INTERNATIONAL REVIEW
of the Red Cross

Humanitarian debate: Law, policy, action

Migration and displacement

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EDITORIAL

MIGRATION AND DISPLACEMENT: HUMANITY WITH ITS BACK TO THE WALL

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Crowds of people on the move with their bundles of possessions, young men frantically scaling fences, boatloads of women and children pummelled by the waves, bodies washed up the beach, camps with endless rows of tents and chaotic shanty towns stretching as far as the eye can see, transit centres where hopes fade, humiliated workers forced to do jobs nobody else wants, mothers waiting a lifetime in vain for news of daughters or sons who left to seek their fortune elsewhere. These are some of the images that might come to mind when picturing the plight of uprooted people around the world.

Several months ago, the attention of Europe and the world was focused on the crisis that began to unfold in 2015 as millions of Africans, Afghans, Syrians and Iraqis attempted to cross the Mediterranean, fleeing conflict and poverty. The crisis continues but the media spotlight has shifted to the ordeal suffered by people displaced from the cities of Iraq and Syria and to US migration policy, in particular the plans to build a wall on the border with Mexico. As we write, the headlines are dominated by the situation in Myanmar and its neighbouring countries as an entire people flees. On the other hand, there are other places in Africa, Central and South America, where such crises do not make headlines. The never-ending string of such dramas and the masses of people uprooted from their homes on a scale not witnessed since the Second World War have prompted the *Review* to devote another issue to the topic of displacement and migration.[1]

The brunt of the "migration crises" is borne not by countries in Europe and North America, as many journalists and politicians are wont to suggest, but by host countries in the South and, most importantly, by the families, single adults and children lost in the multitude who have set out on a journey into the unknown, leaving everything behind. These crises are just the tip of the iceberg, the predictable consequences of an endless succession of conflicts and disasters and persistent underdevelopment.

While migrants arriving on the doorsteps of destination countries are undoubtedly the most visible manifestation, there are millions more people displaced within their own countries facing the same difficulties. Why do these people leave their homes, exposing themselves to so many risks? What can be done to help them resume normal life?

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1   Previous issues of the *Review* have been devoted to refugees in armed conflict ("50th Anniversary of the 1951 Refugee Convention: The Protection of Refugees in Armed Conflict", Vol. 83, No. 843, 2001) and displacement ("Displacement", Vol. 91, No. 875, 2009).

A brief history of hospitality

History is studded with stories of forced displacement featuring persecuted religious minorities, civilians fleeing bombed cities, expelled political opponents and entire communities driven from their lands by war or famine, and each time they put the humanity of those they encounter along the way to the test.

Exoduses of the past are remembered through tales of the suffering experienced by those exiled, but also of the exceptional resources they summoned from within to overcome the difficulties encountered and the degree of generosity or hostility with which they were received by their hosts. We are required by the most basic sense of humanity to help those fleeing for their lives as best we can, welcoming them to stay for some time or for good. In legal terms it is a duty to rescue and not doing so constitutes a failure to render assistance to a person in danger, which constitutes a crime in many civil law jurisdictions. History is rife with examples of peoples that have opened their arms to foreigners and seen their cultures greatly enriched as a result. There is much to be learned from studying the history of crises and hospitality. With this in mind, the *Review* and the International Committee of the Red Cross (ICRC) mission to the United Kingdom, together with the Arts and Humanities Research Council, jointly organized the conference "Forced to Flee" in London, with a view to looking at the history of the response to population movements and drawing lessons for the present.[2] This history shows how successive crises have progressively brought about innovations in the international response in terms of transnational governance and humanitarian standards and best practices based on experience.

The idea that a person in danger should not be turned away but should be offered hospitality is very ancient. The right to asylum was recognized by the Greeks (*asylon* – inviolability) and the Romans (*asylum*) in certain sanctuaries, and later by Christians in churches. Judaism, Christianity and Islam all feature flight from persecution in their founding stories: the exodus of the Hebrews, led by Moses, to the promised land; the flight of the Holy Family to Egypt to escape persecution by King Herod; and the *hegira*, the flight of the Prophet and his followers from Mecca to Medina, marking the beginning of the Islamic era.

This principle was put forward as an international rule for the first time by Grotius (1583–1645), a Dutch jurist who was himself in exile in Paris at a time when large migration movements were under way, mainly as a result of religious persecution (Jews and Muslims in Spain, Catholics in England, Protestants in France, etc.). In his legal masterpiece *De jure belli ac pacis* (*On the Law of War and Peace*), Grotius wrote:

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2   See the report in this issue of the *Review*, also available at: www.icrc.org/en/international-review/article/forced-flee-multi-disciplinary-conference-internal-displacement (all internet references were accessed in February 2018).

> Furthermore a permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes.[3]

This principle today forms the basis for the international rules that protect refugees, a term that comes from the Latin verb *fugere*, meaning "to flee". The 1793 constitution of revolutionary France introduced the idea of the country as a land of asylum for political opponents. Article 120 states that the French people will "give asylum to foreigners banished from their homeland for the cause of freedom and deny asylum to tyrants".[4]

The French Revolution ushered in a century of revolutionary and nationalist upheaval, with its famous *emigrés* and expelled citizens (such as Victor Hugo, Karl Marx and Chopin) but also its great social movements and large-scale migration. The First World War marked the start of the age of mass population movements that we continue to witness today. The ideological, social and territorial shockwaves it sent around the world were to trigger a series of major exoduses, including the Armenians and Greeks from Anatolia, the White Russians, and the Turks from Greece. It was in response to these crises that the foundations of the current international asylum system were laid in the 1920s. The famous Nansen passport, named after the first High Commissioner for Refugees and issued to Russians and Armenians who had been left stateless, was the hallmark of the response to these events. It was also at this time that efforts aimed at professionalizing humanitarian action really got under way in order to address the scale of the challenges posed. In an attempt to break through the indifference of populations still picking up the pieces after the Great War, humanitarian organizations resorted to the use of "propaganda". The ICRC, for example, took advantage of the cinema boom to promote its action to assist refugees and prisoners of war awaiting repatriation.[5]

The Second World War was to trigger unprecedented population movements within and between countries in Europe and elsewhere: the "exodus" of French and Belgian nationals in 1940, the displacement of millions of Germans following the fall of Nazism, and the odyssey of Shoah survivors, symbolized by the voyage made by the passengers of the Exodus in 1947.

The adoption of the four Geneva Conventions in 1949 and their Additional Protocols in 1977 reinforced the protection of civilians in armed conflicts. Under international humanitarian law (IHL), the forced displacement of the population

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3   Hugo Grotius, *De jure belli ac pacis*, Book II, Ch. 2, XVI.
4   See, Art. 120 of the "Declaration des droits de l'homme et du citoyen", French Constitution of 24 June 1793, available at: www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-du-24-juin-1793.5084.html.
5   Enrico Natale, "Quand l'humanitaire commençait à faire son cinema", *International Review of the Red Cross*, Vol. 86, No. 854, June 2004; ICRC, "Humanitarian Action and Cinema: ICRC Films in the 1920s", news release, 18 April 2005, available at: www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/6bkkyc.htm.

is prohibited and civilians may only be evacuated to protect their security or if imperative military reasons demand it.[6]

It was also at the end of the Second World War that the current system of protection for refugees was put in place with the adoption of the 1951 Refugee Convention. Its definition of the term "refugee" remains valid today. According to this definition, a refugee is 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; or who, 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.[7]

Although the Convention has often been criticized for its limitations in respect of mass population movements, the broad criteria it sets out have allowed the interpretation of refugee status to evolve with successive crises.

In recent decades, the plight of people displaced within their own country has become a major concern, heightened by the fact that today's conflicts tend to be protracted, preventing displaced populations from returning to their homes. The world only began to realize the extent of the problem of internal displacement when Guiding Principles were adopted in 1998[8] and efforts were undertaken to start documenting the problem.[9] The fact that internally displaced persons (IDPs) stay in their country of origin means that they remain, in theory, under the protection of their own government. They are not therefore granted a specific legal status under international law, as refugees are. This is why the adoption of the first binding regional instrument concerned with assistance and protection for displaced people in Africa – the Kampala Convention – has been hailed as a major achievement.[10]

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6   In this regard, see Geneva Convention IV, Arts 49, 147; Additional Protocol I, Art. 85 (4) (a); Additional Protocol II, Art. 17; customary IHL Rules 129 (act of displacement) and 130 (transfer of own civilian population into occupied territory); and other customary IHL rules specifically dealing with displaced persons under IHL – Rules 131 (treatment of displaced persons), 132 (return of displaced persons) and 133 (property rights of displaced persons), available at: ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul.

7   Convention relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entered into force 22 April 1954), Art. 1.

8   UN Office for the Coordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998.

9   The role of collecting and analyzing data on all situations of internal displacement was entrusted to the Internal Displacement Monitoring Centre (IDMC) in 1998. For more information, see the IMDC website, available at: www.internal-displacement.org/about-us/.

10 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 22 October 2009 (entered into force 6 December 2012). The ICRC has carried out a stocktaking exercise on the implementation of the Kampala Convention in order to determine how States can best meet their obligations to internally displaced persons. See the report in this issue of the *Review*.

Large-scale migration also occurs for economic reasons, with people leaving their homes to escape poverty and make a better life for themselves. While some do, in fact, make a conscious decision to leave, we have to ask ourselves if this can really be called a choice when dire conditions mean that they have no job prospects or access to decent education or health care.

Every era has its "El Dorados". The national identity of the United States, Australia and many Latin American countries is built around the melting-pot myth. For the Italian, Irish and Polish migrants who disembarked in New York in the 1900s, the "American dream" meant the opportunity to settle and make their fortune, regardless of their origin. The pedestal of the Statue of Liberty bears the inscription of a poem by Emma Lazarus, entitled "The New Colossus", which includes the following lines:

> *Give me your tired, your poor,*
> *Your huddled masses yearning to breathe free,*
> *The wretched refuse of your teeming shore.*
> *Send these, the homeless, tempest-tost to me,*
> *I lift my lamp beside the golden door!*

Reality and myth do, of course, always diverge to some extent. Even in the shadow of the Statue of Liberty, walls were erected, the "paper walls" that historian D. S. Wyman[11] describes, referring to the snarls of red tape that immigrants had to unravel.

Europe had long been a land of emigration, particularly to the United States, but after the Second World War it became a place of immigration, encouraging workers to come, especially from former colonies, to take part in the reconstruction of the region and contribute to its growth. Today, the prosperity of Europe and North America is a powerful pull factor for people in the countries of the South, although those who come seeking a better life are often disappointed.

Being a host is not always easy, especially when communities face a massive influx of people or lack the means to meet even their own needs. Should we open the "golden door" wide or build a wall? Should we coop foreigners up in camps to wait for a hypothetical return, like the millions of Palestinians in camps in Gaza, the West Bank, Lebanon and Jordan since the wars in 1948 and 1967 or the Somalians in the Dadaab camp in Kenya?

With the passing of time, the notion of asylum has become ambivalent, and it can now have the diametrically opposed meanings of hospitality and of being set apart. The term "asylum", previously used to refer to institutions for the mentally ill or the elderly, has taken on ambiguous connotations as both a place of welcome and care and a place of confinement. In this age of mass movements, awkward compromises have been made between closure and openness, which some refer to

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11 D. S. Wyman, *Paper Walls: America and the Refugee Crisis, 1938–1941*, University of Massachusetts Press, Amherst, MA, 1968.

as "encampment" policy.[12] Camps have become a modern purgatory, between the hell of rootlessness and the heaven of integration. Camps are usually set up in haste in response to waves of displacement, but keeping them open on a long-term basis raises a series of human, social and security problems without providing the people living in them with opportunities for the future. In the words of Michel Agier, author of *Les migrants et nous* (*Migrants and Us*), when large-scale camps were created in response to emergencies in the 1990s,

> a "humanitarian government of undesirables" was born, with the separation of a vulnerable remnant population, treated as a world apart from our own and contemplated from afar with compassion but also with fear and/or hostility. Camps have taken on a completely different meaning in this new context. They are both inside and outside. They form part of global "governance" but as if they were the place for second-class citizens to live.[13]

Today, "managing" migration flows has an ambiguous connotation; while many human lives may have been saved thanks to the European Union's Frontex operations at sea or to the funding provided for the reception of migrants in a number of countries (for example, the agreement between the European Union and Turkey[14]), these initiatives have also come under fire. Held up as measures designed to achieve "humanitarian" aims, they can also give States a way out of their responsibilities in terms of *non-refoulement*[15], by creating a buffer around their borders and outsourcing migrant reception to third countries. This could end up putting people seeking to emigrate in dramatic and/or hopeless situations in camps or detention centres. The "containment" of migrants makes migration an even more daunting prospect. According to Peter Maurer, "there needs to be a collaborative approach among States aimed at the well-being of individuals, and not to deter migration and punish those who decide to leave their communities. Security concerns must be balanced against humanitarian considerations."[16]

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12 See Guglielmo Verdirame and Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism*, Berghahn Books, New York, 2005.

13 Interview with Michel Agier, "Le temps de l'encampement", *L'Histoire*, No. 73, October–December 2016, p. 87. Translation by the *Review*.

14 For more information on the deal, see European Council, "EU–Turkey Statement", press release, 18 March 2016, available at: www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ and European Commission, "EU-Turkey Statement: Questions and Answers", 19 March 2016, available at: europa.eu/rapid/press-release_MEMO-16-963_en.htm.

15 *Non-refoulement* is considered to be a cardinal principle of international refugee law and the cornerstone for international protection (see, among others, UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, Geneva, 26 January 2007, p. 2.). This principle can be found in some variations in different bodies of international law. (Cordula Droege, "Transfers of Detainees: Legal Framework, *non-refoulement* and Contemporary Challenges", *International Review of the Red Cross*, Vol. 90, No 871, 2008). See, also, "Note on Migration and the principle of *non-refoulement*" in this issue of the *Review*.

16 Peter Maurer, "The Critical Challenges of Migration and Displacement", statement, 18 October 2017, available at: www.icrc.org/en/document/speech-migration-and-internal-displacement-national-and-global-challenges.

When foreigners are able to settle in a new community, the question of how hosts and newcomers will live together arises. Will the hosts integrate the newcomers into their community, respecting their linguistic, cultural and religious differences, or conversely, try to assimilate them into the melting pot?

A willingness to receive migrants can therefore be seen as naive or even subversive and dangerous in a climate of anxiety about identity and a deepening isolationism. Times change, and successive economic crises, fears about terrorism and xenophobic political movements have left their mark. Wide swathes of public opinion and numerous governments do not see immigration in terms of a duty of solidarity or of economic benefits (as an injection of labour and skills into an ageing population) but as a threat to national identity and security. By the same token, people fleeing conflicts and persecution can be perceived not as victims, but as dangerous intruders or potential terrorists.

Although enshrined in the legal, moral and religious norms, hospitality is regarded as just another "political opinion". It therefore takes a rare act of political courage to say, as Angela Merkel did on 31 August 2015, "Wir shaffen das" ("We can do it").[17]

"What's in a name?" Different names but the same ordeal

People leave their homes for a wide variety of often overlapping reasons, and the status granted to them under domestic or international law is a factor of great importance in determining the protection they receive and their future. Nonetheless, whether they are fleeing from conflicts or disasters, or are simply seeking a better future for their family, whether they cross borders or are displaced within their own country, these people often face the same hardships and encounter the same pitfalls along the way. ICRC President Peter Maurer described the difficulties they experience in the following terms:

> Once on their journey, migrants and IDPs face multiple risks and high degrees of vulnerability. When they reach their destination they often face difficulties in accessing health care, housing, education or employment. They may become easy targets for abuse, extortion and exploitation due to a lack of a protective family network, a lack of information or missing documents. Many suffer accidents or illness and cannot benefit from medical care. Some lose contact with their families. Thousands die or disappear along the way every year. Many are held in prolonged detention for having entered or stayed irregularly in a foreign country, in disregard of the fact that detention should always be an exceptional measure of last resort and limited in time.[18]

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17 Phoenix, "Flüchtlingspolitik: 'Wir schaffen das' – Statement von Angela Merkel am 31.08.2018", 31 August 2016, available at: www.youtube.com/watch?v=kDQki0MMFh4.
18 P. Maurer, above note 16.

The danger of establishing different types of treatment for different categories of people is that they risk being labelled, classified and treated with different degrees of humanity.

Given the unprecedented number of uprooted people, but also the politicization of the discourse on migration, the International Red Cross and Red Crescent Movement (the Movement) has adopted a broad description of the people it seeks to assist and protect, taking into account their needs rather than their status. The components of the Movement and other humanitarian actors uphold the same humanitarian principles, in particular the principle of impartiality, in their humanitarian response. The title of this issue[19] is therefore deliberately broad so that contributors can provide insights across all dimensions of this phenomenon.

The *Review* does not intend, with this choice of title, to disregard or make light of the different types of legal status that people can seek, such as refugee status; it is simply a reflection of the approach that the components of the Movement wish to adopt in their humanitarian response. As the British Red Cross says on its website, "whenever we see people who need help, we don't demand to see their passports. We just give them help and dignity – something we would all expect after a brutal journey into the unknown."[20]

In accordance with this vulnerability-based approach,[21] the components of the Movement are there on the front line, carrying out a wide range of activities to assist IDPs and migrants. The *Review* has asked several National Societies with experience in this field, namely the Australian, British and Honduran Red Cross Societies, to contribute to this issue, highlighting their work in addressing the needs of migrants and displaced persons.

As noted in observations made by Movement components working on the ground, some of the most serious humanitarian problems related to the phenomenon of migration and displacement are missing migrants, unaccompanied minors (an especially vulnerable group of migrants), immigration detention, the issue of data protection and urban displacement.

The matter of the fate of missing migrants is a particularly harrowing one. Thousands of people have gone missing at sea[22] and along migration routes in recent years. Thousands of bodies have been buried without any attempt to

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19 In this issue, the term "internally displaced persons" refers to people who are forced to leave their homes but stay in their own country, and the term "migrants" to people who have left their homes crossing one or more international borders (including refugees).

20 Craig Burnett, "Why Do We Help Refugees and Migrants?", *British Red Cross Blog*, 9 September 2015, available at: blogs.redcross.org.uk/emergencies/2015/09/why-do-we-help-refugees-and-migrants/.

21 For more on the meaning of the vulnerability approach, see, for instance, International Federation of Red Cross and Red Crescent Societies, "Policy on Migration", November 2009, Introduction, available at: media.ifrc.org/ifrc/what-we-do/migration/policy-strategy/; ICRC, "ICRC Policy Paper on Immigration Detention", April 2016, in this issue of the *Review*.

