in the Tampa case, instituted by the Victorian Council for Civil Liberties Incorporated on behalf of the rescuees,⁵⁷ on September 11 hours before the terrorist attacks in the USA. As Mary Crock and Ben Saul argue, 'the disaster might not have come at a worse time for Australia's boat people,

50 See Department of Immigration, Multicultural and Indigenous Affairs, 'Offshore Processing Arrangements' Fact Sheet No.76, 14 February 2003, on the number of 'unauthorised' boats that have been stopped from reaching mainland Australia since the *Tampa* saga.

51 This is a term coined by the Australian Government to denote those who do not lodge their asylum applications off-shore, or follow the queue so to speak. Since Australia has set aside only 12 000 asylum spaces annually, it means that for every boat person granted refugee status, it is one position less for a (genuine) asylum seeker, 'applying from offshore . . . waiting patiently, in the Minister's mind at least, in some squalid and crowded [refugee] camp'. See P Mares quoted by U.S. Committee for Refugees, *Australia: Sea Change: Australia's New Approach to Asylum Seekers*, <http://www.refugees.org/downloads/Australia.pdf> (visited 4 May 2002). See also Steve Liebmann in an interview with Prime Minister John Howard, *The Today Show*, Channel Nine, 25 January 2002, where PM Howard claims that owing to the Pacific Solution people smugglers were finding it more difficult to convince people that it is easy to come to Australia illegally.

52 See Oxfam Community Abroad, 'Adrift in the Pacific: The Implications of Australia's Pacific Refugee Solution' (2002) (hereafter 'Oxfam Report') 15.

53 This was pursuant to the Refugees Convention's foundational principle of 'burden sharing'. Preamble to the Refugee Convention acknowledges, 'the grant of asylum may place unduly heavy burdens on certain countries', hence proposes 'international cooperation' as a practical measure to 'distribute' the load. It is interesting, though, to realise that the Australian Government applies the Refugee Convention selectively. Whilst it reminds other States of their 'burden sharing' obligations under the Refugee Convention, via the Pacific Solution it goes against one of the fundamental principles of this very Treaty and UDHR, the right to asylum (see also UDHR art 14 guaranteeing *everyone* the right to 'seek and enjoy asylum').

54 See Oxfam Report, *supra*, note 54 at 11.

55 *Ibid* at 15.

56 Department of Immigration, Multicultural and Indigenous Affairs, 'Offshore Processing Arrangements' Fact Sheet No.76, 2 January 2002.

57 *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297 (11 Sept 2001).

many of whom were Afghani nationals'.⁵⁸ Within hours, Washington accused Osama bin Laden and his *Al Qaeda* terrorist movement, and the Afghani Government Taliban regime, a Muslim group and Islamic State respectively, for the attacks. Muslims under public perception were generally labelled 'terrorists' and viewed suspiciously, evaporating any sympathy the rescuees may have elicited from the Australian public prior to 9-11. Over night, they were transformed from persecuted victims of the brutal Taliban regime, to potential terrorists and *Al Qaeda* members. Not surprisingly, a majority of polled Australian respondents considered that boat people increased the risks of terrorism.⁵⁹ Eventually, this series of events culminating with the Pacific Solution that significantly contributed to PM Howard's third term in office.

Notwithstanding the political gain, the Pacific Solution was not without monetary cost to Canberra. To make it work, co-operating Pacific states like PNG and Nauru were offered financial inducements or 'bribery'⁶⁰ to influence their decision to accede to Canberra's request to use their territories as asylum processing points. Under a financial aid smokescreen, Nauru was paid 15 million Australian Dollars and PNG ten million Australian Dollars. Anthony Audoa, a Nauru Independent MP, puts the situation in stark economic terms:

I don't know what is behind the mentality of the Australian leaders, but I don't think it is right. A country so desperate with its economy, and you try to dangle a carrot in front of them, of course, just like a prostitute . . . if you dangle money in front of her, you think she will not accept it. Of course she will, because she is desperate.⁶¹

In addition, Canberra also bore all financial costs including provision of food, medicine, construction of make-shift (detention) camps, and any other incidental costs.

In the name of fighting terrorism the Australian Government stiffened its stance against asylum seekers. But it did not stop here. It demonized them, claiming that some Iraqi boat people had thrown their babies overboard to 'blackmail' Australia into granting them asylum. Reacting to this PM Howard angrily told talkback radio:

58 See Mary Crock and Ben Saul, *Future Seekers: Refugees and the Law in Australia* (Sydney: Federation Press, 2002) at 38.

59 *Ibid.*

60 See for instance, Kalinga Seneviratne, 'Rights: Australia set to Back Down on Refugee Policy', available at Oneworld.net website at <http://www.oneworld.net/article/frontpage/10/3> (visited 23 April 2002) 1.

61 Mark Metherell and Michell Grattan, 'Pacific Solution 'treats nations like Prostitutes'', available at The Sydney Morning Herald website at <http://www.smh.com.au/> (visited 30 April 2002).

We don't want people who seek to come to this country illegally to be able to do so. I can't comprehend how genuine refugees would throw their children overboard.⁶²

However, this claim has since been established to be false. Reacting to the Tampa affair and September 11 terrorist attacks, Canberra further pushed legislation⁶³ through Parliament, 'to validate the actions taken by the Australian authorities in the course of the Tampa affair and to radically strengthen the powers of the Australian authorities to intercept and deflect potential asylum seekers'.⁶⁴ Collectively this legislation substantively amended the Migration Act, (Cth), 1958, and its Regulations and created a somewhat new Asylum regime.⁶⁵ For instance, the 2001 Migration Amendment (Excision from Migration Zone) Act removed the Australian Islands, such as Christmas and Cocos Islands, from Australia's migration zone. Thus, if an asylum seeker lands on any of these Islands he or she is deemed to be outside Australian territory for migration purposes.

B. 'We are Overloaded' European Argument

During the 2002 French Presidential national elections, one of the reasons that made extreme right-wing candidate Jean Marie Le Pen a formidable political force was the anti-immigration policy he espoused. Just like the racist 'white Australian policy'⁶⁶ Le Pen

62 See, Bob Burton, 'Australia: After U.N. Ruling, Government still drags its feet on Refugees', *Inter Press Service*, April 10, 2002, 1, available at Lexisnexis website at <http://www.lexisnexis.com.au> (visited 9 April 2003).