22 For considerations on the search and collect of the wounded, sick, shipwrecked and dead at sea in times of armed conflicts and an introduction to the updated Commentary to the Second Geneva Convention, see Bruno Demeyere, Jean-Marie Henckaerts, Heleen Hiemstra and Ellen Nohle, "The Updated ICRC Commentary on the Second Geneva Convention: Demystifying the Law of Armed Conflict at Sea", *International Review of the Red Cross*, Vol. 98, No. 902.

identify them, and thousands of children have been separated from their parents. The unbearable uncertainty suffered by families who do not know what has happened to their loved ones is one of the most tragic and least visible consequences of mass population movements. This issue of the *Review* opens with testimonies of families of missing migrants in Zimbabwe. These testimonies serve to show the everyday struggle, difficulties and ambiguity of not knowing the whereabouts or the fate of loved ones that those who stay behind are faced with. The ICRC recently published recommendations on missing migrants,[23] drawing on its extensive experience in restoring family links in conflicts. The policy paper emphasizes the need to standardize the way in which information about missing persons and human remains are collected and processed, bringing procedures into line with international standards. These recommendations also cover cooperation among the actors involved – including families – at the national and international level.

Another pressing problem is that of unaccompanied minors. The British Red Cross contribution to this issue addresses the problem in Calais, a specific case that came into the spotlight of media attention in 2015. The need for an urgent, efficient and adequate response demanded a lot of coordination and collaboration, always keeping in mind the specificities of the vulnerabilities of the migrants in question and tailoring a response to them.

The challenges with which humanitarian organizations are faced when it comes to data protection are ever-growing. It comes as no surprise that the humanitarian world needs to adapt fast, keeping in mind the outer limits of experimentation and the ways it might be detrimental to the "do no harm" principle. For this reason, this issue of the *Review* explores this important topic, especially keeping in mind the problematic issues of migrants and displaced persons, data protection and humanitarian action.

Migration management takes on different forms, one of them being immigration detention. In order to stop irregular migration, meaning entry into or stay or residence in a country of which the individual is question is not a national without proper documentation, some States resort to administrative or criminal detention. The problems and consequences of choosing detention as a tool rather than alternatives to detention[24] vary, but as the phenomenon is gaining pace and detention conditions can and sometimes do cause harsh physical and mental health problems, the ICRC has outlined key points for States to bear in mind in this regard.[25]

Recent developments have seen numerous IDPs and migrants seeking refuge in cities. The *Review* has explored the topic of urbanization in its recent

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23   ICRC, *Policy Paper on Missing Migrants*: *The ICRC's Recommendations to Policy-Makers*, Geneva, August 2017, available at: www.icrc.org/en/document/missing-migrants-icrc-recommendations-policy-makers.

24   For more information, see International Detention Coalition, "Alternatives to Detention", available at: idcoalition.org/alternatives-to-detention/.

25   The ICRC, driven by the protection and assistance needs of migrants held in detention, published a policy paper on immigration detention, outlining main considerations for States to bear in mind. See ICRC, "ICRC Policy Paper on Immigration Detention", in this issue of the *Review*.

issue on "War in Cities".[26] As was noted therein, the world is undeniably urbanizing and so are migration and displacement. The issue of urban internal displacement (coupled with the need for an adequately tailored humanitarian response), the search for appropriate and timely solutions and the specificity of the effects of urban IDPs on host communities are explored in this issue of the *Review*.

Useful insights can be gained from looking at the reasons why women and men leave their homes in the specific context of armed conflict. It is well-known that armed conflict is a major cause of displacement. Even in an armed conflict in which IHL is fully respected, people will likely be displaced. War, by its very nature, systematically causes population movements as people flee the violence or find that they cannot live in the conflict-ravaged area owing to the lack of material resources. But is displacement an immutable phenomenon over which we have no control, or can the scale and patterns of such movements be influenced by factors such as respect for the rules of IHL? Compliance or non-compliance with this body of law seems to have a very real and significant impact on the causes of displacement in times of war. The ICRC is currently conducting a study on the links between IHL and displacement. The findings will be published in 2018 and should provide a better understanding of the way in which compliance with or violation of the law can directly influence the scale and duration of displacement.

Humanity with its back to the wall

While the *Review* provides a humanitarian perspective on migration and displacement, the medium- and long-term international response to current developments must go beyond that. The idea of global governance is gaining ground in today's increasingly interdependent and globalized world, and migration and displacement are clearly concerns for this governance in which States have the primary responsibility. Humanitarian actors are nevertheless also called on to play an important role in this respect, highlighting the human consequences, distinguishing real solutions from quick fixes and political posturing, and helping to foster empathy and win over public opinion.

On 19 September 2016, 193 States adopted the New York Declaration for Refugees and Migrants, in which the United Nations (UN) General Assembly expressed its intention to develop a "global compact for safe, orderly and regular migration" and a "global compact on refugees". The Global Compact for Migration will be the first intergovernmentally negotiated agreement prepared under the auspices of the UN to cover all dimensions of international migration in a holistic and comprehensive manner. The process to develop the Compact started in April 2017. The General Assembly will hold an intergovernmental

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26 See the previous issue of the *Review* on "War in Cities", Vol. 98, No. 901 available at: www.icrc.org/en/international-review/war-in-cities.

conference on international migration in 2018, with a view to adopting the global compact.[27] The ICRC has published a comment[28] in which it voices its concerns about the political unease that the recent crises have caused and puts forward its recommendations on clear commitments for the international community.

The New York Declaration also gave the UN High Commissioner for Refugees the task of building on the Comprehensive Refugee Response Framework to develop a Global Compact on Refugees, and he will propose the text in his 2018 report to the UN General Assembly. This issue of the *Review* features an interview with High Commissioner Filippo Grandi, who talks about the current crises, his organization's priorities and the preparation of the Global Compact on Refugees.

Human mobility is a natural dimension of humanity, and everything suggests that it can only continue to increase in our globalized world. The issue of migration is at the heart of the agenda today, doubtless due to the massive influx of people knocking on the doors of prosperous nations. This influx is a result of protracted conflicts, crimes against civilians and the march of globalization.

While it is true that mass population movements have reached harrowing proportions, the history of hospitality shows us that major crises in the past have often led to a surge in solidarity and the progressive extension of the international system of protection. Effective solutions are urgently needed for people on the move, in camps, at the border of rich nations and in countries at war, because time lost will cost more human lives.

The question now is, will the scale of today's crises trigger new progress in stepping up the international response? Or on the contrary, will we see more walls being erected to repel people perceived as the "invaders", the "terrorists" and the dangerous "unknown"? As we can discern from the cover photo of this issue, the labels we give are just a reflection, an image in our minds, of the lives of real women, men and children. They all have the right to be treated with humanity.

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27 At the time of writing, the Zero Draft of the Global Compact for Safe, Orderly and Regular Migration had been published, available at: refugeesmigrants.un.org/intergovernmental-negotiations. The draft was prepared by the co-facilitators from Mexico and Switzerland, and it represents the official commencement of the intergovernmental negotiation phase.
28 ICRC, "ICRC Comments on the Global Compact for Safe, Orderly and Regular Migration", 6 July 2017, available at: www.icrc.org/en/document/icrc-comment-global-compact-safe-orderly-and-regular-migration.

INTERNATIONAL
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VOICES AND PERSPECTIVES

"All I want is to know": Testimonies of the families of missing migrants in Zimbabwe

A homestead in Gwanda where a family has lived for five years without knowing the fate of one of its members – a daughter, mother, sister and aunt – who went missing and whose whereabouts remain unknown. Photo by Jesilyn Dendere, © ICRC.

Every day, people all over the world leave their homes in search of a better life. On the road, many go missing. The mandate of the International Committee of the Red Cross (ICRC) to protect the lives and dignity of victims of armed conflict and other situations of violence includes, in certain contexts, protection of vulnerable migrants. The ICRC missing migrants pilot project aims to locate or clarify the fate of Zimbabwean migrants who went missing in South Africa, on behalf of their families. The ICRC aims to work with South African and Zimbabwean authorities to support and enhance existing systems, tools and resources used for locating missing relatives, living or dead. Additionally, the ICRC carries out and supports the activities of National Red Cross and Red Crescent Societies in the region to restore contact between and where possible reunify family members, in particular children, who have been separated by conflict, migration, displacement or natural or man-made disasters.

The Review *has chosen to open this issue with the stories of family members of missing migrants in Zimbabwe. The section aims to show the everyday struggle, sometimes lasting for many years, of those that live with continuous uncertainty regarding the fate and whereabouts of their loved ones. As a result of the disappearances associated with migration, families searching for missing relatives often face a range of needs and challenges. These persons chose to share their life stories with the* Review, *allowing our readers to understand the intricate balance of uncertainty, hope and the "need to know" that family members of missing migrants live with every day. The testimonies were given to the ICRC in Zimbabwe in November 2017. In order to protect the families, their names have been omitted.*

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Mr S. N. *is 80 years old. He has been looking for his grandson, who went missing in 2007.*

The last time I saw my grandson was in 2007. Since then, we have not seen or heard from him. I cannot say I remember the exact day he went missing, because when he left the homestead, it was to work in Beitbridge [the main town on the Zimbabwean border with South Africa]. A bus came and picked up a lot of young men for manual labour in Beitbridge. At that time, as a family we were not very worried because this is what young men do – they look for work to fend for themselves.

During the time that he was in Beitbridge, he used to communicate with me. In 2007, when his contract with the company that he was working for ended, he asked me to send him his passport and other identification documents so that he could start looking for another job. Genuinely believing that he wanted to look for another job, I sent him the documents he needed. This was the last time I spoke to him. I had no idea what his plans were.

After a couple of months, I realized that he had not made contact with us here at home. I tried calling him on the number that he used but I could not get through. I then started asking his friends and former workmates about his

whereabouts. That is when I started hearing stories that he had said goodbye to his friends and told them he was going to look for a job in South Africa. I was told that he had left Beitbridge.

I continued asking relatives and his friends in South Africa if he had arrived to look for a place to stay or at least to visit them. The answer was the same each time: "We have not seen him." South Africa is a big country; I did not even know where to start looking for him. Look at how old I am. I am 80 years old now and do not have the physical energy to cross the border and look for him. Even if I wanted to send a relative to look for him, where would they start?

> **❝It has been ten painful years for me. The greatest source of pain is not knowing whether he is alive or not. I may not ask him to come back home immediately, but all I want is to know.❞**

We did not at any point report him to the police as a missing person. I didn't think it was necessary because all young people from this area were travelling to South Africa to look for jobs. This is common practice in this part of the country. Also, I thought he was going to come back. However, I realized after several months that he was now a missing person and I thought it was already too late to report him as missing to the police.

I do not know what happened to him. My heart hurts so much because I could not do anything to find him when there was still time. Perhaps he drowned while trying to illegally cross into South Africa. But he had a passport – why would he have used that route? I don't know what happened to him. We all loved him. I would want him to come back home. I hope that he will come back to us alive.

I am grateful to the ICRC for the search that they have initiated; it gives us hope that finally a search for him is going to be started. It has been ten painful years for me. The greatest source of pain is not knowing whether he is alive or not. I may not ask him to come back home immediately, but all I want is to know.

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Ms M. N. lives in Zimbabwe. Her daughter went missing in 2012.

My daughter has been missing for the past five years. On the day she went missing in 2012, we left our home together and took the same bus from Zimbabwe to the South African border. I was headed to my workplace, a farm in South Africa. My daughter had also been working in South Africa since 2008. We took a second bus that took us towards Johannesburg, and after we crossed the border, we were going to disembark at different stops. When I got to my destination, I got off and left her to proceed with her journey. Her last words were, "I will call you as soon as I arrive."

A few days later she still had not called. I received a call from her employer informing us that she had not turned up for work, and that she had not communicated a reason for not being at work. At that time, I did not panic. I was confident that she was fine and had just been delayed.

Later, when her employer advised us to report her to the police as a missing person, I became nervous. I sent her sister to South Africa to file a police report. The police advised her to go back to the border of South Africa and Zimbabwe and liaise with the police. She did this. She was able to check the identification of people who had been arrested by the South African police while trying to cross the border illegally from Zimbabwe. Her sister was not there.

She then checked the mortuary in Musina, the main town along the South African border with Zimbabwe. There, she was told that a female body had been found in the river, possibly trying to illegally cross into South Africa. She went to where the body had been found, and discovered that it was not her sister.

> ❝These have been the most painful years, not only for me as a mother but for all of us as a family. When your child goes missing, not a day passes by without thinking about it and reliving the pain.❞

In the first months following her disappearance, there was a lot of activity from the police in South Africa. Our family was hopeful that she would be found. Our home area in Zimbabwe is quite remote, so we could not do much ourselves to look for her. We depended on police updates. However, as months moved on there was no news. My heart sank and I began to lose hope. Months turned into years. But there is never a day that I do not think about my child.

In 2014, one of our relatives told us he had spoken to her on Facebook. She had told him she would be coming home soon. My hope was revived and we anxiously waited for her to come back. After that there was no sign of her return.

My daughter left me with her son. He is six years old now. She was the family breadwinner and life has not been the same since she went missing. We are struggling to feed the children and take them to school. I wouldn't want to speculate about what could have happened to her. I don't want to think about it, but if she is somewhere, what could have happened to the love she had for her child? I know she would have come back to her only child.

It has been hard. In all these years, I wanted to do something to try and find my child but I did not know what to do or where to start. I know that I can't just sit and do nothing, but no one has offered to help us.

When the ICRC arrived to tell us that they were assisting families who have missing family members, I did not think twice about registering. I am not sure where this search will lead us, but it has given me hope. I can now hold onto the knowledge that something is being done to find out what happened to my daughter. As a family, we will accept whatever outcome we are provided with. We have waited for a long time for any news about what happened to her.

But I can never forget the past five years. These have been the most painful years, not only for me as a mother but for all of us as a family. When your child goes missing, not a day passes by without thinking about it and reliving the pain.

Interview with Filippo Grandi

United Nations High Commissioner for Refugees*

Filippo Grandi became the eleventh United Nations (UN) High Commissioner for Refugees on 1 January 2016. He has been engaged in international cooperation for more than three decades, primarily with the UN, and served in field operations in many of the major refugee and humanitarian crises of those years, including in Southeast Asia, the Great Lakes and Afghanistan. His previous appointments include Commissioner-General of the UN Relief and Works Agency for Palestine Refugees in the Near East, and Deputy Special Representative of the Secretary-General for the UN Assistance Mission in Afghanistan. As High Commissioner he is head of the Office of the UN High Commissioner for Refugees (UNHCR), the UN Refugee Agency, which leads the international response to refugee crises around the world, working with governments to ensure that refugees have access to protection and support, and helping find solutions to displacement and statelessness.

The tradition of providing refuge to people who are fleeing and in need of protection is a long-standing one, present throughout history and in various contexts, and now embedded in international law. The New York Declaration for Refugees and Migrants, adopted by the UN General Assembly in 2016, reaffirmed international refugee protection standards and provided a model for a more comprehensive response to large-scale refugee movements, based on shared global responsibility for refugees. It represented a critical development at a time when international cooperation aimed at preventing, responding to and resolving conflicts is proving inadequate, and an increasing number of people are being internally displaced,

forced across borders or left in protracted exile as a result of conflict, violence and persecution. In this interview, the UN High Commissioner for Refugees shares his thoughts on some of today's most significant forced displacement challenges, and the prospects presented by the New York Declaration.

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You have had a great deal of experience in refugees and humanitarian work. Have you observed that the humanitarian needs of the displaced have changed during the course of your career? How has the response to those needs changed?

The most fundamental change is in the global context in which humanitarian needs are generated, especially since the end of the Cold War. I first started working with refugees in 1984, with Cambodians in Thailand. This was a case involving a major conflict, and Cold War refugees. I worked for a non-governmental organization, and the people we found ourselves assisting included not only refugees but also some remnants of the genocidal Khmer Rouge, who, because of the Cold War context – they were escaping the current Vietnamese government, which was supported by the Russians – were given refuge in the West. There was support for this population by, among others, the United States, Thailand and China. The needs of refugees *per se* are not that different today from what they were then, as people need food, medicines and protection, but the global political context has profoundly changed.

Another change has been the magnitude of the populations affected. In twenty years, from 1997 to 2017, the number of people forcibly displaced around the world by conflict, violence and persecution has doubled – from almost exactly 33 to 66 million. Prior to the nineties, we did not really know how many internally displaced persons there were; this is also a matter of communication, better information and more access. The space for neutral, impartial humanitarian action was very limited, and the Cold War context precluded many organizations from accessing many of the people affected, especially in locations like Africa or Southeast Asia where major proxy conflicts were carried out.

Finally, it is interesting to see a different attitude to protracted refugee situations. Contrary to what is often said, these are not something new. A case in point is the Palestinians. Their displacement has lasted longer than any other group, and had already lasted for decades even when I started refugee work in the late eighties. However, there were many others as well. For instance, my first job with UNHCR at that time was in Sudan, where we dealt with Eritreans and Ethiopians who had already been refugees for more than twenty years. Protracted

refugee situations clearly existed then, especially in Africa. The difference is in the way that they are dealt with. There were many more possibilities for integration of long-term refugees back then, and many examples of populations that were integrated in their host countries. The issue was less politicized, and States could absorb refugees who stayed for a long period of time more easily than is the case now. Talking about integration today is difficult, as many States are uncomfortable with that word for a variety of reasons that are often understandable.

You mentioned that the refugee issue has had an underlying political dimension to it. Is the context different now? Is there less solidarity than in the past?

I would not say that there is less solidarity now than in the past. It might be that solidarity has taken on different dimensions. In the past, the refugee issue was a humanitarian one, with its own legal aspects and specificities. The context itself was political, but the responses were seen as essentially humanitarian in nature. Today, the context is still a political one – people flee because of conflicts, which are political crises. However, the difference is in the responses, which were less controversial in those days.

The example of resettlement – which in the UNHCR language refers to bringing refugees from one country of refuge to another – is a good measurement of global solidarity. Traditionally, resettlement was mostly done from countries in Asia or Africa to the US, Canada, Europe or Australia. It is not required by any international treaty, but is a voluntary programme that governments offer with the aim of sharing, to an extent, the burden of countries hosting large numbers of refugees. Usually, it is aimed at giving opportunities to the most vulnerable refugees, such as women at risk, people exposed to particular protection risks, and so forth. Historically, resettlement played a fundamental role in crises such as the one in Indochina in the eighties. Integration was always a difficult issue in Asia. At the time, countries like the US, Canada, France and Switzerland agreed to take a large number of refugees from Vietnam and Laos. These humanitarian resettlements, which were also well resourced, could be thought of as models of humanitarian response.

Another similarly good example would be the concept of temporary protection. When the Bosnians fled, UNHCR crafted the concept of temporary protection – an exceptional measure to provide people unable to return to their country of origin with immediate protection in the context of mass influxes. Germany and other countries responded rather quickly.

Additionally, there is the example of emergency evacuation. In 1999, UNHCR had to negotiate the emergency evacuation of Kosovo refugees. The Former Yugoslav Republic of Macedonia did not want to let anyone in, which caused a blockage of 100,000 people at the border. UNHCR worked with States and evacuated them in a matter of days. Hence, one can say that this was

political but not politicized. There was a sense of urgency to find solutions and certain States came readily to help. I think in that sense solidarity has changed.

Conversely, if one looks at Europe in 2015–16, there is a lot of solidarity among ordinary people. I think that that has not gone away. The "Western" governments have become timid in proposing solutions for refugees, especially if that means taking them in their respective countries. The usual response to this concern is the risk of losing political capital. Undoubtedly, a part of public opinion is against these solutions for refugees. However, rather than avoiding action, political leaders and governments should perhaps invest in that part of public opinion that is very open to solidarity.

The question remains as to why governments do not listen more. The challenge is for all of us to prop up this public opinion, interact with the public and help them become actors of solidarity in a way that influences governments in the right direction.

Some in the academic and humanitarian community would argue that the term "refugee", as it is understood in the 1951 Refugee Convention,[1] is too narrow given the varied drivers of displacement. How does UNHCR address these concerns? How would you address the calls to renegotiate or expand the definition found in the 1951 Refugee Convention?

The fundamental point is that any renegotiation of terms in the current international context is quite dangerous. The definition is very clear when it comes to refugees fleeing persecution. One should note that it has proven to be adaptable to different situations forcing people to flee against their will, and especially to flight related to different forms of conflict and violence. Man-made circumstances, in particular, evolve with the passage of time. For example, many of the people fleeing from violence perpetrated by gangs in Central America are considered to be refugees as they have lost the protection of their State. This capacity for adaptation to contemporary forms of persecution and violence stays very clearly within the spirit of the 1951 Refugee Convention.

As well as the 1951 Refugee Convention and its 1967 Protocol, there are now also regional instruments: the Convention adopted by the Organisation of African Unity in 1969, the 1984 Cartagena Declaration and the European Union asylum framework. These instruments are very valid, usable and used, and they complement the big vision of the 1951 Refugee Convention. Over the decades, they have also helped UNHCR adapt its responses.

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1   Editor's note: Under Article 1(A) of the 1951 Refugee Convention as amended by its 1967 Protocol, a refugee is someone outside his or her country of nationality or habitual residence owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, and who is unable to enjoy protection from his or her own State.

I would agree that today the situation is more complex than in the past. However, I do not think that the definition of "refugee" is weakened and that unless it is reviewed or broadened it loses its effectiveness. The 1951 Refugee Convention is actually a very versatile document. There might be some parts of it that are less relevant today, such as the ones that dealt with transitional arrangements and so forth, but by and large, the Convention is a very current document that can be very actively utilized and which can – and does – save lives.

Further, the issue of climate change and so-called climate-related refugees or forcibly displaced persons is a very complex one. We have been asked to be part of the debate on people moving for climate-related reasons, and we have also participated in responses to natural disasters – for example, in the Philippines and in Pakistan during the floods. Our role there has been to move into responses that are not those related to traditional refugee movements, meaning conflict- or persecution-related. We have transferred our expertise in dealing with the consequences of those movements to circumstances which were similar, in particular as regards protection risks.

Admittedly, one of the biggest challenges today is that of mixed flows. In Libya or, to an extent, Central America, some people are clearly identifiable either as refugees or non-refugees, but then there are many others whose situations require a more complex analysis which demands a lot of time. This is quite a challenge.

It is important to maintain the distinction between refugees and migrants. We do not say that all those on the move are migrants and some of them are refugees, but rather that some are refugees and some are migrants. It is important to be clear that refugees are outside their countries and are unable to return for very specific reasons related to conflict and persecution. Migrants may also have problems, but they are different in nature. It is important to maintain this distinction while recognizing that movements, especially if they happen in parallel, have many common features which need to be addressed comprehensively, and not just by category. The most obvious examples are trafficking and slavery.

Most recently, a lot of media attention has been dedicated to the so-called "refugee crisis", much of it focused on refugees crossing the Mediterranean to reach Europe. What challenges and opportunities does this type of media attention bring for UNHCR?

This is a crucial question, and the reply has several aspects. We have always thought that attention is good because it brings resources and in some cases energizes the search for solutions. To an extent, this is also true for the Western and Central Mediterranean crises that have affected Europe in the past three years.

However, there are downsides. One is the nature of this type of media communication. The global refugee crisis is almost entirely a crisis affecting the countries in the global South. Around 84% of refugees are hosted in developing

countries, not in the global North. Yet, because of the people arriving to Europe, in particular in 2015 and 2016, this is often portrayed as a European crisis or a crisis of the "rich world". Unfortunately, there is also political manipulation around it, portraying it as an "invasion" or merely an attempt by people to get better opportunities. On the contrary, however, the global refugee crisis is essentially one of people seeking protection and safety, and fleeing conflict. This is a fundamental issue that gets lost in this perspective. Such is the downside of a continent which is at the heart of global communications being affected in this manner, and for the first time. The only other equivalent that I can think of is the Balkans in the nineties, but that example was different in nature as it was a "Europe to Europe" crisis. In comparison, the current perception emerged when African and Middle Eastern citizens started coming in large numbers to Europe. Even though this was maybe not so dramatic, the political manipulation coupled with the media visibility caused a lot of damage.

As a consequence, the effects in Europe today entail restrictive legislation, inability to craft a common European approach to handle the crisis – as seen in the very limited success of the relocation scheme – and no progress in the current discussion on a Common European Asylum System. Some countries, influenced by all that has happened, do not want to agree on shared solidarity measures.

Apart from the negative effects of this visibility in Europe, there is also a global effect. Some countries of the global South are being asked to keep borders open, or to continue to host refugees that have been there for several generations. Every time I visit them, I get asked many questions in reference to the demands put on them by "rich countries" as well as their responses. The reality is that the negative visibility given to the crises by unscrupulous politicians is affecting UNHCR's ability to work with States that host the bulk of the refugees. One illustrative example is Kenya. This was one of my first crises as High Commissioner. I went there three or four times last year to try and address the pressure to close the Dadaab refugee camp. The Kenyan government referred to the fact that these refugees, perceived as a security threat, have been there for twenty-five years. There were demands to find a solution, either to work towards peace or in any case for Somalia to receive the refugees back. Interestingly, it was emphasized that "rich countries" also voice the same concerns, but still push people back or do not take them in. Therefore, the question arose as to why Kenya, with much fewer resources, should respond differently. It is important to note that in these situations, especially the protracted ones, resources have dwindled. Unfortunately, after the first few years it is very difficult to continue to resource a response in the traditional manner.

Consequently, the negative role of the media visibility is very difficult to handle. What does not always come to mind, but is very damaging, is the problem of setting a negative example. People sometimes realize this when I say it in a public speech. Europeans usually do not have a problem in saying that Kenya or Pakistan should take refugees, but reactions change when it is about them. Challenging this attitude usually results in the answer that this problem is a political one in Europe. However, this is a political problem in places like

Lebanon, Kenya and Pakistan as well. The failure to recognize this is almost "colonial" in nature.

My final point is more on the positive side. As it was Europe that was hit so visibly and dramatically, this generated important debates in the last part of 2015 and 2016. The debates ranged from the topic of the humanitarian–development nexus and how to become concrete in addressing long-term crises, to working on more predictable and better resourced responses to refugee emergencies. The discussion at some point moved into the UN General Assembly and generated the New York Declaration and the process that will hopefully lead to the adoption of the two Global Compacts. This would not have happened, in my opinion, if the visibility of that crisis had not prompted lots of countries to say that something needed to be done. We need to try and find a response that is better than we have managed so far.

Turning to the two ongoing Global Compact processes, on refugees and migration respectively, could you tell us more about their significance and what is expected from them?

When it comes to the Global Compact on Refugees, UNHCR has been tasked by the General Assembly with facilitating the process. We have concluded a first year of informal consultations with States, civil society and other organizations and have entered into the second year of formal consultations on a draft text.

The idea is to obtain a document or a tool which does not put into question the fundamental principles and standards. It will be based on the existing doctrine, with the aim of reinforcing it and finding a better way to respond to crises. The Compact on Refugees is an agreement between all States that there is a problem and that there are certain rights enshrined in international law, and refugee law more specifically, that the people in question enjoy. However, the responses have been very inadequate. This is especially true for big crises in terms of resources and sharing responsibility.

When it comes to expectations, the Compact on Refugees started on a good footing, as the New York Declaration already spoke about this in Annex I, which has become known as the Comprehensive Refugee Response Framework. We want that framework – which has already been agreed to by 193 States – to become the basis of the Compact, together with a programme of action, which will make certain commitments and engagements by States more concrete.

Many questions were put forward in the first informal phase of the process. How to become more effective in raising resources? How to become more predictable in mobilizing the logistical capacity to respond to big crises? How can development actors intervene at an early stage so that we can invest in areas that have been traditionally underfunded, like education and employment? How can the international community better support host communities, especially in large-scale situations? These, and others, are all lingering issues that have always existed, but we have never been able to make responses very predictable because

there was never a drive to agree to a plan of action. Whether this will be translated into better responses will depend on States, but we will have a framework of reference that will be very important.

It is also very important that the framework is applied on the ground, and this started immediately after the adoption of the New York Declaration. Uganda was the first country where it was applied, and now thirteen countries are already rolling out the comprehensive model. This has four key components: easing pressure on host countries and communities; building the self-reliance and resilience of refugees and hosting communities, as opposed to responding purely to humanitarian needs, which remain important; developing more resettlement opportunities and legal pathways to other countries; and building conditions for voluntary return.

Many lessons are already emerging from this experience, both positive and negative. Regional approaches have been put in place in Central America, for instance, and for Somali refugees in the East and Horn of Africa – an approach that was endorsed at heads-of-State level in Nairobi in March 2017. In several countries in Africa there is also a country-by-country approach, and some countries in Asia are also considering joining. The key takeaway is that even though this is not a new Convention in the making, States are asked to make certain commitments. In particular, one should emphasize the call for mobilizing financial resources as well as more resettlement, and on the part of the host countries, the call to give refugees more access to public services and the labour market. This is a more inclusive approach than putting refugees in camps and keeping them there for twenty years. The idea is not to open more refugee camps, but rather to allow refugees to be included in the local economy and public services for as long as they need to be in that country.

Clearly, there are numerous ideas but many are not really new. The achievement is that they are now all presented together in one document – which, once approved, will enjoy the endorsement of all States, giving it particular strength at an international level.

The development of the Global Compact for Safe, Orderly and Regular Migration (Migration Compact) is in certain respects more complex, as it starts from a much more limited doctrinal basis. Clearly, migrants have human rights, but there is no equivalent instrument to the 1951 Refugee Convention or the regional refugee frameworks. This makes it a more challenging process. As UNHCR is a contributor to that debate, the main interest is to make sure that the common issues are addressed in a manner which is harmonious between the two Compacts, while at the same time making sure that the particular status and rights of refugees are upheld.

It should be noted that a strong and solid Migration Compact is important for refugees as well. If migration is managed better than is currently the case, this will have a positive impact on the way in which refugee flows are addressed. For one, a lot of people that currently move, not for reasons of persecution or violence but to look for economic opportunities, would be less inclined to resort to asylum claims as their only channel to get into countries. Providing safe, regular migration

opportunities would help alleviate undue pressure on the institution of asylum, which is already challenged, and often fragile. The Migration Compact is very important and is, at least, the starting point of a better way to manage migration – more effective, more respectful of people's rights but also more useful to States. In a way, the two Global Compacts are very complementary and it is important that they move together in parallel. It would be unfortunate not to have consensual compacts, because in the end, the fundamental issue is that people on the move, be they refugees or migrants, are not an isolated phenomenon any more. These are issues of global interest which need global responses.

There is a lot of talk around the topic of "burden-sharing" or "responsibility-sharing". What, concretely, will the Global Compact on Refugees do to facilitate responsibility-sharing between States?

There are three key things. The first one is more resources, but resources of a different nature. For years now we have been battling to mobilize more humanitarian resources through the traditional means, but these efforts have been outpaced by growing needs, and we are now pretty close to hitting the outer limits. In particular, protracted displacement situations that do not offer much chance for local integration generate needs that humanitarian resources cannot fully respond to, like education, livelihoods, employment benefits and the whole array of needs that pertain to the local communities that host refugees. We hope the Global Compact on Refugees, underpinned by much stronger, earlier development action including new financing instruments, will address this. If done on a broad scale, this can represent much more substantial burden-sharing.

The second key aspect is resettlement. Resettlement is not and will never be the solution for a large number of people. Last year we were able to find places for around 75,000 refugees, representing a very small proportion of the refugees that fall under UNHCR's responsibility, who are now approaching 19 million. This is much less than 1% of the total number – and also represents a fall of around 50% from 2016. We believe the number of resettlements can and should be much bigger. This is a very powerful aspect of burden-sharing.

An illustrative example would be the Dadaab camp. Indeed, a third generation of refugees is now growing up there, in an isolated area of Kenya. This is not a good solution for anyone. We did not want them to be pushed back to Somalia, but we agreed with the government that we needed to "unpack" Dadaab and look at different solutions: resettlement, local integration for people that were of mixed Somali and Kenyan heritage, transfers to other parts of Kenya, voluntary repatriation to Somalia for those that wanted to go back. However, this could be done only by Kenya, UNHCR and Somalia together; we needed a joint effort, and help from other governments. This is an

embryonic example of broader solutions. The reduction in resettlement to the US has come at an unfortunate time, in the middle of this situation. The US went from officially accepting 110,000 refugees a year – although this ceiling was not in the end reached in practice – to fewer than half that number last year. This, of course, goes against the notion of shared responsibility. We would actually like countries to increase their quotas, as many countries in Europe are now planning to do.

The last key point is more awareness on the part of public opinion and civil society. We are trying to find ways through which the business community, both international and local, can become involved in responses.

In the humanitarian sector today, which is increasingly expanding in terms of local, regional and international actors, how is UNHCR's experience in partnering with other organizations? What new opportunities do you see?

From its very beginnings, UNHCR worked through or with partners. These were mostly local and international NGOs and sometimes National Red Cross and Red Crescent Societies.

In the past twenty years UNHCR has gone through a complex exercise in moving from partners that are essentially recipients of our funds to more strategic partnerships based on collaboration and complementary expertise. For instance, we partner with many NGOs that have developed very good protection skills, which years ago was an area in which we were essentially working by ourselves. Overall, on the NGO front, although it is always quite dynamic and there is a lively debate, I think we work well together. However, the areas where we need to learn a lot more – and I see the Compact on Refugees as an opportunity for this – are the development partners and the private sector.

When it comes to development partners, we are fortunate to have very visionary leadership at the World Bank. On the UN side, we have invested a lot in this relationship and have made huge strides. The World Bank has created a fund, under its International Development Association IDA18 replenishment process, to provide targeted development support to countries and communities hosting large numbers of refugees, and together with other stakeholders has also developed financial instruments for middle-income countries affected by large refugee flows, such as Lebanon and Jordan. Yet, we still need to advance and learn more, in terms of language, tools and analysis, in our interaction with the development partners. This is true for the World Bank, and also other financial institutions and major bilateral entities like the European Union. At the same time, these prospective partners also need to learn our way of reasoning, operating and analyzing. The cooperation with the World Bank has been very successful – it now uses us as a sounding board with regard to its allocation of refugee-related funds through grants, loans, soft loans and other instruments. We help analyze the relevant data, learning a lot in the process. This opens up

enormous possibilities – in particular, the resources in question are considerably bigger than those we can ever mobilize in the humanitarian world, and the World Bank also brings into the equation its capacity to analyze data, especially economic data. These are capacities that we never had before, as this is not our area of expertise.

The other area is the private sector. For a long time the private sector was considered essentially a donor or a giver of charity. This remains to some extent true today, but many private donors are also expressing their willingness to partner with us and be a part of how we programme. This has many benefits, as they have significant expertise in areas of technology, business models, employment schemes and training, especially skills training. They bring in additional resources, new approaches and new expertise, and can create a lot of awareness. Often, they are large companies that have a lot of employees and big markets, which means they give publicity to what they do and create awareness about positive approaches to refugees. I am a big believer in this. At the same time, it is also very challenging because of the gap in conceptual approaches, which is even bigger than with development organizations.

The interest in preventing atrocities seems to be gaining pace – already twenty years ago, UNHCR had spoken about early warning. The link between respect for international humanitarian law (IHL) within the frame of conflicts to prevent forced movement of populations has been very present in the international discourse. How do you see this interest in prevention? What is your contribution to it as the head of UNHCR?

It is true that conflicts have become very harsh on civilians, maybe harsher than they used to be. Civilians have always been targeted in all wars, but after the Cold War ended, starting from the Balkans, the Great Lakes and so on, there seems to be more license to target civilians than was the case before. This is a major cause of flight, and IHL violations are a fundamental element in the decisions of people to flee. The risk of their houses being destroyed, their life or freedom being threatened, or forcible recruitment, for example, are important factors in driving displacement. I think that respect for civilians in conflict would be a formidable measure for preventing forced displacement. We know how difficult that is, but the discussion on prevention is very important, and for it to be effective there needs to be a minimum of political will. From the UNHCR side, we offer information coming from our observations of population movements and conversations with refugees as systematically as possible. We also share this information with our political colleagues in order for them to have a better analysis of looming conflicts. This is more early warning than prevention. Importantly, the current Secretary-General, who was my predecessor as High Commissioner, has a very clear sense of the importance of

early warning and prevention. There is now more awareness in New York that a "humanitarian" read-out of these situations – for example, in relation to the Congolese refugees leaving the Democratic Republic of the Congo for Angola last year – is important to help address conflict at a very early stage. Other than that, it is really a political matter.

With all the ongoing international processes you mentioned, the challenges and the need to work together to find solutions, what do you see in the future for UNHCR?

My mandate as High Commissioner for Refugees has two aspects: protection of refugees and other people of concern to UNHCR, and working with States to find solutions.

The narrative on the crisis of protection is unfortunately very true, but so is its twin evil – the crisis of solutions.