63 Namely *Migration Amendment (Excision from Migration Zone) Act 2001*; *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act*, (Cth), 2001; *Migration Amendment (Excision from Migration Zone) Act*, (Cth), 2001; *Migration Legislation Amendment Act (No. 6)*, (Cth), 2001; *Migration Legislation Amendment Act (No. 1)*, (Cth), 2001; *Migration Legislation Amendment Act (No. 5)*, (Cth), 2001; *Border Protection (Validation and Enforcement Powers) Act*, (Cth), 2001; and *Migration Legislation Amendment (Judicial Review) Act*, (Cth), 2001.

64 Crock and Saul, *supra*, note 60 at 38.

65 For an overview of this 'keep out' legislation see Crock and Saul, *supra*, note 60 at 38–42; U.S. Committee for Refugees, 'Australia Sea Change: Australia's New Approach to Asylum Seekers', (2002), at 35–38.

66 As the name suggests, this century old policy (1855–1958) was aimed at excluding non-white people from Australia. Originally, it targeted Chinese immigrants but was later extended to all 'non-white races'. Peter E Nygh and Peter Butt, *Butterworths Concise Australian Legal Dictionary*, 2ed. (Sydney: Butterworths, 1998) state, 'after 1958, a non-racial immigration policy was introduced: for example *Migration Act (Cth) 1958*, and *Pacific Island Labourers Act (Cth) 1901*' (at 459). For a summary of the evolution of the policy see U.S. Committee for Refugees, *supra*, note 53 at 5. See also Mary Crock, *Immigration and Refugee Law* (Sydney: Federation Press, 1998) discussing the 'dictation test' used to exclude non-white immigrants (at 13 to 19).

promised to immediately end immigration and to expel all immigrants and refugees from France.⁶⁷ Although, he lost miserably to Jacques Chirac in the final round, Le Pen caused a surprise shock by coming second in the first round and in the process defeated political 'heavy weights' such as the incumbent Prime Minister, Lionel Jospin.⁶⁸ A similar picture emerges from the Dutch elections. On 6th May 2002, a Dutch right wing politician, Pim Fortuyn, was murdered nine days prior to the May 15 General Elections. Notwithstanding Fortuyn's racist anti-migration argument that 'Holland is full'⁶⁹ polls tipped his party, Lijst Pim Fortuyn, to 'win up to 28 of the 150 seats'⁷⁰ approximately 19% of Parliament seats and a possible place in a coalition Government. In the end, his party fell short by two seats, winning 26 seats or 17% of the total votes cast.⁷¹

C. Lessons from Western State Practice

These experiences portray a disturbing attitude by traditional refugee-receiving States in the West.⁷² Three facets can be drawn from this State practice. First, use all means persuasive or otherwise to keep IDPs or potential refugees as far away as possible from your territory to gain political mileage or for economic reasons. The name of the game is: do all that it takes to protect our borders from 'invaders' lest, 'they take away our jobs' or 'we admit terrorists'. Little wonder in the local elections in Rotterdam, a port city with a large immigrant population, Fortuyn's party was still able to garner 35% of the total votes cast. Second, for those who try to enter, do not allow them to set foot but rather, bribe third States to admit them, where humanitarian aid will be distributed and asylum claims processed. Third, make it clear to successful claimants that even they will not be automatically

67 See Hugh Schofield, 'Profile: Jean-Marie Le Pen' available at BBC News website at <http://www.bbc.co.uk> (visited 9 April 2003) quoting an interview with reporters where Le Pen asserted 'Massive immigration has only just begun. It is the biggest problem facing France, Europe and probably the world. We risk being submerged'.

68 See BBC News, 'Profile: Lionel Jospin' available at BBC News website at <http://www.bbc.co.uk> (visited 9 April 2003).

69 See BBC News, 'Obituary: Pim Fortuyn' available at BBC News website at <http://www.bbc.co.uk> (visited 9 April 2003).

70 See CNN.Com, 'Dutch election on despite murder' available at CNN News website at <http://www.cnn.com> (visited 8 May 2002).

71 *Ibid.*

72 See, UNHCR, *Statistical Yearbook*, *supra*, note 7 at 62 on the number of asylum seekers admitted in westernised States (1982–2001) under the 1951 Refugee Convention, both at first instance and on appeal. Comparing this trend with that of the refugee population (at 84) and asylum applications submitted (at 60) what is noticeable is failure by Westernised States to respond effectively, by increasing their annual asylum intake to absorb the growing global population of asylum seekers.

admitted into your territory. Such 'keep-out' measures are likely to attract fewer political costs except for the French case, compared to allowing asylum seekers in. A further observation may be made with regard to the changing political climate in Western States. Previously, politicians steered clear of such anti-migration policies lest they be branded 'racist' or 'fascist'. However, these anti-immigration sentiments are now expressed, as part of election campaign promises.

Collectively, these three examples illustrate the increased acceptability of racist policies within the domestic politics of Western States. Today, the international refugee treaties have largely been globalized considering the number of States that have ratified them.⁷³ Therefore, adopting deterrent measures to discourage asylum seekers from a state goes against the grain of two fundamental tenets of international refugee law—the right to seek asylum and the right not to be expelled or returned to territories where an individual may face persecution. Unfortunately, some traditional refugee-friendly developing States have based their refusal to admit asylum seekers on Western State practices. Two examples can be cited in this regard. First, in the wake of the genocide in Burundi and Rwanda, in 1993 and 1994 respectively, Tanzania closed its borders to the prevent entry to hundreds of thousand of asylum seekers. Citing the US interdiction programme preventing Haitian asylum seekers from landing onto US soil, the then Minister of Home Affairs argued that it was a double standard to expect weaker countries to live up to their humanitarian obligations, while major powers did not do so where national interests dictated otherwise.⁷⁴ Secondly, when Pakistan closed its borders to thousands of Afghani asylum seekers⁷⁵ fleeing American artillery after September 11, it drew from the Australian *Tampa* incident. The Pakistani leader, General Pervez Musharraf, asked, perhaps genuinely, if a wealthy State like Australia could refuse to admit less than a handful boat-people, why should a poor State like Pakistan already

73 As at 1 April 2003 136 States were party to both the Refugee Convention and Protocol and 144 were party to one or both of them. See UNHCR, *State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, available at UNHCR website <http://www.unhcr.ch> (visited 9 April 2003).