The end of the Cold War raised expectations that we would be able to solve conflicts, but these have been met with a lot of disappointment for a variety of reasons. The only conflict that was solved in 2017 was Gambia. António Guterres, assuming office as UN Secretary-General at that time, saw Gambia as a very good model. ECOWAS [the Economic Community of West African States] successfully worked on prevention, so that the conflict would not erupt and become worse. Unfortunately, it stopped there, and no other conflict was resolved last year. Clearly, this is a big obstacle in carrying out our mandate. One has to navigate extremely complex situations in which solutions are not clear and, for the majority of people, are simply not there.

Considering this pressing and ongoing need for solutions, at UNHCR we are establishing a new division – the Division of Resilience and Solutions – that will be overseen by Volker Türk, our Assistant High Commissioner for Protection. By focusing on resilience, we can concentrate our efforts on transforming the circumstances of refugees that are stuck in long-term situations and on keeping them, and the communities hosting them, strong until a solution happens.

The crisis of solutions obliges us to look at intermediate issues, but in a different manner. I think this crisis of solutions is linked very much to the prevention discussion. It is a fundamental challenge. In the nineties we had a lot of hope, but unfortunately many of those hopes have not been met.

Moving forward, we must be both ambitious and realistic. The New York Declaration was, I believe, an important reaffirmation at the highest level of the values and standards of international refugee protection, at a time when these were being called into question by many. It has provided us with an important platform for engineering real changes to the response system and making it much more robust, comprehensive and sustainable. Political attention is constantly shifting, especially around a charged issue such as refugees and migrants, and we can certainly anticipate challenges and setbacks ahead. It can be very tempting, in

circumstances like these, to say "it's impossible" – but we absolutely cannot. We have to confront the challenges, and to take up the important responsibility of turning the political commitments of the New York Declaration into something very concrete, with a real impact on people's lives, and to avoid making them hostage to volatile politics. This is essentially what the Global Compact on Refugees hopes to achieve.

PERSPECTIVES FROM THE NATIONAL SOCIETIES

Mobilising the Movement: Australian Red Cross, migration, and the role of the Red Cross and Red Crescent Movement around humanitarian response

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Abstract

Established in war, embedded in communities and operational in every major natural and man-made disaster, the International Red Cross and Red Crescent Movement (the Movement) – including 191 National Societies – is uniquely positioned to address the humanitarian needs of migrants at all points of their journey. With migration on the rise and an area of intense debate, this article examines the work of Australian Red Cross and the collective efforts of the International Federation of Red Cross Red and Red Crescent Societies, the International Committee of the Red Cross and the Asia Pacific Migration Network, particularly across 2015–17, to support the Movement in the region in providing assistance and protection to those who are most vulnerable. It considers the progress made so far, and the potential of the Movement to engage more effectively and collaboratively on opportunities and challenges into the future.

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As a National Society, this meeting is very important on migration, to improve our knowledge, and better advocate to authorities for migrants using the principle of humanity.

> APMN Migration Focal Point response after
> the "Mobilising the Movement" meeting,
> 28 April 2016[1]

APMN has played an important role to keep migration on the radar. There was previously not a role or focus from IFRC. APMN has been crucial in progressing this for the region.

> IFRC Asia-Pacific after the 2017 APMN General
> Meeting, 8 June 2017[2]

Established in war, embedded in community, and operational in every major natural and man-made disaster, the International Red Cross and Red Crescent Movement (the Movement)[3] is uniquely positioned to address the humanitarian needs of migrants at all points of their journey.

National Red Cross and Red Crescent Societies (National Societies) are present in 191 countries, with a broad reach into communities through their branches and volunteer networks. They provide humanitarian assistance to migrants in countries of origin, transit, destination and return; their emblems are universally regarded as a sign of safety.

The challenge is whether the Movement is working to its full potential for the benefit of migrants in transition, wherever they may be, and what more can be done. This challenge led Australian Red Cross to embed, in its 2020 strategy, support for a coordinated, collaborative global and regional response to the needs of migrants.

This article sets out a rationale for a coordinated Movement response to migration, details the formation and challenges faced by the Asia Pacific Migration Network (APMN), and offers evidence-based recommendations for stronger collaboration across the Movement.

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1 Asia Pacific Migration Network (APMN) Secretariat, *Mobilising the Movement: Humanitarian Responses to Migration in the Asia Pacific*, report, Melbourne, 21 July 2016.
2 APMN Secretariat, *APMN General Meeting*, report, Melbourne, 30 June 2017.
3 The Movement is comprised of the International Committee of the Red Cross (ICRC), National Red Cross and Red Crescent Societies (National Societies), and the International Federation of Red Cross and Red Crescent Societies (IFRC).

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The Australian Red Cross response

For more than twenty-five years, Australian Red Cross has worked with "migrants in transition",[4] including people who have endured war, fled from conflict or experienced persecution. Its programmes support people who have been trafficked or forced into marriage against their will; people who have been separated from their loved ones because of conflict, disaster or migration; and people who might not have other support or access to mainstream services, including those who are destitute, held in immigration detention or facing deep social exclusion.

Australian Red Cross provides humanitarian support regardless of nationality, ethnicity, religion, visa status or how people arrive in Australia. Many of the people and communities with whom Australian Red Cross works have experienced significant hardship and have uncertain futures. Assistance is provided through direct services, and facilitated by support, partnerships and referrals. Systemic issues are addressed with a strong evidence base, which supports direct engagement with the authorities and policy-makers. In addition, Australian Red Cross advocates for societal change by fostering stronger understanding between communities and promoting acceptance, participation and contribution.

In Australia, where almost half of the population is born overseas or has a parent born overseas, the contribution of migrants is profound and continues to shape an open, diverse and vibrant society. However, migrants in transition – largely those with unresolved or temporary visa status – remain among the most vulnerable groups in Australia. Relative to local populations, migrants typically face uncertainty surrounding legal status and the fates of loved ones, which compounds practical obstacles such as language barriers, access to support and relevant services (such as health or legal services), and barriers to participation in both education and work. Isolation can compound existing vulnerabilities such as significant trauma, experiences of deep poverty, conflict, persecution, and physical or sexual violence. For those forcibly displaced, there are often acute and immediate protection and assistance needs.

In addition, there is a noticeable trend toward increasingly negative public portrayals of migrants, impacting their ability to feel safe, to feel like they belong, and to build networks of support and assistance in the community. This can further impact on the ability of newly arrived migrants to engage with, participate in and contribute to the broader community.

Australian Red Cross's connection with the Movement

Australian Red Cross's domestic migration programmes have always engaged closely on migration policy matters with the International Federation of Red Cross and Red Crescent Societies (IFRC) and the International Committee of the Red Cross (ICRC).

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4   For detailed information on Australian Red Cross migration programmes, see Australian Red Cross, "Help for Migrants in Transition", available at: www.redcross.org.au/migration-support.aspx (all internet references were accessed in November 2017).

In 2013, Australian Red Cross started to work more intensively on regional migration matters: engaging with the ICRC to support immigration detention monitoring visits in Papua New Guinea and Nauru, agreeing to co-chair the fledgling APMN, working with the IFRC Secretariat to address policy settings within the Movement on migration, deploying delegates on migration-related missions, and integrating migration more closely within its own international humanitarian and development programming.

Australian Red Cross firmly believes that the Movement can have a greater impact on migration issues: one of the key outcomes in its Strategy 2020 is to contribute directly to this impact. Hence its policy and advocacy work looks to increase the Movement's commitment to migration work; the focus on migration at Statutory Meetings;[5] the development of global strategies, advocacy and communications on migration through initiatives such as the IFRC's Global Migration Taskforce;[6] and capacity development to enhance the work and voices of National Societies through domestic and regional mechanisms.

Australian Red Cross focuses on coordination and collaboration within the Asia-Pacific region. This includes global and bilateral engagement on migration issues,[7] learning from and building the capacity of National Societies in areas such as protection, gender and inclusion, and working with the Australian government to inform global and regional policy, operational and coordination frameworks.

Collaboration in action: Australian Red Cross and the Asia Pacific Migration Network

Australian Red Cross is currently co-chair of the APMN, a network of National Societies in the region.[8] It was established by seventeen National Societies in

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5   The Red Cross and Red Crescent Statutory Meetings act as an opportunity for all components of the Movement to evaluate progress, discuss challenges, set goals and priorities, and agree on the policies which guide the Movement's work. Three main meetings take place during the Statutory Meetings: the General Assembly (biennial meeting of National Societies and IFRC to elect members of the Governing Board, admit new National Societies, and discuss financial reports and constitutive documents), the Council of Delegates (biennial meeting of all components of the Movement to discuss whole-of-Movement policies and ways of working) and the International Conference (quadrennial meeting of the Movement components and representatives of governments during which they make joint commitments on humanitarian action).

6   The IFRC Global Migration Taskforce evolved from a partnership meeting on the humanitarian needs of migrants organized by the IFRC and the Tunisian Red Crescent in Tunis on 17–18 September 2015. See IFRC, "'Tunis Commitment to our Shared Humanity' – Responding to the Needs of Migrants and Building their Resilience: A Pressing Humanitarian Imperative", September 2015, available at: ifrc-media. org/interactive/wp-content/uploads/2015/10/IFRC-Tunis_Commitment-EN-LR.pdf. The Taskforce is a group of National Societies more actively involved in migration programmes that provide advice to the IFRC on matters of migration policy in the global, regional, national and local contexts.

7   For example, Australian Red Cross staff have been sent to National Societies for capacity-building, and delegates have been deployed to respond to emerging humanitarian crises involving migrants in locations such as Vanuatu, Fiji, Budapest, Greece, Tanzania and South Sudan.

8   New Zealand Red Cross and Mongolian Red Cross were the inaugural co-chairs in 2012–13. In 2013–17, Australian Red Cross co-chaired the network with Mongolian Red Cross Society, while currently it does so with Maldivian Red Crescent.

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Bangkok in December 2012, with the aim of exploring critical migration issues, developing actions, and contributing to a growing body of knowledge for the benefit of migrants. The ICRC and IFRC in the region have been critical supporters of the network.

The number of international migrants located in the Asia-Pacific region stands at more than 60 million,[9] and 40% of the world's international migrants originate from this region.[10] Asia-Pacific is home to 6.5 million refugees, or people in a refugee-like situation, 2.5 million of which are within the APMN's scope.[11] Displacement and migration at this magnitude often connotes situations of extreme hardship, such as the impacts of natural disasters, conflict and violence, persecution, or untenable personal circumstances and economic hardship. It also reflects resilience and a search for opportunities around economic participation.

The Movement has a strong presence in the Asia-Pacific region throughout countries of origin, transit, destination and return. Given its mandate on humanitarian assistance and protection and, in particular, the status of National Societies as auxiliary to the authorities on humanitarian issues, there is a key role for the Movement to work with public authorities in order to better respond to the many needs and challenges that arise for migrants in this region. The APMN supports this vital work by providing a platform for National Societies to collaborate and coordinate, share knowledge and resources, build on an evidence base, and take practical action for the benefit of migrants.

Currently, the network is engaging with thirty-five of the thirty-eight National Societies in the Asia-Pacific region, as well as the ICRC and the IFRC, and has increased its engagement through regular Skype calls and teleconferences, membership updates, research and mapping, hosting events, and developing regional and thematic working groups.

Research and mapping

When the APMN was founded,[12] it became evident that there was a lack of information about migration in the region, the vulnerabilities of migrants in each context, and the migration-related services and activities currently undertaken by National Societies. As such, the core work of the APMN Secretariat has been to lead research on these issues as foundational information for the Movement.

The first APMN study in September 2015 consisted of a literature review of desk research on migration issues within the region, along with a survey of

9   United Nations Economic and Social Commission for Asia and the Pacific, *Towards Safe, Orderly and Regular Migration in the Asia-Pacific Region: Challenges and Opportunities*, Bangkok, 2017, p. 5, available at: www.unescap.org/publications/towards-safe-orderly-and-regular-migration-asia-pacific-region.

10 *Ibid.*

11 *Ibid.*, p. 25. The figure of 6.5 million includes 4 million refugees in Turkey and the Islamic Republic of Iran, which are outside of the APMN's regional scope.

12 The APMN was founded in 2012 in Bangkok at a meeting of regional National Societies and the IFRC Regional Office.

National Societies in the region, to which twenty-six of the thirty-eight National Societies responded. The study clarified that the Asia-Pacific region has one of the highest numbers of vulnerable migrants in the world. It confirmed migration as an emerging priority for Asia-Pacific National Societies, with migrant workers being the most commonly identified group of concern. The study highlighted significant barriers to developing programmes for migrants. These barriers include lack of available resources, lack of awareness of migration issues, barriers to accessing information and the politically sensitive nature of migration issues in many countries.

The next step was to map National Society activities that support or assist migrants or persons made vulnerable through migration. The aim was to share knowledge, identify collective priorities and provide an evidence base for future work.

The report mapping National Society migration-related activities in the Asia-Pacific region[13] involved consultations with National Society migration focal points to determine actions taken by National Societies to support migrants in countries of origin, transit and destination. The report highlights the valuable work undertaken by National Societies in the Asia-Pacific region and marked an opportunity for the Movement to reflect on how to better support and assist migrants – both in detention and in communities – and increase its influence on public authorities in order to address the needs and vulnerabilities of migrants in the region.

Strong cooperation and collaboration – between National Societies, the IFRC and ICRC, with authorities, and with local and international organizations – was identified as a key requirement to ensure that people made vulnerable as a result of migration have access to humanitarian assistance and protection.

Contact with migrants was identified as essential to ensuring that protection and humanitarian assistance are made available to migrants, irrespective of their legal status. As such, access to detention centres and community outreach services were important components of this work.

Ensuring that migrants have access to humanitarian assistance and protection was a priority for National Societies. Health and well-being support, settlement and employment support, and emergency relief were identified as key services, in addition to supporting the humanitarian mandate to ensure the right of people to know the fates of their loved ones.

Building resilient and socially inclusive communities which promote diversity, peace and participation was highlighted as an important task for the Movement in the region. For many National Societies, this includes supporting cultural awareness activities, community education, social cohesion forums and engaging with host communities.

The regional mapping identified that in order to ensure that the Movement is best placed to respond to the needs of migrants, it is imperative to focus on collaboration, leverage existing partnerships and foster new relationships in the

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13 APMN Secretariat, *Mapping National Society Migration-Related Activities in the Asia Pacific Region*, Melbourne, 2016. On file with author.

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region. Most National Societies reported collaborating with external agencies as well as civil society organizations, public authorities and other Red Cross partners to support migrants in origin, transit and destination countries. Several National Societies provide pre-departure training and safe migration messaging to migrants in order to ensure that migrants can identify key risks when working overseas and in transit.

The report also highlights the work that National Societies are undertaking to assist and protect migrants: through urgent assistance such as disaster or emergency responses, and by identifying areas of concern, resources, or training opportunities that would be useful in gaining a stronger baseline understanding of migrant vulnerabilities. The mapping identified more activities than had been expected; it is important to acknowledge the breadth of migration-related activities under way across the region. Preparation for climate-induced migration,[14] responding to the vulnerabilities of undocumented migrants and preparing nationals to go abroad for work are only some of the initiatives being delivered to ensure that migrants are educated about their rights in order to reduce vulnerabilities before they occur.

The mapping covers past and present migration-related activities and will function as a living document as the Movement adapts to emerging challenges. Of course, the politically sensitive nature of migration does limit some National Societies in engaging directly with migration-related initiatives. The APMN works to build the capacity of National Societies to understand and leverage their status as auxiliary to government, sharing approaches to advocating with public authorities on behalf of vulnerable migrants.

Several challenges were identified throughout the mapping consultations. Some National Societies were unclear on the Movement's mandate and position on migration in the region. Others highlighted difficulties in addressing issues of humanitarian concern for migrants in detention, questions regarding support for victims of trafficking, and sensitivities around supporting vulnerable groups such as people seeking asylum or people who are stateless.

As a result of this mapping, and through the recent endorsement of the IFRC Global Strategy on Migration, there is an opportunity for National Societies, the IFRC and the ICRC to consider ways in which they might develop localized strategies applicable to their local contexts, whilst collaborating with the Movement, partners, authorities and other actors to mitigate migrant vulnerabilities.

There is an ever-increasing range of opportunities for collaboration. National Societies may engage to increase the visibility of services such as restoring family links; they may improve the sharing of resources and programmatic knowledge; they may work to address any needs for increased training and resources. They can work together to better understand the

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14   For example, the "Migration with Dignity" policy is part of the Pacific nation of Kiribati's long-term nationwide relocation strategy in response to climate change and related outcomes. See Office of the President of the Republic of Kiribati, "Kiribati Climate Change", available at: www.climate.gov.ki/.

complexities of the issues that migrants face, and work more effectively with public authorities and communities.

A collaborative approach is essential to ensuring that those who are most vulnerable – no matter where they have come from – receive protection, support, assistance and connection, and are treated at all times with dignity and respect. The mapping report recommended that the IFRC, ICRC, APMN and Partner National Societies work with and through National Societies in the Asia-Pacific region to address the needs of vulnerable migrants.

This approach would also benefit Pacific National Society engagement on migration, an increasing area of concern to Pacific National Societies. The APMN, IFRC and ICRC can play an important role in ensuring that all Pacific National Societies have a baseline understanding of migration and practical, useful tools for discussing migration concerns (including how to identify vulnerabilities within local contexts and in the broader context of climate change), and are supported to include migration into organizational strategies. Further research should also be undertaken to ascertain how the Movement could best help Pacific National Societies to prepare for climate-related migration.

National Societies could benefit from tools and skills for advocating with local and national authorities for access to migrants, irrespective of their legal status. The APMN can support this through training and resources on how to undertake humanitarian diplomacy on migration. Resources should help National Societies understand and respond to particularly vulnerable migrant groups including undocumented migrants, people who have been trafficked and people moving irregularly across borders. Partnerships should explore restoring family links as means of community outreach, and develop new and creative ways to reach and connect with migrant communities.

Another key priority is to empower National Societies with tools for connecting with communities, civil society organizations, schools, workplaces and local public authorities, and for working towards more connected communities. These tools should be developed with a view to influencing a more nuanced and humanitarian understanding of Asia-Pacific migration issues in global platforms. They should facilitate engagement with the Global Compacts for Migration[15] and Refugees,[16] and the Global Forum on Migration and Development.[17] Guidelines can be developed on how to communicate about sensitive migration issues and vulnerabilities with external partners and the authorities, in line with the Red Cross Fundamental Principles of humanity, impartiality, neutrality and independence. Recent collaboration between the IFRC, ICRC, APMN and regional National Societies on the Global Compact on Migration has been a strong example of coordinated engagement, support and impact.

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15 For more information on the Global Compact for Safe, Orderly and Regular Migration, see: refugeesmigrants.un.org/migration-compact.

16 For more information on the Global Compact on Refugees, see: refugeesmigrants.un.org/refugees-compact.

17 For more information on the Global Forum on Migration and Development, see: gfmd.org/.

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The APMN and other Movement partners should also help National Societies to increase their capacity in responding to migration. This could include peer-to-peer engagement between National Societies, so they can share plans and programming and engage together on issues of concern. It could lead to National Societies providing risk-mitigating pre-departure advice to nationals within their own countries before they embark on international migration, and extending National Societies' humanitarian services beyond the limits of their State's borders. It could also entail training and tools for identifying and addressing specific vulnerabilities of migrants, such as people who have been trafficked, people who are stateless or seeking asylum, and vulnerable groups including women and children.

National Society leaders need to be aware of the Movement's mandate to protect and assist all vulnerable populations, with a focus on capacity-building for current migration activities based on the Fundamental Principles,[18] the IFRC's Resolution 3 on Migration[19] and Migration Policy,[20] and the IFRC global and regional Strategies on Migration.[21] Support in areas such as communication, translation and technology would help to ensure that language is not a barrier for migrants seeking access to services, information or humanitarian assistance in times of need.

Building on the activities mapping, the APMN is currently undertaking a country-by-country mapping of migration issues and vulnerabilities.

Events and peer learning

Aiming to engage National Societies in supporting vulnerable migrants across the region, the APMN, ICRC and IFRC organized the first regional coordinated Movement migration event, entitled "Mobilising the Movement: Humanitarian Responses to Migration in the Asia Pacific 2016". The event promoted the unique role and mandate of the Movement in supporting vulnerable migrants. "Mobilising the Movement" was attended by secretaries-general and migration focal points from eighteen National Societies,[22] as well as ICRC and IFRC colleagues from the Asia-Pacific region.

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18 Humanity, impartiality, neutrality, independence, voluntary service, unity and universality: these seven Fundamental Principles provide an ethical, operational and institutional framework to the work of the Movement. They are at the core of its approach to helping people in need during armed conflict, natural disasters and other emergencies. For more information, see ICRC, "Fundamental Principles", available at: www.icrc.org/en/fundamental-principles.

19 31st International Conference of the Red Cross and Red Crescent, "Resolution 3: Migration", Geneva, 28 November–1 December 2011, available at: www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-3-2011.htm

20 IFRC, "Policy on Migration", November 2009, available at: media.ifrc.org/ifrc/wp-content/uploads/sites/5/2017/03/Migration-Policy_EN.pdf

21 IFRC, *IFRC Global Strategy on Migration 2018–2022: Reducing Vulnerability, Enhancing Resilience*, Geneva, 2017, available at: media.ifrc.org/ifrc/wp-content/uploads/sites/5/2017/12/IFRC_StrategyOnMigration_EN_20171222.pdf.

22 The National Society attendees included representatives from Afghanistan, Australia, Bangladesh, Fiji, Indonesia, Kiribati, Malaysia, Mongolia, Myanmar, Nepal, New Zealand, Pakistan, Philippines, the Solomon Islands, Sri Lanka, Timor Leste, Tonga, Tuvalu and Vanuatu.

In May 2017, as co-chair and Secretariat of the APMN, Australian Red Cross organized the first APMN peer-to-peer learning between Asia-Pacific National Societies. Colleagues from the Pakistan Red Crescent, Sri Lankan Red Cross and Bangladeshi Red Crescent joined Australian Red Cross staff to discuss migration issues, challenges and opportunities around restoring family links, labour migration and exploitation, detention of migrants, supporting asylum-seekers in the community, preparedness, responding during a disaster, and safe migration. The peer learning highlighted that although National Societies work in different contexts or along different stages of the migration journey, they share a common objective: to support people made vulnerable through migration, at any stage of their journey. Participants reported the effect on interpersonal working relationships, noting that it is easier to have open discussions on sensitive, complex topics with people who one has spent time with in person. National Society focal points have expressed interest in engaging in additional peer learning opportunities, both as hosts or participants – an important outcome of the process. In 2018, Australian Red Cross is welcoming another five National Societies' representatives to engage in peer learning.

The 2017 APMN Annual General Meeting (AGM) took place on Thursday, 8 June following the IFRC Migration and Health meeting in Kuala Lumpur, Malaysia. Twenty-two participants from fourteen Asia-Pacific National Societies were present for the AGM, including two secretaries-general and one deputy secretary-general, as well as IFRC and ICRC representatives. Participants discussed the importance of building on approaches to engage community leaders, civil societies and public authorities on migration, through region-focused leaders' forums in South Asia, Southeast Asia and the Pacific. The meeting saw the Maldivian Red Crescent take on the co-chair role of the APMN with Australian Red Cross, which will continue to provide Secretariat support.

Four thematic and regional working groups – with ongoing ICRC and IFRC technical expertise and support – were reviewed and developed at the meeting. These groups are: migration in the Pacific; labour migration and understanding the needs of people who have been trafficked; collaboration on migration in South Asia; and migration and health. Key working group outcomes thus far include the endorsement of the Pacific Statement on Migration developed by the APMN Pacific Working Group and circulated at the Pacific Leaders forum. Participants at the AGM agreed to build on this model as way to engage leaders on migration.

The APMN prioritizes engagement with other networks within and beyond the region, including the Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants (PERCO), the Asian Red Cross and Red Crescent AIDS Task Force, and the European Red Cross Action for Trafficked Persons Network. On 16 October 2016, the second meeting of Movement regional networks was held with the APMN and PERCO. This meeting explored lessons learned, information sharing and ways to extend practical collaboration. The network also conducts regional consultations with Asia Pacific National Societies, most recently on the IFRC Global Migration Strategy and Global

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Communication Strategy and on the IFRC's response to the Global Compact on Refugees and the Global Compact on Safe, Orderly and Regular Migration.[23] APMN members are kept up to date and engaged with the network through regular communications, Skype calls, emails and sharing of information on migration.

National Societies' voices

The APMN began surveying Asia-Pacific National Society focal points in 2015 and observed many attitudinal and programmatic changes over the subsequent two-year timeframe. The results from the 2017 survey (to which thirty of thirty-eight National Societies responded) showed a marked increase in organizational documents that included reference to migration relative to the 2015 results.

Focal points were asked to indicate their views on which migration-related issues were a priority for their National Society. There were positive developments in this space, with many expressing increasing knowledge of, and concern toward, migrants in their communities.

Aside from political obstacles, barriers identified by National Societies to working with or prioritizing migrants within their organizations were predominantly related to a lack of support and collaborative measures. In this regard, some National Societies highlighted the following when asked about barriers to supporting migrants:

"Other [organizations] including our government are yet to prioritise migration in their plans."

"[There is a] lack of knowledge on migration activities; for example, how to develop the assessment tools, identification of needs and further steps."

"[Lack of] cooperation with National Societies, specifically from the receiving countries for labour migrant workers in the Middle East."[24]

When asked about the most useful aspect of their engagement with the Network, APMN focal points cited meetings, peer-to-peer learning, migration events (such as "Mobilising the Movement"), receiving key updates from regional migration events, and participating in working groups.

National Societies now look to the APMN as a platform to assist in capacity-building, peer learning and increasing their knowledge on activities and opportunities that address the humanitarian needs of migrants. The APMN will work closely with Movement partners to progress these areas of requested support.

23 IFRC, "IFRC Policy Brief: Global Compact on Migration", Geneva, 3 December 2017, available at: media. ifrc.org/ifrc/document/ifrc-policy-brief-global-compact-migration-2/.
24 APMN Secretariat, above note 2.

Call to action: Moving from understanding to action

As co-chair of the APMN and a participant in a range of global and regional working groups, Australian Red Cross has the opportunity to move from building understanding of migrant needs to mobilizing partners in strategy, data and collective action. Australian Red Cross is proud to work as part of a Movement that responds to increasing global migration challenges, be it through the Migration and Refugee Compacts, the Global Forum on Migration and Development, or the development of the first IFRC Global Migration Strategy.

The Movement has extraordinary capacity to offer a humanitarian response to the needs of vulnerable migrants all over the world. Collaboration, coordination and the sharing of skills and resources between all Movement actors will be critical in this response.

Conclusion

There is a growing need to ensure that the work of National Societies reflects the realities of human mobility as it exists today, such that human suffering is mitigated and migrants may more easily become assets to their destination countries. National Societies and the broader Movement have a mandate to advocate to public authorities so that addressing the humanitarian needs of migrants becomes a more focused component of national policies and planning, and so that global documents enshrine humanitarian responses as central to how States and other actors deal with the growing number of people seeking better lives overseas.

Australian Red Cross sees work with and for migrants not as a choice but as a humanitarian necessity for the Movement. At a time when public opinion is divided and the issue of migration is an area of intense debate, the Fundamental Principles provide a crucial guide. Regardless of who you are, where you come from or your legal status, the Movement aims to provide assistance and protection to those who are most vulnerable.

If the Movement can draw effectively on its presence across 191 countries, its reach into and across communities through 13 million volunteers, and its influence and role with government, it can not only provide assistance and protection but also coordinate across borders to ensure that no one in need is left without support, as well as influencing the global and national agenda to ensure that humanity is at the core of any response.

Most of all, the Movement must work alongside and support communities themselves to determine their needs and utilize their strengths, always recognizing the resilience and capacity of migrants. Movement actors should leverage the trust they enjoy within their own countries to build more cohesive, supportive and inclusive communities.

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British Red Cross response to young migrants in Calais, France

Debbie Busler
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Abstract

In 2016, thousands of young migrants were stranded in Calais, France, in the "Jungle" refugee camp. This paper aims to provide an overview of the British Red Cross's response and of how the organization engaged in numerous activities to secure their safety, culminating in a transfer of children to the United Kingdom.

Keywords: Calais, crisis, Dublin, Dubs Amendment, emergency deployment, Jungle, migrants, psychosocial support, refugees, reunification, separated children, unaccompanied minors.

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The British Red Cross provides a range of services to asylum-seekers and refugees across the UK. Most services are delivered directly in the UK, but the Refugee Support team also engages with other National Societies and European partners to try to ensure security and safety for those on the migratory trail. The core aims of the Refugee Support and Restoring Family Links Division are to reduce destitution and exploitation, restore family links and facilitate reunion, challenge stigma and build inclusion, ensure protection, and empower people to make positive decisions in order to regain control of their lives. This work is carried out through individual casework and group work provided by staff and volunteers, often in settings where service users can arrive without an appointment to access services. As part of its efforts towards restoring family links, the British Red Cross offers family reunion services. This includes support

from qualified caseworkers to apply for visas, and travel assistance to pay for flights for those granted permission to join a sponsoring family member in the UK.[1]

In this respect, in the autumn of 2016, efforts were made to support young migrants trying to reach the UK who were stuck in Calais, France. Over a period of several months, actions were intensified and culminated in the transfer of many young people.

The "Jungle", the unofficial refugee camp in Calais, France, has been in and out of use since 1999. Most recently, migrants returned to northern France in January 2015, seeking a staging ground for getting to the UK. By the summer of 2016, there were more than 1,000 children and young people[2] living in the "Jungle", with approximately 90% of those children being unaccompanied. Most were waiting for an opportunity to make dangerous attempts to get to the UK, and many of them tried repeatedly. The British Red Cross supported young people who were granted permission to move from France to the UK by the respective governments of those countries.

Many of the children who were stuck in Calais qualified for family reunification under the Dublin III regulation.[3] They had family members in the UK who were willing to provide care and support, but the practical mechanisms of using this legal route were not established, leaving the children stranded. Since the summer of 2015, the British Red Cross, government officials and other relevant organizations – principally the Office of the United Nations High Commissioner for Refugees (UNHCR) – had been holding discussions in an effort to come up with solutions to a range of issues related to migration, including a way to safely facilitate the transfer of these children to the UK using the Dublin Regulation as safely and efficiently as possible.

The justification for bringing the young people to the UK was primarily on humanitarian grounds, but included legal recourse through the Dublin Regulation and the Dubs Amendment.[4] The Dublin Regulation is a European framework that defines which State takes responsibility for assessing an asylum claim; this is usually meant to be the first State that a person has entered. However, if a close family member of the asylum-seeker is already in a particular European Union member State (even as an asylum-seeker), that country becomes responsible for evaluating the asylum claim of the family member.[5] A number of children in

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1 See British Red Cross, "Refugee Support", available at: www.redcross.org.uk/What-we-do/Refugee-support (all internet references were accessed in August 2017).

2 See Help Refugees, "How Many More? September Census Results", 19 September 2016, available at: www.facebook.com/HelpRefugeesUK/posts/306615809699099.

3 Regulation No. 604/2013 of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (Recast), *Official Journal of the European Union*, 26 June 2013, available at: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF.

4 British Red Cross, "The 'Dubs Amendment' and the 'Dublin Regulation' Explained", available at: www.redcross.org.uk/en/About-us/Advocacy/Refugees/Family-reunion/The-Dubs-Amendment-and-the-Dublin-Regulation-explained.

5 Refugee Council, "The 'Dublin' Regulation and Family Unity", policy briefing, November 2015, available at: www.refugeecouncil.org.uk/assets/0003/6143/Nov15_Dublin_III.pdf.

Calais had family members in the UK, which qualified them to have their claims assessed by the British government under the Dublin Regulation. In August 2016, Safe Passage[6] counted 170 children living in the "Jungle" who had the right to join family members in the UK.[7] Unfortunately, no bureaucratic processes had been put in place by either the French or British governments to facilitate the transfer of cases to the UK. The British government, at first, considered the problem to be a French one, while France was reluctant to put in place centrally prescribed measures to break the impasse.

The other relevant legal instrument was the Dubs Amendment, an amendment to the 2016 Immigration Act[8] tabled by Lord Alf Dubs, and now Section 67 of the Act.[9] Lord Dubs was himself a child refugee, saved from the Nazis by the Kindertransport during the Second World War.[10] He introduced the Dubs Amendment in an attempt to bring children living in northern France to safety in the UK, particularly those who did not have family in the UK and therefore could not benefit from the Dublin scheme. The UK government interpreted the Dubs Amendment as applying to children who entered Europe on or before 20 March 2016 and did not have family links to the UK. In the summer of 2016, there were at least 200 children in the "Jungle" who qualified to be transferred under the Dubs Amendment.[11] It was widely understood that approximately 3,000 children would be moved to the UK from across Europe under Dublin and Dubs over time, though the legislation omitted a firm number.[12] Ultimately, the scheme was abruptly ended after 200 children from France were transferred, with allocations for Greece and Italy still pending in summer 2017.[13]

British Red Cross involvement in securing children's safety before the close of the camp

The British Red Cross continually offered its assistance to the UK Home Office to transfer children from Calais to the UK as quickly and as safely as possible. The

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6   See the official webpage of Safe Passage, available at: safepassage.org.uk.

7   British Red Cross, *No Place for Children*, report, 2016, p. 2, available at: www.redcross.org.uk/~/media/ BritishRedCross/Documents/What%20we%20do/Refugee%20support/No%20place%20 for%20children. pdf.

8   See Immigration Act 2016, 12 May 2016, Chapter 19, available at: www.legislation.gov.uk/ukpga/2016/19/ contents/enacted/data.htm.

9   See Section 67, relating to relocation of and support for unaccompanied refugee children, available at: www.legislation.gov.uk/ukpga/2016/19/section/67/enacted.

10 Read more on Lord Alf Dubs in *The Guardian*, available at: www.theguardian.com/profile/alf-dubs.

11 British Red Cross, above note 7, p. 3.

12 Lizzie Dearden, "Government Plan to Resettle up to 3,000 Refugee Children 'Not Good Enough', Say MPs and Charities", *The Independent*, 21 April 2016, available at: www.independent.co.uk/news/uk/home-news/government-plan-to-resettle-up-to-3000-refugee-children-not-good-enough-say-mps-and-charities-a6994551.html.

13 Tom Peck, "Government Backtracks on Pledge to Take Child Refugees", *The Independent*, 8 February 2017, available at: www.independent.co.uk/news/only-350-syrian-refugee-children-will-be-allowed-to-settle-in-britain-thousands-less-than-promised-a7569691.html.

National Society also had conversations with various actors (central and local government, partners in the International Red Cross and Red Crescent Movement, and other voluntary groups) to see how the situation could be progressed, including scoping visits to see how support could be offered.

In December 2015, a joint British and French Red Cross mission was undertaken to distribute humanitarian relief to those living in the camps. Tents, sleeping bags and other articles to make the living conditions a bit more bearable were distributed to residents.[14]

Throughout the winter of 2015 and into the spring of 2016, the numbers living in the camp only grew, but without a clear escape route to the UK other than the dangerous attempts to stow away in lorries. Voluntary organizations were spontaneously organized by both UK and French citizens to support those living there, offering a range of services, but these were completely independent of the government. As spring turned into summer and there was no progress through the official channels, the British Red Cross used various other methods to try to move the situation along. Meanwhile, the French Red Cross continued some outreach work. The discussions with government officials continued, but the National Society decided to publish an advocacy report about the issues, as well as offering support to a smaller organization attempting to open up safe and legal routes of migration.[15]

The No Place for Children report

Following research, interviews and a scoping visit, the British Red Cross released a report entitled *No Place for Children* on 9 October 2016. This document examined the situation in northern France and highlighted the plight of the many children stranded there.[16] The report made an immediate impact, was covered widely in the media and was referenced in a parliamentary debate featuring the UK home secretary.[17] It described the process that children who qualified under Dublin III were meant to use, but which had failed them for months on end.[18] For example, there was a severe lack of information in an age- and language-appropriate format to explain what options children had, and a dearth of staff to implement any of the processes needed to facilitate transfers. Children lacked safe accommodation and the most basic resources, and government agencies on both sides of the Channel were not prioritizing them, despite their vulnerabilities. As

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14 British Red Cross, "Red Cross Helps Refugees and Migrants in France", 23 December 2015, available at: www.redcross.org.uk/About-us/News/2015/December/Red-Cross-helps-refugees-and-migrants-in-France.
15 See "Winter Looms in the Calais 'Jungle' camp", *BBC News*, 9 December 2015, available at: www.bbc.co.uk/news/av/world-europe-35047732/winter-looms-in-the-calais-jungle-camp.
16 British Red Cross, above note 7.
17 See the statement in the House of Commons by Home Secretary Amber Rudd on the Calais camp, 24 October 2016, available at: www.parliament.uk/business/news/2016/october/statement-on-calais-24-october-2016/.
18 British Red Cross, above note 7, p. 5.

of August 2016, it was taking an average of ten to eleven months to process a claim to get a child from France to the UK.[19]

Best interest assessments

With word circulating that the French government was going to close the camp imminently, efforts intensified and became more urgent. From 12 to 14 October 2016, an experienced and qualified social worker who is a senior member of the British Red Cross Refugee Support team[20] led a group of independent social workers conducting best interest assessments on children in the camp. The children were identified by staff and volunteers with Safe Passage, whose mission is to open legal routes to sanctuary for children. Lawyers working with Safe Passage then used the assessments to build their case that the government must take action to get the children to safety. While the social workers were conducting the assessments, the French government was moving closer to shutting down the camp, positioning water cannons and riot police.[21]

The situation was getting more dangerous as each day passed in the camp, and the UK government was under a legal challenge to develop a functioning system to protect children who had a right to be in the UK. This required cooperation from the French government, who had also not developed working systems to manage Dublin cases. Eventually everything came to a head as the French authorities decided to close the camp in mid-October, though a clear protection plan for the children remained unclear.[22] This gave the governments and voluntary agencies working in the camp very little time to coordinate a clear plan. At this point, the UK Home Office accepted a long-standing offer from the British Red Cross to assist.