74 See Bonaventure Rutinwa 'The End of Asylum? The Changing Nature of Refugee Policies in Africa', (2002) 1 and 2 (21) *Refugee Quarterly Survey* 12 at 33. Between 1993 and 1995, Tanzania, one of the Least Developed countries, refugee population fluctuated between 565 000 and 830 000 refugees. Compare this to the United States of America, an industrialised country, which, during the same period, hosted 620 000 and 630 000 asylum seekers. See UNHCR, *Statistical Yearbook*, *supra* note 7 at 87.

75 Approximately 200 000 asylum seekers. See UNHCR, *Statistical Yearbook*, *supra* note 7 at 91.

overburdened with refugees⁷⁶ be requested to admit more?⁷⁷ Consequently, the UNHCR was unable to render assistance to the many Afghani nationals were trapped in Afghanistan.⁷⁸ Grace, however, came from the ICRC, which offered food assistance, health care, water and sanitation to the tens of thousand internally displaced Afghans.⁷⁹

IV. INADEQUACY OF THE EXISTING INTERNATIONAL FRAMEWORK AND DEVELOPMENTS TO MEET THIS

As at 1 January 2002, there were almost 20 million 'persons of concern'⁸⁰ to the UNHCR. The Refugee Convention recognises that this problem cannot be borne by a selected group of States as this would be unduly taxing. It proposes international co-operation through the 'burden sharing' principle. Despite a rise in inter-State armed conflicts and persons seeking asylum, traditional refugee-receiving States have refused to admit more refugees. However, those few⁸¹ fortunate enough to be admitted into a third state receive protection and assistance from that State itself or the UNHCR, as determined by domestic legislation and international refugee treaties. The scope of refugee rights a refugee can enjoy in a third State depends upon the number of rights a State reserved⁸² when becoming party to the refugee treaties or the generosity of domestic legislation.

76 By the end of 2001 Pakistan hosted 2.2 million refugees, compared to Australia's 'drop in the ocean' figure of 21,000. See U.S. Committee for Refugees, 'Worldwide Refugee Information: Country Report, Pakistan, 2002', <http://www.refugees.org/world/countryrpt/scasia/pakistan.htm> (visited 23/07/02) and USCR, 'Worldwide Refugee Information: Country Report, Australia, 2002', http://www.refugees.org/world/countryrpt/easia_pacific/australia.htm (visited 23 July 2002) respectively.

77 Pakistani leader, General Pervez Musharraf is quoted by Mark Baker, 'Pakistan Leader's Swipe at Australia's Refugee Ban', <http://old.smh.com.au/news/0110/24/national/national4.html> (visited 9 April 2003), to argue: 'Hundreds of thousands of refugees want to cross over into Pakistan and our dilemma is we already have about 2.5 million refugees here. You can compare this when you think of Australia not accepting even 200 [Tampa] refugees. So a poor country, an economically weak country like Pakistan cannot really accept refugees over this great figure of 2.5 million.'

78 See U.S. Committee for Refugees, *Country Report Pakistan, 2002*, <http://www.refugees.org/world/countryrpt/scasia/pakistan.htm> (visited 9 April 2003).

79 See, ICRC, *The ICRC in Afghanistan*, <http://www.icrc.org/eng/afghanistan> (visited 9 April 2003).

80 UNHCR, *Statistical Yearbook*, *supra*, *supra* note 7 at 12.

81 In 2001, for instance, 92 260, or 1%, of 'persons of concern' were resettled in industrialised states. See UNHCR, *Statistical Yearbook*, *supra*, note 7 at 60.

82 A Reservation is a unilateral statement made by a state when signing or ratifying a treaty, by which the it excludes or modifies the legal effect of certain provisions of the agreement in their application to that State. See *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N.T.S.115 (entered in force 27 January 1980) art 2 (1) (d). See also Nygh and Butt, *supra*, note 68 defining 'reservation' as 'the making of some

However, IDPs do not have the benefit of their own treaty and their welfare is heavily dependant on external ad hoc humanitarian aid. Moreover, obstacles are often encountered in trying to get humanitarian aid to IDPs, especially when the State or rebel forces refuse to allow humanitarian aid to pass through territories they effectively control. Unlike rebel forces, States have a legal basis for blocking humanitarian aid by invoking the principle of State sovereignty,⁸³ and characterising the conflict as an 'internal matter'. Notwithstanding what may be termed 'illegal' disruption of aid convoys from rebel forces, this factor cannot be ignored. The brutal murder of three UNHCR staffers in West Timor, on 7 September 2002,⁸⁴ and Mensah Kpognon, UNHCR Head of Field Office in the Guinean town of Macenta, Guinea,⁸⁵ nine days later, are horror stories demonstrating the casualties affected by this form of disruption. Blocking humanitarian aid exacerbates the general suffering of IDPs.

A. State Sovereignty Principle and its Counterarguments

This section examines the argument of state sovereignty states may raise to block access of humanitarian aid to IDPs from the UNHCR or ICRC, and the possible counter-arguments. This is important as the acceptance of humanitarian assistance rest on state consent.

One of the foundational UN purposes was to promote and encourage, 'respect for human rights and fundamental freedoms'.⁸⁶ However, the UN Charter limits this by affirming that the UN and its member states are prohibited from 'intervening in matters which are essentially within the domestic jurisdiction of any State',⁸⁷ save for actions which breach or threaten to breach international peace and security.⁸⁸ Two fears have been expressed with regard to the principle

"exception" by which a legal right is withheld or preserved' (at 379). With regard to refugees, art 42 of the *Refugee Convention* recognises this right.

83 See UN Charter art 2(7). IHL also recognises this principle via Protocol II art 3. See also Ivan Shearer, *Starke's International Law*, 11th ed. (Singapore: Butterworths, 1994) arguing this concept 'signifies that within this territorial domain jurisdiction is exercised by the state over persons and property to the exclusion of other states' (at 144).