Escorts

The primary role that the British Red Cross undertook was to escort and support children and young people in their journeys – in coaches from Calais to London, and then during onward journeys from London to their next accommodation, usually in foster homes. On 16 October, the first transfers from Calais to the UK began. The British Red Cross initially sent members of its Psychosocial Support Team (PST) to escort the young people in coaches secured by the UK Home Office. The PST is an emergency deployment team that assists British nationals abroad in times of crisis, with staff who are specially trained to manage

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19 *Ibid.*, p. 4.
20 The author of this article.
21 The author was in Calais during these events, and was in regular communication with colleagues in the camp. See also "Calais Migrants: 'Jungle' Closure to Start on Monday, France Says", *BBC News*, 21 October 2016, available at: www.bbc.co.uk/news/world-europe-37733794.
22 May Bulman, "French Police Accused of 'Stealing Phones and Shoes of Refugees to Stop them Leaving Calais Jungle'", *The Independent*, 14 October 2016, available at: www.independent.co.uk/news/world/europe/french-police-calais-jungle-migrants-refugees-human-rights-brutality-a7362281.html; UNHCR, "UNHCR: France Decision to Close 'Jungle' Camp Welcome; Proper Care in Next Steps Crucial", 14 October 2016, available at: data2.unhcr.org/en/news/15786.

high-intensity situations outside of the UK, providing practical and emotional support to British nationals (and occasionally others) in need. Team members are usually deployed in conjunction with the Foreign and Commonwealth Office abroad; this was the first time the British Red Cross had been deployed at the request of the Home Office.

As the situation continued, it became evident that more volunteers from other parts of the organization were needed, so the response expanded to include those from the wider Emergency Response teams and Refugee Support teams of the British Red Cross, among others. Given that Calais was also seen as the border between England and France, British Red Cross team members who were not necessarily trained for international deployments were allowed to go, since they would not technically enter France.

Volunteer teams also escorted young people from the Home Office's Lunar House in Croydon, south London (where people claim asylum), to their planned accommodation. Their new homes were spread all across the UK, so this often involved multi-hour journeys for the young people after their already exhausting experiences.

Through the course of the operation, the British Red Cross supported nearly 429 young people (under the Dublin and Dubs legal instruments) in their journey to the UK using 247 volunteers.[23]

Other roles

Though the official role for most of the operation was to escort young people to and from the Home Office, many British Red Cross volunteers found themselves undertaking other roles to fill gaps. Though there may have been rough timetables of when coaches and taxis (to foster homes) were meant to arrive and depart, these were often not followed. Coaches were delayed for various reasons, and sometimes it was not always clear where the young people would go next. The asylum screening interviews also took a significant period of time in between. This meant that volunteers were often sitting in the Home Office supporting young people for hours at a time, reminding staff that the young people needed to be fed and watered, playing games with them to keep them entertained, and serving as appropriate adults[24] during asylum interviews.

Challenges

There were many challenges to this operation, many of which could have been avoided had it been handled in a planned, organized fashion months earlier. The

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23 Internal British Red Cross data collected by Emergency Response team leading the response, on file with Emergency Response team.
24 "Appropriate adults safeguard the rights, welfare and effective participation of children and vulnerable adults who are detained or questioned by police": see the National Appropriate Adult Network website, available at: www.appropriateadult.org.uk/.

Home Office was leading the response, which at times made it difficult for British Red Cross members to challenge or correct various courses of action.

There were a number of other organizations with a range of roles, but they did not have clear coordinators to lead the response. Basics such as introducing team members and explaining roles from respective organizations could have gone a long way to ease communication and working relationships. The British Red Cross had a team leader, but did not always know with whom to liaise. Communication between teams within the Home Office could also have been improved, though it was recognized that all parties were working under severe time constraints and were taking part in an innovative use of the Dublin Regulation. As an example of the problems involved, coach delays also led to potential safety concerns, with drivers being on the clock for many more hours than they should have been, due to waiting for interviews to finish. British Red Cross staff and volunteers raised these concerns consistently with the Home Office. Another challenge was the lack of interpreters available to brief the young people about where they were going. On a few occasions the coaches left without the young people having been told where they were going – something that the British Red Cross staff and volunteers had to manage en route.

Some volunteers felt that the other organizations which were leading various elements of the response did not have the appropriate skills to do so. For example, in England, an appropriate adult is a specific role with specific responsibilities and training, but some who were undertaking this role at the Home Office did not seem to understand all of their responsibilities within that role. At times there were not enough people from the other organizations, so British Red Cross volunteers were asked to step into some of these roles. This fluidity of roles may have led to some confusion.

There were also certain miscommunications that caused distress for some young people. Many of those coming under the Dublin Regulation expected to be immediately reunited with their families upon their arrival in the UK. In some cases, however, the local authority had not yet assessed the families' viability to take a new child into their homes (if they were not the biological parents). In other cases there were concerns about the proposed family members, which led to delays in reunification, similarly causing upset. These circumstances meant that the young people had to go into foster homes or other temporary accommodation, which was yet another bump in the road of their already very bumpy journey. For children who came under the Dubs Amendment, it could be bittersweet to see others reunited with their families when they themselves did not have anyone waiting for them.

Once on the coaches, the volunteers had the unenviable task of trying to keep the young people from using their phones. This remit was in part due to concerns that the media was tracking their location and movement. The young people also wanted to be in touch with their families, but the Home Office did not want them to contact the latter prematurely.

There were also some very high expectations of what the UK would be like, with one child saying "it will be like going to heaven".[25] The volunteers tried to manage some of these expectations, while validating their excitement at moving to a place of safety.

During the early trips, there was heavy media presence at the Home Office, waiting for the coaches' arrival. There was no private area or screens to protect the young people as they exited the bus, so several young people were photographed and their images were used by the media almost right away. These photos led to a huge controversy about the age of the children, with many members of the public assuming the young people were over the age of 18 due to their weathered appearance, and so should not be treated as children. The British Red Cross responded in the media and also met directly with the Home Office regularly during this period, both individually and alongside many other organizations, in order to highlight the need for changes to the process.[26]

Transitions were quite difficult. As the young people left France, they were often forced into saying quick goodbyes to those voluntary-sector workers who had supported them. Once at the Home Office, the young people were usually told where they would be going, often away from friends who had become family to them. This was quite a shock, and one that the volunteers tried to ease by exchanging phone numbers and/or passing on details through social workers.[27]

Successes

Both Home Office and British Red Cross members were on coaches with the young people as they left the camp to make their way to England. The power of the emblem was notable, as the young people tended to trust the Red Cross volunteers and welcomed their support with the aid of interpreters. Reflections from one member of the PST were that, although the young people seemed to have grown up very fast due to their experiences, they were, at the same time, still frightened children. The emotions they expressed ranged from excitement to fear to apprehension, often cycling through these emotions repeatedly.

Many of the children were desperate to meet up with family, in some cases from whom they had been separated for many years. Some volunteers were on hand to directly witness and facilitate the restoration of family links, which were profoundly moving experiences. Several volunteers noted how the young people cared for each other, as they had become family to each other, supporting one another during transitions.

The British Red Cross volunteers felt excited and proud to contribute to the mission. PST volunteers were team leaders for the Red Cross teams, and felt the

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25 Notes from PST member Gill Moffat, on file with author.
26 "Two-Thirds of Refugee 'Children' ARE ADULTS Figures Show", *The Express*, 21 October 2016, available at: www.express.co.uk/news/uk/722968/two-thirds-calais-refugee-children-over-18-home-office-age-assessment-teeth-test-davies;
27 Notes from PST member Andrea Wood, on file with author.

training they experienced had prepared them for the roles. Team leaders for the Red Cross ensured that their teams were briefed, supported throughout and debriefed at the end (unlike some of the teams from other organizations). One British Red Cross volunteer noted that their Red Cross colleagues were "calm, professional, aware, enthusiastic, thoughtful and proactive", and that the various skills that volunteers brought from different parts of the organization led to an improved response.[28] Several colleagues noted that the Red Cross teams shared "commitment, good humour and flexibility" regardless of the length of time they had been with the organization, showing the Fundamental Principles shining through.[29]

The British Red Cross's national Emergency Response team in England received high marks for maintaining a level of coordination in a chaotic situation. Briefings supplied to teams evolved as new information was learned and team leaders were briefed appropriately. There was also consideration of lessons learned as time went on, and the managers of the responses ensured that this was fed in to subsequent team leaders and responding staff and volunteers.

Conclusion

The situation of children being at risk in Calais is far from over. Children remain in northern France in insecure positions. Governments and the voluntary sector, including the British Red Cross, need to continue to consider how to avoid a similar situation in the future, and how to respond should there be a repeat of these circumstances. Many of the young people who are now in the UK are struggling in their new situations. Families that received the young people have not been given nearly enough support, and many of the arrangements have broken down.[30]

The British Red Cross learned valuable lessons from the response, many of which the organization is still trying to unpack, consolidate and apply to responses that have happened since, but ideally, any future migration response will not be crisis-led like the one that occurred in 2016. Regardless, the British Red Cross will continue to refuse to ignore people in crisis, and will apply the Fundamental Principles to all responses.[31] The British Red Cross will continue to model these principles, as in this response: the principle of humanity, by preventing and alleviating human suffering wherever it may be found, and the principle of impartiality, by not discriminating as to nationality, race, religious beliefs, class or political opinion and being guided by the needs of those in distress.

28 Notes from British Red Cross PST member Rowan Johnson, on file with author.
29 *Ibid.*
30 Many of these young people are now approaching the British Red Cross's young refugee programmes for support.
31 The fundamental principles of humanity, impartiality, neutrality, independence, voluntary service, unity and universality bind the International Red Cross and Red Crescent Movement together. See British Red Cross, "The Seven Fundamental Principles", available at: www.redcross.org.uk/About-us/Who-we-are/The-international-Movement/Fundamental-principles.

INTERNATIONAL
REVIEW
of the Red Cross

PERSPECTIVES FROM THE NATIONAL SOCIETIES

Assistance for and protection of migrants: Experience of the Honduran Red Cross

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Abstract

The Honduran Red Cross began working in the area of migration in July 2012, when it set up the Migrant Assistance Module in Corinto for Honduran migrants returning over land at the Honduran–Guatemalan border. The Honduran Red Cross has helped hundreds of returning and irregular migrants, thanks to agreements with the Ministry of Foreign Affairs and the National Migration Institute. It has also worked with other National Red Cross Societies in the region, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, which have helped it to strengthen its capacity and build a comprehensive vision for the protection and assistance of migrants. This article summarizes the action that the Honduran Red Cross has undertaken with respect to migration and explores the services provided at the Corinto module, the Honduran Red Cross's subsequent management of the Returning Migrant Assistance Centre in Omoa and other care centres for migrants returning because of their irregular status, and the development and implementation of projects on migration and related topics.

Keywords: Honduran Red Cross, migration, migrants, Corinto, Omoa.

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Migration trends in the Americas

The global landscape is changing drastically as structural and political developments in some countries increase the level of insecurity among the population, causing internal displacement and migration. In the past ten years, the intensification of violence (armed conflicts and other situations of violence) has led to massive population movements. According to the 2015 *World Migration Report* published by the International Organization for Migration (IOM), "there are an estimated 232 million international migrants… and 740 million internal migrants… in the world".[1] According to the UN News Centre, there are around 20 million refugees, bringing the total number of international migrants up to 244 million.[2]

Regardless of the cause that drives people to migrate irregularly, when they arrive in host countries they expect to enjoy a sense of well-being and freedom, and to live a safe and healthy life. This is, however, sometimes preceded by a long and dangerous journey rife with risks that include lack of protection, neglect, exclusion, extortion, abuses, discrimination, ill-treatment, enforced disappearance, human trafficking and even death, as well as an endless catalogue of human rights violations that require timely action to be redressed.

Migration has a long history in the Americas, particularly with regard to movements between neighbouring countries and areas within the region, driven by events such as those referred to above. In the last two decades, however, migration to the United States has overshadowed these population movements between the region's countries and areas. As noted in the 2015 *World Migration Report*, Canada and the United States are now two of the ten countries where about 50% of the world's international migrants live.[3]

In spite of this general trend, in the past decade, there have been significant migration flows into some Latin American and Caribbean countries. The Organization of American States' (OAS) 2017 *International Migration in the Americas* report observes that, between 2012 and 2015, 7.2 million individuals left their country of origin in the Americas.[4] According to the same report, 48% emigrated to the United States and Canada, 34% to Latin America and the Caribbean, and 18% to Europe. The report also shows that in 2015, 880,000 people worldwide emigrated to countries in Latin America and the Caribbean, representing 20% of total emigration, with Barbados, Chile, Ecuador and Panama establishing themselves as the new emerging countries of immigration in the

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1   IOM, *World Migration Report 2015 – Migrants and Cities: New Partnerships to Manage Mobility*, Geneva, 2015, p. 17.
2   "Deputy UN Chief Presents New Report on Global Migrant Trends, Highlighting Rising Numbers for 2015", *UN News Centre*, 12 January 2016, available at: news.un.org/en/story/2016/01/519782-deputy-un-chief-presents-new-report-global-migrant-trends-highlighting-rising (all internet references were accessed in March 2018).
3   IOM, above note 1, p. 17.
4   OAS and Organisation for Economic Co-operation and Development, *International Migration in the Americas: Fourth Report of the Continuous Reporting System on International Migration in the Americas (SICREMI)*, 2017, p. 42, available at: www.oas.org/documents/eng/press/SICREMI-2017-english-web-FINAL.pdf.

Americas. Furthermore, the study highlights that "[i]n the Americas, as in other parts of the world, migration trends have been reinforced by the increase in the number of people fleeing their countries, whether from natural catastrophes, or economic or political instability;"[5] migrants may also be fleeing from conflict zones or conditions of economic collapse or underdevelopment, or because of expectations that regulations facilitating immigration to a particular country will come to an end, as is the case for Haitians, Colombians, Venezuelans and Cubans.

In the same period, there was a surge of extra-continental migration to Latin America, which was noted by the OAS and IOM to be "'new and growing', comprised of mixed migration flows with diverse types of migrants: economic migrants, refugee applicants, refugees and victims of migrant smuggling".[6]

The situation in Central America is exceptional because all irregular migrants whose destination is North America (Canada, the United States or Mexico) must pass through it. It is also an area with very high migration outflows, particularly from the so-called Northern Triangle of Central America. It is therefore a region of origin, transit, destination and return for thousands of irregular migrants. Irregular migrants in Central America come from the Caribbean, South America, Asia and Africa; there are also regular and irregular migrants who come from North America.

Guatemala, El Salvador and Honduras are the Central American countries from which the largest numbers of people migrate to North America (mainly the United States) and outside the continent (mainly Spain). The year 2014 was eventful in terms of migration in the region, with large numbers of unaccompanied migrant children and adolescents (around 60,000) arriving at the US border and many more on the migration route through Mexico. This situation led to a humanitarian emergency being declared by the Honduran government[7] and prompted a response from the countries involved, consisting not only of humanitarian assistance but also activities to ensure the safe and dignified return of migrants to their own countries. Laws, policies and tools were adopted to implement repatriation processes. Even so, in 2016, US Customs and Border Protection intercepted nearly 46,900 unaccompanied children and more than 70,400 family units at the US–Mexico border.[8]

In 2015, approximately 3.4 million Central Americans were residing in the United States, and 85% of them were from the Northern Triangle. According to the mid-2015 estimates of the United Nations (UN) Population Division, 78% of the 4.1 million migrants from Central America resided in the United States; 15% were scattered within the region (including Mexico), while the rest were in Canada and Europe.[9]

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5 *Ibid.*, p. v.
6 OAS and IOM, *Regional Report: Irregular Migration Flows to/within the Americas from Africa, Asia and the Caribbean*, 2016, p. 7.
7 Republic of Honduras, Executive Decree PCM 33-2014, *La Gaceta*, No. 33,476, 11 July 2014, available in Spanish at: www.acnur.org/fileadmin/scripts/doc.php?file=fileadmin/Documentos/BDL/2016/10642.
8 Gabriel Lesser and Jeanne Batalova, "Central American Immigrants in the United States", *Migration Policy Institute*, 5 April 2017, available at: www.migrationpolicy.org/article/central-american-immigrants-united-states.
9 *Ibid.*

Migration trends in Honduras

Honduras has seen different forms of human mobility, including forced displacement and voluntary migration. Large-scale migration began in 1998 in the wake of Hurricane Mitch, when the main reasons for leaving the country were family reunification and the search for better employment prospects and a better life. However, recent years have seen a growth in forced internal and external displacement caused by violence and crime in the country. The increased presence of organized crime, in its different forms (such as murders, kidnappings, extortion, forced recruitment and the control of territories), has forced a large number of people to leave their places of residence in order to protect their life, freedom, well-being and physical safety, owing to the lack of suitable protection mechanisms.[10]

In Honduras, ensuring the human dignity of internally displaced people and migrants is a complex challenge, as it is a country of origin, transit, destination (to a lesser extent) and return. It therefore has to meet the assistance and protection needs of returnees, irregular migrants, children, adolescents, young people and adults.

The parliament of Honduras – the National Congress – adopted a law on Honduran migrants and their families[11] as a starting point for the implementation of measures to raise awareness about the dangers of irregular migration. It also established activities to provide assistance and protection to Honduran migrants and their families in Honduras and in other countries, and to promote their reintegration into society. However, the sheer number of Honduran migrants returning to the country has meant that response is outstripped by demand. According to the Observatory for Consular Affairs and Migration in Honduras, in the three years up to December 2017, a total of 193,267 Honduran migrants returned to the country, with a decrease of 30.8% in 2017 as compared to 2016.[12] These figures include migrants returning by land, sea and air.