84 See UN Security Council, S.C. Res 1319 (2000) on Timor, 8 Sept 2000, S/Res/1319 (2000).

85 See, U.S. Committee for Refugees, 'UN Refugee Aid Worker Killed in Guinea Toiled On Despite Poor Donor Support', available at U.S. Committee for Refugees website at <http://www.refugees.org/index.cfm> (visited 24 July 2002).

86 UN Charter art 1(3).

87 Art 2(7) UN Charter states: 'Nothing contained in this Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . '.

88 *Ibid.*

of state sovereignty.⁸⁹ First, States wishing to block humanitarian assistance may abuse the principle. Second, external political intervention may be concealed as humanitarian assistance. With regard to rebel forces and militia groups, as much as they are illegitimate in the eyes of the Government, their consent remains vital if humanitarian aid has to pass through a territory they control or within range of attack. Joan Fitzpatrick, in 2002, noted:

The internally displaced also have a compelling need for international human rights protection. UNHCR's role in protecting IDPs still remains a daunting barrier to assuring their safety and fundamental rights. IDPs remain under the formal protection of their own state, even though officials of that state may have deliberately caused their displacement. Where the state has violated human rights treaties or customary law in its treatment of IDPs, it is subject to international scrutiny and cannot invoke its sovereignty as a shield.⁹⁰

At least two legal counterarguments qualify assertions of state sovereignty. The first is premised on the view that human rights are the 'immutable rights of individuals' and not purely domestic matters,⁹¹ recently affirmed by the 1993 Declaration of the United Nations World Conference on Human Rights⁹² (hereafter 'Vienna Declaration'). Recent UN action demonstrates that the international community will act against gross human rights violations. The UN Security Council has invoked Chapter VII to characterise certain violations as threats to international peace and security. Three examples may be cited. First, after the first Gulf-war attempts by Kurds to establish their own

89 These were expressed as far back in 1977 when the two Additional Protocols to the Geneva Conventions were drafted. The introductory paragraph to Additional Protocol II states: 'The aim of the present Protocol is to extend the essential rules of the law of armed conflicts to internal wars. The fear that the Protocol might affect State sovereignty, prevent governments from effectively maintaining law and order within their borders and that it might be invoked to justify outside intervention led to the decision of the Diplomatic Conference at its fourth session to shorten and simplify the Protocol'.

90 Joan Fitzpatrick, ed, *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (New York: Transnational Publishers, 2002) at 5.

91 This view is expressed in preamble to the following treaties: *Refugee Convention*, *Convention on the Elimination of All Forms of Discrimination Against Women* and the *UN Charter*.

92 UNGA/CONF.157/23 (12 July 1993). Preamble to the Vienna Convention recognized and affirmed that 'all human rights derive from the dignity and worth *inherent* in the human person and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms'. (emphasis added)

State in 1991 failed miserably. The Iraqi Government retaliated in the name of 'repressing the uprising' leading to a massive displacement and flow of Kurds towards the Turkish border. In response, the UN Security Council passed Resolution 688⁹³ condemning the repression and insisting the Iraqi Government should 'allow immediate access'⁹⁴ of international humanitarian aid to the Kurds, denied entry into Turkey. Secondly, during the 1994 genocide and civil war in Rwanda French forces were authorised under Resolution 929⁹⁵ to 'implement a temporary operation under national command and control aimed at contributing ... to the security and protection of displaced persons, refugees and civilians in Rwanda'.⁹⁶ Third, in 1996 during the civil war in the former Zaire⁹⁷ and subsequent mass internal displacement, the Security Council took a proactive step toward humanitarian intervention. It authorised under Resolution 1078⁹⁸ the formation of a military force to create 'safe corridors and temporary sanctuaries'⁹⁹ to facilitate the delivery of international humanitarian aid such as food, water, and medicine.

A second argument would regard the obligation to respect the territorial sovereignty of other States as being subject to the principle of *abus de droit*. Under this principle, the exercise of a lawful right can become unlawful, if it involves sacrificing a more important individual or community right to a less important individual one,¹⁰⁰ thus justifying humanitarian aid intervention. In this regard, the basis of humanitarian intervention, whilst recognising State sovereignty, is to maintain global peace and security through prevention of gross violations of human rights. Thus, Plender argues:

[A]n arbitrary refusal to permit the administration of humanitarian relief to [IDPs], in violation of human rights, may constitute an *abus de droit* which cannot prevent the United Nations

93 U.N. S.C Res. 688 (1991) (adopted at the 2982nd Security Council meeting).

94 *Ibid.*, para. 3.

95 U.N. Doc S/RES/929 (1994) (adopted at its 3392nd meeting, on 22 June 1994) on 'establishment of a temporary multinational operation for humanitarian purposes in Rwanda until the deployment of the expanded U.N. mission for Rwanda'. See also U.N. Doc S/RES/925 (1994) paragraph 4 reaffirming that [United Nations Assistance Mission to Rwanda] will: (a) Contribute to the security and protection of displaced persons, refugees and civilians at risk [via] establishment and maintenance ... of secure humanitarian areas and (b) Provide security and support for the distribution of relief supplies and humanitarian relief operations.

96 *Ibid.*, para. 2.

97 Now Democratic Republic of Congo.

98 U.N. Doc. S/RES/1078 (1996) (adopted at the 3710th meeting, on 9 Nov 1996) on 'the situation in the Great Lakes Region'.

99 *Ibid.*, introductory paragraph.

100 See Ruddick, *supra*, note 22 at 468.

Organizations from discharging the tasks conferred upon it by the [UN] Charter.¹⁰¹

B. *UNHCR and Internally Displaced Persons: A 'United Nations General Assembly Resolution' mandate*

Although the UNHCR lacks a specific legal IDP mandate, it has nonetheless assisted several millions¹⁰² IDPs over the years, deriving its mandate from two sources.

First, as Ruddick¹⁰³ points out, the UNHCR 'act[s] pursuant to its flexible, extra-statutory "good offices" powers to bring IDPs within its area of concern'. Second, various General Assembly resolutions have conferred upon the UNHCR a selective limited mandate, to undertake humanitarian assistance and provide protection to IDPs. Previously, the closest the UNHCR came towards addressing the plight of IDPs was within its general mandate of voluntary repatriation, rehabilitation and resettlement of refugees.¹⁰⁴ The precedent that enlarged the logical extension of the UNHCR's mandate is General Assembly resolution 1388 (XIV) of 20 November 1959.¹⁰⁵ This authorised the High Commissioner to use 'good offices' to transmit humanitarian aid to Chinese refugees in Hong Kong, falling without UN competence since they could theoretically avail themselves of the protection of the Republic of China.¹⁰⁶ Subsequently, 'this precedent was followed in 1961 when fugitives from Angola fled to the Democratic Republic of Congo in such numbers that it was impossible to subject them to a determination procedure'.¹⁰⁷

Similarly, in 1972, the ECOSOC, within the context of voluntary repatriation of refugees in southern Sudan, called upon the High Commissioner's good offices and that of other agencies to extend rehabilitation measures both to refugees returning from abroad and to 'persons displaced *within* the country'.¹⁰⁸ However, the General Assembly only distinguished IDPs as a specific class in

101 Richard Plender 'The Legal basis of International Jurisdiction to Act with Regard to the Internally Displaced' (1994) 6 (3) *International Journal of Refugee Law* 345 at 356.

102 See UNHCR, *Protecting Refugees: Questions and Answers* available at UNHCR website at <http://www.unhcr.org> (visited 6 Dec 2001).

103 Ruddick, *supra*, note 22 at 468.

104 Commonly referred to as 'durable solutions' to the plight refugees. See UNHCR Statute arts. 8(c) and 9.

105 U.N.G.A. Res 1388 (XIV) adopted at the 841st plenary meeting (20 Nov 1959).

106 Plender, *supra*, note 103 at 347.

107 *Ibid.* This was effected vide UNGA Res.1673 (XVI), adopted at the 1081st plenary meeting (18 Dec 1961).

108 UN doc. EC/1994/SCP/CRP.2 (4 May 1994).

resolution 47/105 of 1992, which acknowledged the previous efforts the High Commissioner in responding to requests from the Secretary General or other UN organs to meet the plight of IDPs. Subsequently, a 1993 resolution was adopted which allowed the UNHCR's Executive Committee to 'extend on a case-by-case basis and under specific circumstances, protection and assistance to the internally displaced'.¹⁰⁹

Subsequently, two UN General Assembly resolutions addressing 'human rights and mass exoduses of peoples'¹¹⁰ and 'strengthen[ing] the coordination of humanitarian emergency assistance of the UN'¹¹¹ were passed, marking significant landmarks on the road towards a specific IDP mandate. However, it is the creation of a permanent office and appointment the IDP Representative in July 1992, which was a major turning point in addressing the concerns of IDPs at the international plane. Representative Deng in 1995 described the terms of reference of this Office as:

to co-operate and co-ordinate with the Department of Humanitarian Affairs of the Secretariat, the office of the [UNHCR], and the [ICRC], and call upon these agencies and other inter-governmental and non-governmental organizations to continue to co-operate with . . . and facilitate [its] tasks.¹¹²

Further, Governments are requested to continue to facilitate the tasks and activities of the IDP Representative including, where appropriate, extending invitations for country visits, in deference to state sovereignty.

C. ICRC formal mandate for Internally Displaced Persons

States while acknowledging that 'about 80% of the victims of armed conflicts since 1945 have been [as a result of] *non-international* armed conflicts. . .'¹¹³ amended the Geneva Conventions to bring it into conformity with the spirit of IHL. In 1977, Protocol II was adopted to protect victims of 'non-international' armed conflicts, such as IDPs. Previously, common Article 3 to the four Geneva Conventions that applied to 'persons taking no active part in the hostilities'¹¹⁴ addressed minimum protective rights to IDPs, since it referred to armed conflicts

109 UNGA Res. 48/135 (20 Dec 1993).

110 A/46/721.

111 46/182.

112 Deng, *supra*, note 40 at 75.

113 Introductory paragraph to Additional Protocol II.

114 Art 3(1).

'not of an international character'. Although a very short article, it contains the most essential principles¹¹⁵ initially requiring each party to a conflict to treat IDPs and *hors de combat*¹¹⁶ humanely. In addition to collecting and caring for the sick 'humane treatment' it excludes:¹¹⁷

- (a) violence to life and person, in particular murder, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (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;
- (e) collective punishments;
- (f) acts of terrorism;
- (g) slavery and slave trade in all forms;
- (h) pillage; and or
- (i) threats to commit any form of the foregoing acts.

In this equation, the ICRC is mandated to promote IHL and to protect and assist victims of conflict.¹¹⁸ Thus, IDPs fall at the 'core' of the ICRC mandate.¹¹⁹ This amendment through Protocol II was meant to extend the primary rules of the law on armed conflicts to internal wars,

115 See Jean-Philippe Lavoyer 'Refugees and Internally Displaced Persons: International Humanitarian law and the role of the ICRC' (1995) 304 Int'l Rev. of the Red Cross 163 at 171.

116 A person who no longer plays an active part in a combat situation. Protocol I art 41 (2) sets three tests to distinguish between *hors de combat* and combatants. A person is *hors de combat* if he or she:

- (a) is in the power of an adverse Party;
- (b) clearly expresses an intention to surrender; or
- (c) has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is *incapable of defending himself*, provided that in any of these cases he abstains from any hostile act and does not attempt to escape. (emphasis added)

117 Common art 3 and Protocol I art 4 (2). See also Denise Plattner 'The Protection of Displaced Persons in Non-International Armed Conflicts' (1992) 291 Int'l Rev. of the Red Cross 567 at 571 classifying these protections into three categories: protection from the effects of hostilities, against abuse of power and norms concerning care and relief services.