With regard to assistance for irregular migrants, changes were implemented in the National Institute for Migration (Instituto Nacional de Migracion, INM), the office responsible for migration policy in Honduras. While management of migration policy remained under the area of national security, a human rights-based approach to assistance for irregular migrants[13] was developed. This approach includes granting irregular migrants humanitarian visas, which have eventually become three- to five-day permits for leaving the country, with the aim of reducing the risks they face and

10 Inter-Agency Commission for the Protection of Persons Displaced by Violence, *Characterization of Internal Displacement in Honduras*, 2015.

11 Ley de Protección de los Hondureños Migrantes y sus Familiares (Law on the Protection of Honduran Migrants and Their Families), available at: www.tsc.gob.hn/leyes/Ley_proteccion_HND_migrantes_y_fam_2014.pdf.

12 For a comparative table showing statistics on migrants returning to Honduras, see "Cantidad de Hondureños retornados al país el año 2017", Observatorio Consular y Magratorio de Honduras, available at: conmigho.wixsite.com/subscym-conmigho/retornados-2017. See also IOM, "Honduran Statistics", available at: triangulonorteca.iom.int/honduran-statistics.

13 For more statistics on irregular migration in Honduras, see OAS and IOM, above note 6, pp. 40–41.

facilitating their journey. The work itself involves improving reception facilities and seeking partnerships for the delivery of humanitarian assistance. In the case of minors, in line with government policy, the Directorate for Children, Adolescents and Family (Dirección de Niñez, Adolecencia y Familia, DINAF) intervenes to ensure that irregular migrant children and adolescents receive due protection and assistance.

Humanitarian commitment of Honduran Red Cross in the area of migration

Actions based on humanitarian principles

The Fundamental Principles of the International Red Cross and Red Crescent Movement (the Movement),[14] the Declaration "Together for Humanity" adopted at the 30th International Conference of the Red Cross and Red Crescent,[15] and the humanitarian needs of hundreds of migrants in the country have prompted the Honduran Red Cross to take action to provide protection and assistance for them.

The Honduran Red Cross's work in the area of migration began with the support of the International Committee of the Red Cross (ICRC), and continues to the present day. The International Federation of Red Cross and Red Crescent Societies (IFRC) also provides support through the implementation of projects aimed at protecting the rights of migrants in the region, especially in the Northern Triangle.

The first step taken by the Honduran Red Cross and the ICRC in 2011 was to conduct a joint study to assess the situation of returning Honduran migrants. The study involved meeting with the authorities and visiting repatriation points, including the Returning Migrant Assistance Centres (Centros de Atención al Migrante Retornado, CAMRs) for migrants arriving by air, located at the international airports of Toncotín in Tegucigalpa and San Pedro Sula in the municipality of La Lima.

The study concluded with the development of a project to set up a Migrant Assistance Module at the Corinto border crossing (the Corinto module) located between Honduras and Guatemala. The project was aimed at assisting returning

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14 The Fundamental Principles of the Movement are humanity, impartiality, neutrality, independence, voluntary service, unity and universality. International Committee of the Red Cross (ICRC), *The Fundamental Principles of the International Red Cross and Red Crescent Movement: Ethics and Tools for Humanitarian Action*, available at: www.icrc.org/en/publication/0513-fundamental-principles-red-cross-and-red-crescent. See also Amelia B. Kyazze, "Walking the Walk: Evidence of Principles in Action from Red Cross and Red Crescent National Societies", *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016, available at: www.icrc.org/en/international-review/article/walking-walk-evidence-principles-action-red-cross-and-red-crescent.

15 30th International Conference of the Red Cross and Red Crescent, Resolution 1: Declaration "Together for Humanity", 26–30 November 2007, Geneva, available at: www.icrc.org/eng/resources/documents/publication/p1108.htm.

Honduran migrants and migrants in transit (children, adolescents, young people and adults) that were entering through Corinto by land.

Before the module was set up, Corinto was a challenge for the hundreds of migrants returning each day, as there was no assistance available and no frequent transport to the nearest city (Puerto Cortés, which is 60 km away), from which they could start their journey back home. Many of them returned to the migration route.

Volunteering and humanitarian assistance at the Corinto module

Assistance was provided to migrants by Honduran Red Cross volunteers, who had received appropriate training in migration issues, safety, restoring family links (RFL) and technical and financial management. They were also required to have skills in other areas, such as psychosocial support, first aid and leadership. There were originally two teams, each consisting of three people working weekly shifts, meaning that they would travel 60 km to Corinto each day. Sometimes they would have to stay for entire days (twenty-four hours) until the buses bringing the Honduran migrants arrived. Staffing had to be increased once the service was in operation and demand rose. Operational procedures were developed for the delivery of services, including management of the module, opening and closing of the module, assistance on board the buses arriving in Corinto, assistance at the module, management of special cases, coordination, media relations and communication, and safety.

In addition to assistance for adults, services were also provided at this border point for unaccompanied children and children travelling with their families, in coordination with the government agency responsible at that time for ensuring children's rights in the country. This assistance varied in some respects, taking into account the criteria established by the government agency and the best interests of the child.

The services provided included support for migrants from the time of their arrival at the border, with volunteers boarding the buses and welcoming them to boost their spirits and self-confidence, and to assuage their sense of frustration at their failure to achieve their dream of migrating. The volunteers explained the services offered and invited the migrants to pay an optional visit to the module when they got off the bus. Whereas volunteers initially had to remind the returning migrants when they disembarked that, for example, the services were free and accessible as needed, after a few months the buses were arriving at the border with the passengers well aware of the Corinto module, its services and the Honduran Red Cross. The migrants also received information and guidance for their onward journey. With the aid of a map on the wall, one of the volunteers would show them where they had entered the country and points of interest en route to the city, where they would have a better chance of finding a way to travel home. A telephone was made available to the returning migrants so that they could contact their families.

First aid was provided in an area fitted out for this purpose, providing the required privacy, and staffed by a paramedic. Migrants requiring further medical treatment were transferred to a hospital as part of this service. Hygiene kits, the contents of which varied according to the age (infants, children and adults) and sex (men and women) of the recipient, were handed out. Those given to children included a snack (fruit purée/baby food, biscuits and fruit juice), oral rehydration solution and nappies. Purified water was given to migrants as they entered the module, and children were also given water once they had been received by the government agency responsible for their care.

Provision was made for particularly vulnerable migrants unable to continue their journey to stay at a small hotel near the module. They were given food, and transport was provided once they were fit enough to travel. Lastly, migrants who were ill, mutilated, injured or in a poor state of health were transported from Mexico and other countries using the ambulance services of the region's National Societies, forming a "humanitarian chain".

The work of the Honduran Red Cross in Corinto was known to Honduran government institutions, representatives of other governments, UN agencies, civil society organizations and components of the Movement. There were extensive discussions about the need for the government to provide comprehensive assistance to migrants returning by land, including a service which, in addition to registering entry into the country, would allow returning migrants to receive humanitarian assistance such as that offered by the Honduran Red Cross. The module ceased to operate on 22 September 2015 after the Honduran and Mexican governments agreed a new repatriation point 45 km from the border, in the municipality of Omoa.

Management of the Returning Migrant Assistance Centre in Omoa and other work

On 23 September 2015, in accordance with the law on the protection of Honduran migrants and their families, the Honduran government opened CAMR – Omoa, the first centre for receiving and assisting Honduran migrants returning to the country by land.

Given the Honduran Red Cross's experience in assisting returning migrants, an agreement for it to manage CAMR – Omoa was signed with the Ministry of Foreign Affairs in November 2015 and remains in force. Red Cross volunteers continue to deliver the humanitarian services that had previously been provided by the Corinto module, in accordance with the Fundamental Principles of the Movement. The Honduran Red Cross currently supports all reception centres for Honduran migrants returning by land, sea or air. It also provides free telephone calls at the Migrant Child and Family Care Centre, a DINAF unit that receives migrant children, adolescents and family units returning by land.

As mentioned above, the migrants assisted by the Honduran Red Cross include irregular migrants passing through the country. The first operation to meet the needs of this group of migrants started in August 2016, when the

Honduran Red Cross Choluteca branch (southern area) reported the presence of over 2,000 mostly Haitian migrants, including both children and adults. It approached the INM about the problem, and as a result the National Society started an RFL service (telephone calls) – provided to irregular migrants at the Irregular Migrant Care Centre based in Choluteca – which is still in operation, with funding provided through a Disaster Response Emergency Fund allocation granted by the IFRC. Health information, different types of hygiene kits, first aid and paramedic support for medical assessments and hospital care, and purified water are provided to migrants for a three-month period after their arrival. These services were delivered under an agreement signed with the INM, which has been renewed until 2020. Through these activities, the Honduran Red Cross has assisted more than 127,910 people, providing over 421,392 services.[16]

The Honduran Red Cross's involvement in activities to provide assistance and protection to migrants is not, however, limited to the operations described above. With guidance from the ICRC, a number of initiatives have been undertaken in the area of protection, while projects are being developed with other National Societies to address the problem of internal displacement. Together with the IFRC, the Honduran Red Cross is involved in implementing the Rights of Migrants in Action project, the Violence and Legal Protection in Migration in the Northern Triangle of Central America project, which has now ended, and other regional projects. It is also part of the IFRC Migration Task Force, helping to develop tools and strategies that promote the Movement's work on migration.

Outside the Movement, a UNICEF-funded project is being carried out to implement the Community Strategy for the Emotional Recovery of Children, with a focus on returning migrants.

Coordination with the government and other actors to strengthen the response

From the outset, the Honduran Red Cross's response in the area of migration entailed two approaches. The first involved the National Society, in its role as auxiliary to the government, helping the public authorities to carry out humanitarian activities, complementing but not substituting State action. While working in Corinto, the Honduran Red Cross engaged with central government and local authorities on numerous occasions. The second approach highlighted the primacy of the Fundamental Principles, particularly the principle of humanity, basing all activities on human rights in order to ensure the protection of migrants and their enjoyment of said rights.

Dialogue and coordination with State actors led to the signing of a number of the agreements referred to above, as well as participation in high-level discussion forums such as the Regional Conference on Migration, a forum led by regional

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16 Honduran Red Cross statistics on how many people were assisted and the quantity of services provided between 2012 and 2017. On file with authors.

foreign affairs ministers for coordination and decision-making aimed at achieving safe and orderly migration. The Honduran Red Cross engaged in dialogue with the Honduran Ministry of Foreign Affairs to establish processes for and development of guidelines on assistance for migrants (agencies such as the Norwegian Refugee Council and the Office of the United Nations High Commissioner for Refugees (UNHCR) also participated), and it maintained relations with the INM, thereby ensuring an effective humanitarian response for irregular migrants.

As an actor with recognized expertise in the field of migration nationally, the Honduran Red Cross takes part in training processes with UN agencies, including UNHCR and the IOM. From the start, it has coordinated its work with civil society organizations such as the National Forum for Migration in Honduras, the Human Mobility Pastoral Group and the Centre for Human Rights Research and Promotion in Honduras, which is also a partner in the Rights of Migrants in Action project. The Honduran Red Cross also partners with academia, participating in the Support Group of the Observatory for International Migration in Honduras, set up by the Latin American Faculty of Social Sciences.

Achievements and challenges

Thanks to its experience and knowledge in the area of migration, the Honduran Red Cross has positioned itself as an important partner in this field nationally and within the Movement, hence its participation in various forums dealing with migration issues. In addition to the Movement guidelines set out in the IFRC migration policy[17] and migration strategy,[18] the Honduran Red Cross's National Development Plan 2016–2020 identifies human mobility as one of the major strategic areas of social development. This implies taking action, together with the other components of the Movement working in Honduras, to establish a regional Red Cross and Red Crescent platform on migration. Such a platform should be backed up by a policy and strategy that allow it to define its actions and strengthen its capacities as the forum for coordinating and consolidating efforts to protect and assist this vulnerable group, whether they are returning Honduran migrants, migrants in transit or migrants with specific protection needs.

Human mobility is itself a reality that is changing because of diverse factors that require careful analysis. However, even though the Honduran Red Cross has important partners producing knowledge in this area, it believes that producing knowledge from its own experience and in-depth research on the effects of its

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17 IFRC, *Policy on Migration*, Geneva, November 2009, available at: www.ifrc.org/Global/Governance/Policies/migration-policy-en.pdf.
18 IFRC, *IFRC Global Strategy on Migration 2018–2022: Reducing Vulnerability, Enhancing Resilience*, Geneva, 2017, available at: media.ifrc.org/ifrc/wp-content/uploads/sites/5/2017/12/IFRC_StrategyOnMigration_EN_20171222.pdf.

work will improve its response and enable it to identify and address new issues – for example, protection needs and the humanitarian effects of human trafficking.

The Honduran Red Cross firmly believes that its humanitarian action as auxiliary to the public authorities must continue in order to deliver the comprehensive response that migrants need: striving to help them to become resilient and integrate, and to ensure recognition of the need for the respect, exercise and enjoyment of their rights.

The Honduran Red Cross has already come a long way in its efforts to meet the humanitarian needs of migrants. However, more research and knowledge on the subject would lead to more efficient and effective action for improving the resilience of migrants, as a matter of priority.

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PHOTO GALLERY

Displacement in Nigeria: Scenes from the northeast

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Now in its ninth year, the armed conflict in Nigeria has forced more than 2 million people from their homes, with more than 1.5 million of these displaced within the country. The regionalized conflict – which since 2013 has affected the neighbouring countries of Cameroon, Chad and Niger – has caused a protracted humanitarian crisis with some of the highest human costs in the world. The most affected area in Nigeria is the northeast of the country, primarily the States of Adamawa, Borno and Yobe.

Those that have fled their homes often face numerous difficulties as they are left with nothing. In these dire situations, many have basic needs that have to be addressed: lack of food and water, access to health, shelter and education, mental health consequences, safety. Family separation is especially hard as in the chaos of violence, family members lose contact with their loved ones.

Most uprooted people gather in and around places such as Maiduguri and other camps in Borno and Adamawa. Northeast Nigeria is an underdeveloped area, and the humanitarian crisis takes a toll on both new and long-term displaced, returnees, host communities and hard-to-reach rural communities. A total of around 7 million people are in need of humanitarian assistance.

In the following gallery, photographer Newsha Tavakolian gives us a glimpse into the lives of displaced persons in northeastern Nigeria.

Figure 1. A view of the Muna camp for displaced persons, located just outside of Maiduguri, Nigeria. Continued violence in the northeast has forced residents to flee their villages, and many of them have come to the Maiduguri area seeking safety. Today the camp is estimated to shelter approximately 24,000 displaced people. All photos © Newsha Tavakolian/Magnum Photos for the ICRC.

Figure 2. A wood market outside of the Muna camp, where wood is sold to people both inside and outside of the camp.

Figure 3. The home of Asami, a father of twelve, from the town of Bama. After not seeing six of his children for over seven years, he was reunited with two of them, but four are unaccounted for to this day. "At the time we lost [our two sons] they were 8 and 9 years old, and now they are 14 and 15", he says. The ICRC's Restoring Family Links (RFL) programme works to trace and reunite families separated by the chaos of violence, offering services that include phone calls, sending messages, and family reunifications.

Figure 4. Roghiya, mother of twelve and wife of Asami, is seen with her two sons after being reunited through the RFL programme. Abuali and Muhammad, eight and nine years old, left the family to attend religious school seven years before this photo was taken. They explained that their teacher disappeared and the kids were left alone. The school was far from their home, and they were forced to live on the street without food and clean drinking water for months. Another teacher who found them and took them in for nearly two years gave their names to the ICRC's RFL delegate in hopes of finding their parents. Roghiya explains that her three daughters, who were also enrolled in the school, went missing after the attack. "Since then, we have no news from them and it's been seven years now that they are apart from us," she says. "Even when I am sleeping, I am always thinking of my children and wondering where they are; even when I am eating I imagine them sitting next to me and eating with me. My dreams are like a series."

Figure 5. Paulina, 42, was abducted during an attack as she was attending her sister's funeral. Since then her family has had no news from her. Paulina's 16-year-old daughter Jummai reflects on her family's daily life after the abduction: "We have no news since the day she was abducted. Life is very hard for us. My mother was a woman who took care of everything with the household. Now we go to school and come back hungry." Paulina's husband adds: "She was everything for this house; she used to cook and clean and bring money to the family. Without her we really don't know how to survive."

Figure 6. A resident at a camp for displaced persons in Maiduguri.

Figure 7. Alhaji, 34, from Ngala, recuperates after surgery in the State Specialists Hospital in Maiduguri. He was sleeping at home when he was shot in the throat. Two ICRC surgical teams tend to weapon-wounded and to displaced persons in need of surgical care at the hospital.

Figure 8. Students attend class at the Future Prowess Islamic School in the city of Maiduguri. The school was set up in 2009 for orphans and vulnerable children, offering both a Western and Islamic education to both boys and girls for free. The ICRC supports the school with food donations that are used to feed the children once a day. Some of their parents are widows who benefited from the ICRC livelihood support programme.

Figure 9. Children prepare for their meal at the Future Prowess Islamic School.

Figure 10. Children from a school in the Muna camp.

Figure 11. People line up to collect water in the Muna camp.

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Between hospitality and asylum: A historical perspective on displaced agency

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Abstract

This article aims at positioning the agency of the displaced within the longue durée, as it is exposed in contexts of hospitality and asylum, by articulating its key modes: contingent, willed and compelled. Using the ancient world as its starting point, the article exposes the duplicity in conceiving of the current condition of displacement as transient or exceptional. As such, it argues for the urgent need of a shift in the perception of displaced persons from that of impotent victims to potent agents, and to engage with the new forms of exceptional politics which their circumstances engender.

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Introduction

The capacity for action – agency – of forcibly displaced persons needs urgent attention.[1] To not understand its potency and discount it is to forsake over 100 million people to a false state of victimhood, and to ignore the emergence of new forms of collective action and "governance". Responses to conditions of displacement, or de-placement, refute the classification of such contexts as "states of exception" – defined by the impossibility of politics and agency. For Agamben, the "camp" is where the temporary "state of exception" is given spatial permanence.[2] Yet despite systems of constraint and suspension of rights, such conditions as experienced in the intransient refugee camps can still generate an exceptional politics that is innovatively flexible and adaptable. It is a politics that has equal potential for influence through progressive methods as through intimidation. Without romanticizing, there are lessons to be learned from this situation, which defies the liminality of displaced existence. The aim of this paper is to position the agency of people who are displaced within the *longue durée*, as it is exposed in contexts of hospitality and asylum, by articulating its key modes: contingent, willed and compelled.