118 See ICRC Statute art 4 (1).

119 See address by the ICRC in the 52nd session of the Executive Committee of the High Commissioner's Programme, Geneva, 1-5 October 2001, available at ICRC website at <http://www.icrc.org> (visited 14 Dec 2001) asserting '... people displaced internally as a result of conflict are at the core of ICRC's activities'. See also Françoise Krill 'The ICRC's Policy on Refugees and Internally Displaced Civilians', (2001) 83 Int'l Rev. of the Red Cross 607 arguing IDPs fall at the 'heart' of ICRC's mandate (at 610).

and to supplement common Article 3, which it had to be read together with without ‘modifying its existing conditions or applications’.¹²⁰

However, for Protocol II to apply to an internal armed conflict situation four conditions should be satisfied.¹²¹ First, the conflict should occur within the territory of one State. Secondly, it should pit the armed forces of a State against a dissident-armed force or other *organized* armed group. Third, the dissident forces or armed group should be under a responsible command. Four, they should exercise control over a part of the State’s territory to enable them carry out *sustained* and *concerted* military operations. Condition one repeats an obvious fact—that an internal war is one that occurs within a State’s boundaries. But more importantly, it implicitly puts displaced persons outside the ambit of ‘refugees’ and additionally bestows upon their parent State a protective obligation. Conditions two and three complement each other. It is not enough for a State to merely face opposition from militia members. The requirement for any form of opposition to be ‘organised’ limits the breadth of combatants the Protocol protects, since it excludes sporadic or disorganised attacks from disgruntled forces or groups. Upon capture, such individuals will be treated as common criminals and may be prosecuted under domestic criminal law, unlike their Protocol counterparts who enjoy Prisoners of War status.

It is from the third that condition four stems since only ‘organized’ groups are able to carry out ‘sustained’ and ‘concerted’ attacks, though it is difficult to quantify this nature of attack. All cases must be evaluated on their merits. The additional requirement for such a group to have ‘control over part of the State’s territory’ is somewhat outdated considering the modern combat environment. Today territorial control does not necessarily offer a military advantage since modern technology allows military attacks to be launched from one’s personal computer.¹²² In addition to this specific mandate, common Article 3(2), which allows the ICRC to ‘offer its services to the Parties

¹²⁰ See art 1.

¹²¹ *Ibid.*

¹²² For an extended analysis of cyber-attacks see Michael N. Schmitt ‘Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework’ (1999) 37 Colum. J. of Trans Law 885. Schmitt, at 888, cites three examples of cyber-attacks: ‘[First] It is no longer necessary . . . to physically destroy electrical generation facilities to cut power to a foe’s command and control system; instead, the computer network that drives the distribution system can be brought down to accomplish the same result. Second, whereas the means of “attack” in centuries past presupposed the use of kinetic force, in the twenty-first century an attack may be nothing more than the transfer of cyber commands from one computer to others. Third, [use a computer to] shut off a particular service or function (e.g., disrupting telecommunications) or to alter or misdirect data (e.g., unauthorised electronic transfer or transmittal of false intelligent information)’.

to the conflict', is a fallback provision that may also apply. Abi-Saab argues this simply means the ICRC 'may offer its services to an internal conflict [as well], just as the right of initiative would permit in any situation'.¹²³ Even so, the consent of belligerents is a crucial factor to consider. Additionally, although the kind of services offered is unspecified, it appears to fall within the ICRC's general umbrella of services provided to armed conflict victims:

[M]aterial, medical and food aid ... technical support to the authorities ... Register [and] trace those who have been displaced, try to trace those who have disappeared, arrange for the exchange of Red Cross messages and reunite the members of dispersed families ... as well as act as an intermediary between the warring parties themselves or between those parties and displaced persons so as to facilitate contacts between them or even settle a humanitarian problem.¹²⁴

Parts III and IV of Protocol II, seeking to protect the civilian population, outline the rights available to IDPs. Generally, they should be safe from the dangers likely to result from military operations. IDPs should specifically not be made 'the object of an attack',¹²⁵ nor be forcibly moved except for their security or 'imperative military' reasons;¹²⁶ combatants are prohibited from using starvation of IDPs as a method of combat;¹²⁷ works and installations that contain dangerous forces upon release¹²⁸ and their cultural objects and places of worship¹²⁹ should not be made the subject of military attacks; wounded or sick IDPs should have access to medical relief¹³⁰ and care.¹³¹ Finally, special protection is laid down for women and children IDPs.¹³²

123 Rosemary Abi-Saab, 'Human Rights and Humanitarian Law in Internal Conflicts' in Daniel Warner, ed., *Human Rights and Humanitarian Law: The Quest for Universality* (The Hague: Martinus Nijhoff, 1997) 107 at 119.

124 Marguerite Contat Hickel 'Protection of Internally Displaced Persons affected by Armed Conflicts: Concept and Challenges' (2001) 83 *Int'l Rev. of the Red Cross* 699 at 704.

125 Protocol I art 13.

126 *Ibid.*, art 17.

127 *Ibid.*, art 14.

128 *Ibid.*, art 15. Examples include dams, dykes and nuclear electrical generating stations provided such attacks will release dangerous forces leading to 'severe losses' in the civilian population

129 *Ibid.*, art 16.

130 *Ibid.*, art 18(2).

131 *Ibid.*, see generally arts. 7–12.

132 *Ibid.*, art 4(3).

V. GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT:
CROSS-FERTILIZATION OF INTERNATIONAL REFUGEE LAW
AND INTERNATIONAL HUMANITARIAN LAW

The primary reason IDPs received little international attention in the past was because their plight was considered an internal matter. However, this view changed in the early 1990s, owing to events in the former Yugoslavia, which elevated the issue to the international plane. According to Plender,¹³³ these events caused the UN to ‘examine’ the magnitude and scope of the problem and to ‘define possible solutions the international community could undertake. This marked the beginning of the road towards developing a normative and institutional framework to protect IDPs with the appointment of the IDP Representative in July 1992 and the adoption by the UN in April 1998 of the Guiding Principles on Internal Displacement¹³⁴ (hereafter ‘Guiding Principles’), which the IDP Representative drafted.

The Guiding Principles are dual purposed.¹³⁵ First, they seek to ‘address the specific needs of [IDPs] worldwide’. Secondly, to ‘identify the rights and guarantees relevant to the protection of persons from forced displacement, and to their protection and assistance during displacement, . . . return, resettlement and integration’. Principle 2 defines IDPs from an informal perspective:

[P]ersons or groups of persons who have been *forced or obliged to flee or to leave their homes* or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or man-made disasters, and *who have not crossed an internationally recognized State boundary*.¹³⁶ (emphasis added)

Three quick observations are apt. First, since the words ‘in particular’ precede the root causes of forced migration, this demonstrates the ‘List of Causes’ is open-ended. Second, from the usage of general terms such as ‘generalized violence’, ‘violations of human rights’ and ‘natural or man-made disasters’ it may be inferred the IDP Representative intended this pragmatic definition to be flexible enough

¹³³ Plender, *supra*, note 103 at 351.

¹³⁴ UN doc.E/CN.4/1998/53/Add.2 of 11 February 1998. Since 1995, there has been a growing body of literature in the area of IDPs. For a general overview and evolution of the IDP Representative’s Office and the Principles see: Simon Bagshaw ‘Internally Displaced Persons at the Fifty-Fourth Session of the United Nations Commission on Human Rights’ (1998) 10(3) *International Journal of Refugee Law* 548; Deng, *supra*, note 40; Lavoyer, *supra*, note 117; Plender, *supra*, note 103.

¹³⁵ See preamble to the Principles paragraph 1.

¹³⁶ Preamble to paragraph 2. See also Principle 6 prohibiting arbitrary displacement arising from collective punishment, unjustified development projects and ‘ethnic cleansing’ policies.

to capture unforeseen contingencies. Finally, it notes the obvious that IDPs are located within their national borders.

These Guiding Principles represent a mix of three fields of international law. They reiterate norms derived from international human rights law, international humanitarian law and international refugee law.¹³⁷ In terms of scope, they seek to guide four classes of persons, the IDP Representative, States, all other authorities, groups and persons, IGOs and NGOs.¹³⁸ Once again, a catch-all phrase, 'all other' is adopted to cater for unforeseen events. These Guiding Principles recognise that if the IDP problem is to be solved or ameliorated, every world citizen needs to be involved. Thus, it requests:

all authorities and international actors [to] respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.¹³⁹ (emphasis added)

In terms of rights, the Guiding Principles outline rights before, during, and after displacement, as well as those applicable when IDPs return, or during resettlement and reintegration. They reiterate that IDPs should enjoy the same rights and freedoms as other nationals of that country, bearing in mind that in fact they are still nationals of that State.¹⁴⁰ In particular, they should not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.¹⁴¹ The special needs of unaccompanied minors, expectant mothers, mothers with young children, persons with disabilities and elderly persons should be considered.¹⁴² During displacement, rights to life, liberty and security of the person, movement and freedom, asylum, education, protection of property and recognition before the law should be respected.¹⁴³ Relief and

137 For instance, inherent right to life (principle 10); right to life and liberty (principle 12); freedom of movement (principle 14); right of asylum (principle 15); right to be informed of the fate and whereabouts of missing relatives (principle 16); recognition before the law (principle 18); access to medical facilities by the sick and wounded (principle 19); protection from direct military attacks (principle 21); humanitarian assistance (section IV); voluntary repatriation, resettlement and reintegration (section V).

138 Preamble paragraph 3(a)–(d) inclusive.

139 Under Principle 5. A similar provision is found in the Geneva law, see particularly Convention IV art 49 of and Protocol II art 17.

140 Principle 1(1).

141 *Ibid.* See also Principle 22. Principle 4 outlines the grounds of discrimination to include race, sex, colour, religion, age, political opinion, disability, legal or social status or on any other similar criteria.

142 Principle 4(2).

143 See section III generally.

humanitarian assistance should also be allowed to reach IDPs¹⁴⁴ and after conflict, they should be allowed to return voluntarily to the places from which they fled, resettle and reintegrate.¹⁴⁵

At face value, the Guiding Principles bestow upon IDPs an impressive package of protective measures. However, these are non-legally binding guidelines. Moreover, as Principle 2(2) states:

These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights of any international humanitarian law instrument or rights granted to persons under domestic law.

Since these Guiding Principles constitute ‘soft law’,¹⁴⁶ they only apply domestically if expressly incorporated into the municipal legal framework. This means that the Guiding Principles *per se* can neither bestow rights nor impose duties unless adopted as a matter of domestic law, as was the case with Burundi¹⁴⁷ and Angola.¹⁴⁸

VI. CONCLUSION

This article examined the overlapping formal and informal mandates of the ICRC and UNHCR with respect to IDPs and analyses how, at the international plane, IDPs are no longer classified in the same category as refugees but treated as a distinct vulnerable group. Generally, the mandates of the UNHCR and ICRC can be said to differ, at least in principle. ICRC has a flexible mandate that allows it to offer protection and assistance to both IDPs and cross-border refugees. In contrast, the UNHCR’s mandate is more restrictively defined although it has informally rendered protection and assistance to ‘several millions’ of IDPs. However, practice indicates that the UNHCR cannot act on its own initiative with respect to IDPs and that its ‘good offices’ role is a passive one, contingent upon a request that it acts from other

144 Principles 24–27.

145 Principles 28–30.

146 Harris, *supra*, note 21 at 65 describes ‘soft-law’ to consist of ‘documents that are not legally binding upon states (and hence not directly enforceable in courts and tribunals) but that nonetheless may have an impact upon international relations, and, ultimately, international law’.

147 See, Conselho de Ministros, Decreto No.1/01, Normas Sobre o reassentamento das populações des locados, Dairo da Republica, l’*Série*-No. 1, 5 January 2001, quoted by Walter Kalin ‘Flight in times of War’, (2001) 83 *Int. Rev. of the Red Cross* 629 at 648, footnote 34.

148 See, Protocol relatif à la création d’un cadre permanent de concertation pour la protection des personnes déplacées, 7 February 2001, quoted by Kalin, *ibid*, at 648, footnote 34.

UN agencies. In comparison, the assistance offered by the UNHCR is more permanent both in terms of material assistance and offering 'durable solutions', such as resettlement. On the other hand, the ICRC generally offers temporary emergency relief and assistance.¹⁴⁹

Nevertheless, there are special areas of overlap within the informal mandates of these agencies. First, both provide material assistance, food, water and medical aid to refugees and IDPs. Secondly, in addition to this assistance, both are involved in the legal protection of displaced individuals. Third, while trying to keep families as intact as possible, both agencies offer tracing facilities for family reunification purposes. Fourth, both issue protected refugees with travel and identification documents whilst they are in third States. Fifth, both pay special attention to the needs of unaccompanied minors. And lastly, IHL and international refugee law inevitably converge in the Guiding Principles, which contain the current international statement of principles to be applied as basic standards for the protection and assistance of IDPs.

These Guiding Principles are meant to influence how States and other interested parties deal with IDPs, although to have legal effect the Guiding Principles need to be domestically enacted. Nevertheless, within their short period of existence they have achieved tremendous levels of success in terms of being adopted, published, and applied. Kalin notes that important global institutions such as 'the CHR, ECOSOC, Commission and UN[GA] have adopted Resolutions taking note of the Principles and of the IDP Representative's intention to use them in dialogues with governments, intergovernmental bodies and NGOs'.¹⁵⁰

Following the 'dissemination call', positive steps have been adopted towards this end by regional organizations in Europe, Africa and America, individual Governments and NGOs. More specifically, the Organization of American States, has hailed the Guiding Principles as 'the most comprehensive restatement of norms applicable to the internally displaced' which 'will provide authoritative guidance to the Commission on how the law should be interpreted and applied during all phases of displacement'.¹⁵¹ In Europe, the Organization for Security and Cooperation in Europe, has expressed support for and

149 See Vitit Muntarbhorn 'Protection and Assistance for Refugees in Armed Conflicts and Internal Disturbances' (1988) 265 *Int'l Rev. of the Red Cross* 351 stating 'Red Cross protection-cum-assistance is more transitory by nature, since it is conceived in terms of emergency relief, usually in the form of material assistance and immediate physical relief' (at 365).

150 Kalin, *supra*, note 149 at 647.

151 *Ibid* at 647.

begun to disseminate the Guiding Principles to its field staff,¹⁵² as well as co-sponsored some workshops¹⁵³ that promote the Guiding Principles. Similarly, the African Union has formally expressed appreciation of the Principles and several AU-sponsored seminars have emphasised their importance to Africa.¹⁵⁴

At the national level, States such as Austria, Switzerland and Sweden have reacted positively. Bagshaw, in 1998, noted:

Austria . . . referred to them as becoming a tool for addressing the protection and assistance needs of [IDPs] as well as contributing to the prevention of internal displacement in the future. Switzerland stated that the[y] constituted an important document and called upon all those concerned with the problem of internal displacement to implement the[m] with a view to improving the situation. . . . Sweden, speaking on behalf of Nordic countries welcomed [them] . . . and called for their wide dissemination among Governments, UN agencies, international and regional organisations and NGOs.¹⁵⁵

Some States currently faced with the IDP problem, such as Angola and Burundi, have accepted the authoritative character of the Guiding Principles by incorporating them into their domestic laws and policies. NGOs have also undertaken to widely disseminate the Principles and some have organised workshops and meetings to discuss how best to implement these.¹⁵⁶ This includes the ICRC, UNHCR, World Food Programme, United Nations Children's Fund, Norwegian Refugee Council, U.S. Committee for Refugees and International Organization for Migration. Although, all these efforts contribute towards giving the Guiding Principles some 'international standing', it will take a while before these become part of binding international law. Meanwhile it remains important for the ICRC and UNHCR to continue to cooperate and coordinate with respect to their IDP and refugee mandate, to avoid duplicated roles and services. Examples of bilateral co-operation include the Guiding Principles and Working Procedures that were agreed upon, in May 2001, with respect to the

152 See Robert Cohen, Simon Bagshaw and Vladamir Shlolnikov, *Background Memorandum of the Regional Workshop on Internal Displacement in the South Caucasus*, Tbilisi, Georgia (May 10-12 2000) 3.

153 For instance the Regional Workshop on Internal Displacement in the South Caucasus, Tbilisi, Georgia, May 10-12, 2000.

154 See Cohen, Bagshaw and Shlolnikov, *supra*, note 154 at 3.

155 Bagshaw, *supra*, note 136 at 550.

156 *Ibid* at 550-551. On specific examples see Cohen, Bagshaw and Shlolnikov *supra*, note 154 at 3.

'care and protection'¹⁵⁷ of unaccompanied children in Kosovo; high-level annual meetings between the two agencies where they share views on 'ethical and operational topics'¹⁵⁸; and the participation of ICRC legal experts in UNHCR's Global Consultations on International Protection.¹⁵⁹ More recently in May 2002, these organisations discussed the IDP situation in Afghanistan and the need to 'uphold international law systems' in the aftermath of 9-11.¹⁶⁰ Through these means, both agencies can improve their field operations and assistance programs.

For a permanent solution to be found for the plight facing war victims, more is needed than UN Resolutions or other types of legal or humanitarian intervention. One cannot take comfort in Henry Dunant's words, 'we cannot always avoid wars'. Hence, the search for peace and tranquillity should be a continuing pragmatic process that calls for a consideration of the root causes civil war and internal conflict, which generates this problem. In this regard, on-going peace talks hosted by the Kenyan government between the Sudanese Government and rebel forces in the south, and the civil war between factional groups in Somalia, are practical examples. With peace, two aims are likely to be achieved. First, the prevention of future mass displacement and movement of people, and second, secure environments that may promote voluntary repatriation and resettlement. Although achieving total peace is not a possibility, for every conflict diffused by peaceful settlement, this alleviates the horrors that war otherwise causes.

157 Official Statement of the ICRC at the UN General Assembly, 56th session, Plenary, New York, 26 November 2001 available at the ICRC website at <http://www.icrc.org/> (visited 27 May 2003).

158 Official Statement of the ICRC to the Executive Committee of the UNHCR's Programme, available at the ICRC website at <http://www.icrc.org/> (visited 27 May 2003).

159 *Ibid.*

160 See Executive Committee of the High Commissioner's Programme, EC/52/Sc'INF.2 at 4, paras 23 to 24.