Exceptional are the policies and the negotiations that accompany the political and moral dilemmas of how to address the stranger at the threshold. What happens across that threshold has, once again, become central to the understanding of what it means to inhabit the earth as a community. Some 3,000 years ago, the measure of society was encapsulated in what happened at the moment of reaching across that liminal space – inhospitable treatment of a stranger was used to make a more general statement about the negative character of the community as a whole. Seminal to the narratives of the most well-known surviving works of ancient literature are the encounters between the guest and the host; between those who seek asylum and those who are asked to provide it. There is a timelessness to these encounters in ancient writings that, like the intransient permanence of today's camp, challenges the liminality of displaced existence.

Following a preliminary reflection on ancient terminology and contemporary approaches, this article begins by critically presenting some of the features of ancient hospitality, asylum and supplication, while introducing the main cases that will act as witness. It then proceeds with a diagnosis of the three modes of displaced agency. From the ancient context, it first draws on the

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1 Forcible displacement includes that which is the result of conflict, poverty, climate change or socio-political circumstances that make life unendurable, and there is no distinction made between persons who have been displaced across national borders and those displaced within their own States.

2 For the state of exception, which refers to an emergency response by sovereign States leading to suspension of the juridical order, see Giorgio Agamben, *State of Exception*, University of Chicago Press, Chicago, IL, 2005; Jef Huysmans, "The Jargon of Exception – On Schmitt, Agamben and the Absence of Political Society", *International Political Sociology*, Vol. 2, 2008; Carl Schmitt, *The Concept of the Political*, trans. George Schwab, University of Chicago Press, Chicago, IL, 1996 (first published 1932); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, University of Chicago Press, Chicago, IL, 2005 (first published 1922).

Homeric epic and then focuses on the evidence for asylum requests and their function in Greek tragedies, written for the audience of the Classical polis (fifth-century BCE city-State). It also considers later historical episodes, such as Isocrates' record of the Plataean plea for refuge to the Athenians in the fourth century, the Polybian account of "camp" politics during the Carthaginian Mercenary War of the third century BCE, the Roman Republican dispute on foreigners' rights to the city in Cicero's writings, and briefly the encounters with people seeking refuge in the works of Caesar and Virgil. These will be used to investigate the bases on which asylum is sought and decisions are made, including threat and peer pressure, religious and moral obligations, legal duty, reputation, reciprocity, kinship, and utility – the potential for service. Within these negotiations, the site where they take place is also relevant, whether a private, public or other liminal space, such as a sanctuary. The stage on which the discourse is played out defines the roles of the actors and intermediaries involved, including those of the leaders (displaced or not), the community and the divine. On it is exposed the potential for agency and the struggle of fulfilling, often conflicting, obligations to one's fellow community members and to outsiders. In the second half of the article these historical cases will be brought to bear on exploring the different modes of agency, and the article will consider the works of contemporary thinkers as well as recent illuminating examples such as the Dheisheh Refugee Camp in Palestine.

Past and present understandings

Increasingly, investigations into ancient mobility challenge prevailing conceptions of a natural tie to the land and a demographically settled world, showing that much human mobility was ongoing and cyclical.[3] The generic term for migrant, for example, is not easily discernible in Ancient Greek, nor in Latin usage until it gains currency in the fourth century CE, well into the Roman Imperial period.[4] There was no interest in categorizing all those on the move under one label. The closest equivalent to "migrant" is *transitor* (literally, one who goes over or is a passer-by), which only appears in Late Antiquity (c. 300–700 CE).[5] In this later

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3   See the following, with earlier references: Peregrine Horden and Nicholas Purcell, *The Corrupting Sea: A Study of Mediterranean History*, Cambridge University Press, Cambridge, 2000; Elena Isayev, *Migration, Mobility and Place in Ancient Italy*, Cambridge University Press, Cambridge, 2017; Laurens E. Tacoma, *Moving Romans: Migration to Rome in the Principate*, Oxford University Press, Oxford, 2016.

4   Terms do exist for the foreigner/outsider in Ancient Greek – *xenos* (although initially the term could also be used to mean host), or enemy – *polemios*; and in Latin, for the friendly outsider, *hospes*, and the one who is much less so, an enemy, *hostis* (originally the term was also used to mean stranger or foreigner). None of these express the same sentiment as the modern usage of "migrant". Instead, they focus on the specific relationship of the individual to the host community: see Cicero, *De Officiis*, 1.12.37; and Varro, *Lingua Latina*, 5.3, with discussion in E. Isayev, above note 3, Ch. 2.

5   Ammianus 15.2.4: Charlton T. Lewis and Charles Short, *A Latin Dictionary*, Oxford University Press, Oxford, 1900.

period, concepts of immobility became part of the repertoire of virtue.[6] The emergence of new terminology, such as *transitor*, is an indicator of shifting attitudes to mobility and the status of individuals, and an expression of changing methods of control. It exposes how fleeting are the conventions that take shape here and now by highlighting moments of change in conceptualizing mobility and the definition of those on the move.

The actions and decisions within host–guest encounters determined (and perhaps still determine) the positioning of a society on the spectrum of just, civilized or barbarian. For Derrida, whose thought experiments draw on ancient writings, hospitality is the essence of culture.[7] Homer's world of the *Odyssey* is wholly constructed through its protagonist's experience as a guest and suppliant among the inhabitants dwelling on the real and imagined shores of the Mediterranean. As Odysseus is coaxed to tell the story of his adventures, what his hosts are most keen to know is whether those he met were kind or hostile to strangers. The barbarism of Polyphemos, the one-eyed cyclops, is revealed through his subversion of the duties owed to guests – not least eating, rather than feeding, them.[8] Athena, the grey-eyed goddess, disguises herself as a guest at the house of the absent Odysseus to get the measure of his son Telemachus.[9] The most supreme ancient gods, including Zeus himself (in the guise of Xenios, as protector of guests, and Hikesios, as protector of suppliants), mete out harsh punishment on those who transgress the rules of hospitality.

Beyond Homer's world of elite warrior-heroes, for the dramatists of the nascent democracies of Classical Greece, the treatment of the stranger continued to be pivotal in capturing the most polemical issues of their times. This is most explicitly portrayed in such plays as Aeschylus' *Suppliant Women* and Euripides' *Children of Herakles*, which will be considered in more detail below. The host–guest or suppliant encounters are played out to expose the tensions of morality, responsibility and obligation that lie between State and individual, questioning the balance of power and the true place of decision-making. They also zero in on the conflict between agency and victimhood.

Perhaps here the necessary momentum can be found to shift the perception of displaced persons as impotent victims to that of potent agents, who are equally invested in addressing shared global challenges. In the twenty-first century, those involved in more progressive humanitarian endeavours recognize this acutely. Activists in such organizations as the City of Sanctuary Movement show distress at having to present people seeking sanctuary as helpless victims to the public,

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6   P. Horden and N. Purcell, above note 3, p. 384; Bruno Pottier, "Contrôle et mobilisation des vagabonds et des mendiants dans l'Empire romain au IVe et au début du Ve siècle", in Carla Moatti, Wolfgang Kaiser and Cristophe Pébarthe (eds), *Monde de l'itinérance en Méditerranée de l'antiquité à l'époque moderne: Procédures de contrôle et d'identification: Tables rondes, Madrid 2004–Istanbul 2005*, Bordeaux, 2009.
7   Jacques Derrida, *Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond*, trans. Rachel Bowlby, Stanford University Press, Stanford, CA, 2000.
8   Homer, *Odyssey*, Book 9.
9   *Ibid.*, Book 1.

the media and government authorities, in order to get a sympathetic response.[10] A related challenge for such movements is the illusion of equality: how to deal with the reality of exclusion in terms of rights, politics and protection for those who are waiting to have their asylum claims heard, while at the same time fostering an environment that encourages engagement, on equal terms, between citizens and asylum-seekers, refugees and undocumented immigrants. These challenges embody the perplexities of human rights confronted by Arendt, which, while promising equality irrespective of citizenship status, are still articulated within the framework of the nation-State.[11] Nationality remains the basis of entitlement to rights, despite the guarantees offered for legal personhood to those deemed stateless by international human rights law.[12] Gundogdu's reinterpretation of Arendt's analysis of statelessness and human rights articulates these concerns by pointing to the depoliticizing trends that have emerged with the convergence of human rights and humanitarianism, with an increasing emphasis on suffering bodies.[13] Such a focus undermines the ability of displaced persons to make their actions and their speech relevant, hence excluding them from political community, which for Arendt equates to expulsion from humanity.

Scrutinizing claims of inclusivity, Rancière's work tracks the potential for action and power among people whom society positions on its margins. Fundamental to his idea of "equality of intelligences" are workers' practices in nineteenth-century France. This "proletariat", despite the constrictions of the rigorous regime, through their writings, poetry and magazines – their discourse – subverts "the order of time prescribed by domination, … asserting against the rationality imposed by its managers, their governments and experts, a capacity for thought and action that is common to all".[14] For Arendt, early labour movements were also a way to explore the refusal of passive victimhood in *The Human Condition*, showing how workers through their actions engendered a new politics in the wider community. Scholarship dedicated to capturing and confronting the current "migration crisis" signals the urgent need to recognize the agency of displaced people,[15] and their potential to generate new active forms

10 Jennifer J. Bagelman, *Sanctuary City: A Suspended State*, Palgrave Macmillan, New York, 2016, pp. xviii, 18.

11 Hannah Arendt, *The Origins of Totalitarianism*, Harcourt, New York, 1968. Addressing these issues directly is the work of Ayten Gundogdu, *Rightlessness in an Age of Rights*, Oxford University Press, Oxford, 2015.

12 See International Covenant on Civil and Political Rights, UNTS Vol. 999, 16 December 1966 (entered into force 23 March 1976), Art. 2(1); Universal Declaration of Human Rights, 217 A (III), 10 December 1948, Art. 14.

13 A. Gundogdu, above note 11, pp. 16, 76, 116.

14 Jacques Rancière, *Proletarian Nights: The Workers' Dream in Nineteenth-Century France*, trans. John Drury, Verso Books, New York, 2012, pp. xi–xii.

15 Some enlightening studies include J. Bagelman, above note 10; Gideon Baker, *Politicising Ethics in International Relations: Cosmopolitanism as Hospitality*, Routledge, London, 2011; Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens*, Cambridge University Press, Cambridge, 2004; Megan Bradley, "Rethinking Refugeehood: Statelessness, Repatriation, and Refugee Agency", *Review of International Studies*, Vol. 40, No. 1, 2014; Joseph H. Carens, *The Ethics of Immigration*, Oxford University Press, New York, 2013; Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, Cambridge University Press, Cambridge, 2004; Marta Kuzma, Pablo Lafuente and Peter Osborne (eds), *The State of Things*, Office for Contemporary Art Norway, Oslo, 2012; Martha C. Nussbaum, "Kant and Stoic Cosmopolitanism", *Journal of Political Philosophy*, Vol. 5, No. 1, 1997.

of engagement with State-based actors, their governments, and supra-national agencies, not least the United Nations (UN).

To make such agency explicit is to acknowledge that its potential power is what induces fear within host communities: the perception of a "menacing mass of humanity that huddles just beyond the frontiers of nationhood".[16] Addressing this fear directly, through a bodily performance of vulnerability, ancient supplication rituals helped to sanction the suppliant as a figure of pity rather than threat. Such acts, however, were conducted with full awareness of the paradox embodied within them, as the evidence below will show. The performance of vulnerability, the possibility of threat beneath it, and the diverse modes of agency that have the potential to induce change, destabilize or bring harm are not distinctive attributes of contexts of displacement – they are equally prevalent among all communities. It is beyond the scope of this paper to fully address why it is that civilian outsiders are perceived as potentially more dangerous than fellow community members, but one need only think of the numerous civil wars that are at the root of displacement, not least today.

Despite attempts at classification by bloodline and citizenship, these contexts showcase the constructed nature of kin and outsider. This flexibility allows for kin to become estranged and for strangers to lose their foreignness. The Athenian figure of the metic (*metoikos*) – a resident alien with privileges but without citizenship – provides a site of discourse for these issues in Euripides' tragedy *Ion*, and in Plato's *Republic*, which is set in a metic's home. Within these works there is less attention on citizenship as legal standing than on the associated cultural milieu of living as a citizen or a non-citizen.[17] Ancient narratives show a deep interest in the process of such transformations, the articulation of belonging and the porosity of citizenship categories.

Tensions within ancient hospitality and asylum

For Derrida, Homeric epics provide a laboratory in which to test the extremes of hospitality, as if probing its desirability.[18] In diagnosing the uses and abuses of hospitality, Derrida questions the very nature of its existence in light of the impossibility of it being unconditional. Some argue that *xenia* – the ancient Greek term for hospitality, or more specifically guest-friendship – is by its nature a reciprocal relationship. Once the question is asked of the outsiders as to who they are, the encounter becomes governed by some form of reciprocity and the

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16   For De Genova reflecting on Anderson's conception of nationhood, see Nicholas De Genova, "The Deportation Regime: Sovereignty, Space, and the Freedom of Movement", in Nicholas De Genova and Nathalie Peutz (eds), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, Duke University Press, Durham, NC, 2010, p. 49; Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso Books, London, 1991.

17   Demetra Kasimis, *Classical Greek Theory and the Politics of Immigration*, Cambridge University Press, Cambridge, forthcoming; Demetra Kasimis, "The Tragedy of Blood-Based Membership: Secrecy and the Politics of Immigration in Euripides's Ion", *Political Theory*, Vol. 41, No. 2, 2013.

18   J. Derrida, above note 7, p. 22.

hospitality is no longer hyperbolic or unconditional, which Derrida presents as the "violence of the question".[19] One of the earliest examples of outwardly unconditional hospitality that appears in Western literature is the legendary reception of Odysseus in the house of Arete and Alkinoos, the king and queen of Scheria.[20] It provides a contrast to less successful encounters with more reluctant or violent hosts, such as with Polyphemos in his cave, an episode where the guests too are found wanting, exposing the precariousness of these confrontations. On Scheria, however, Odysseus gets a different welcome. Even as a shipwrecked, desperate and semi-naked war hero, he manages to find his way into the palace with the help of the gods. A helpless victim, he clasps the knees of Arete in supplication, having nothing to offer but his bare life. Without even being asked his name or origin, or his circumstances, he is bathed, fed and given shelter – an exemplary enactment of the duties of *xenia*, which could also include assistance with returning home or access to the hosts' support network. Only later is Odysseus finally enticed to divulge his story, through which the epic unfolds. His hosts, now recognizing him as one of the Trojan War heroes, offer him a ship and provisions to convey him home to Ithaca. The line between suppliant and guest is not clear-cut in this episode, which encapsulates the transformation from one to the other. It is questionable to what extent this ideal reception is meant to act as a model, implying that both guest and suppliant should receive equal treatment. After all, we, the all-seeing listeners and readers of the story, know Odysseus' true identity all along – a member of the privileged elite who has the capacity to reciprocate or provide equal service. Rather, what is of interest in this episode is that by moving from suppliant to guest, Odysseus' true agency is revealed. It is evident through the recognition of his role as a victorious, powerful warrior with his own story. His actions are interconnected with, and affect, the lives of the other protagonists, not least his hosts. In the wider narrative, it is his decisions that drive the plot. This embodied duality of victim and agent appears again and again through ancient literature, and it will be drawn on here especially from contexts that are more explicitly those of asylum.

In Homer's epic *Odyssey*, which is set in the face-to-face society of elite warriors that existed prior to the emergence of the polis, the scenario is of an individual who requests asylum and hospitality at the threshold of the head of the household – who alone can make the decision as to whether to grant *xenia*. Several hundred years later, once we move towards the world of city-States with democratic institutions, the responsibilities and obligations become less clear, and at times the people (*demos*) end up in opposition to their leaders. Further complications arise when those seeking refuge arrive in groups and make their appeals not at domestic thresholds but at other liminal places, such as altars and sanctuaries. The waiting state of the asylum-seekers at these ancient sites has commonalities with the state of suspension that we find in refugee camps and detention centres today, although with a number of important differences, not

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19 *Ibid.*, pp. 3–5, 15.
20 Homer, *Odyssey*, Book 7.

least the much shorter periods of time spent there. The ancient sanctuaries are often positioned on the edges of settlements or at some distance from them. In part, this may be a precaution against any threat that suppliants may pose, but also for better accessibility to these sacred sites in their primary capacity as hosts to worshippers and festival-goers during religious celebrations.[21] Accommodating asylum-seekers within these precincts was so common that their presence was likened to that of nesting birds, and there is some evidence that provision for additional lodgings were necessary.[22] Since the position of sanctuaries is separate from the everyday spaces of the community, appeals and negotiations for protection, acceptance or support are by necessity made through representatives and intermediaries. This means that direct appeals – which rely on *pathos* (pity), as those of Odysseus through his body, his gestures and his touch – become impossible, distancing the suppliant from the potential host and making any transformation to guest more difficult. Furthermore, the position of host becomes more ambiguous as it is no longer the individual but the community which is appealed to, hence diffusing the responsibility to provide hospitality.

These tensions – visible in the ambiguous figure of the host, whether community or individual, and in the juxtaposition of helplessness and power of the suppliant – are addressed explicitly in Aeschylus' Greek tragedy *The Suppliant Women*. The play, which is the remaining part of a trilogy that did not survive, was performed in the 460s BCE, but is set in the mythical past of the Bronze Age (c. 3000–1000 BCE). It tells the story of fifty Danaids, the daughters of Danaeus (the brother of a mythical Egyptian king), who have fled Egypt with their father to find refuge in the land of the Argives. They flee to escape forced marriage to their suitor cousins, who are in pursuit. As the play opens we find the women on the shores of a liminal space between the sea and the city, clinging to the altars of a sanctuary. From here they supplicate the king Pelasgos to give them protection: asylum in his city of Argos is what they want. The king's response is as follows:[23]

> You are not sitting at the hearth of my house.
> If the city as a whole is threatened with pollution,
> it must be the concern of the people as a whole to work out a cure.

These seemingly helpless maidens respond with surprising force:

> You are the city, I tell you, you are the people!
> A head of state, not subject to judgement,
> you control the altar, the hearth of the city

21 Thucydides 3.75.5–81.3, on wanting to keep suppliants at a distance and out of town, in case of uprising and threat.

22 Herodotus 1.159.3; Ulrich Sinn, "Greek Sanctuaries as Places of Refuge", in Nanno Marinatos and Robin Hagg (eds), *Greek Sanctuaries: New Approaches*, Routledge, London, 1993; Angelos Chaniotis, "Conflicting Authorities: *Asylia* between Secular and Divine Law in the Classical and Hellenistic Poleis", *Kernos*, Vol. 9, 1996, p. 69.

23 Aeschylus, *The Suppliant Women*, trans. Alan H. Sommerstein, Loeb Classical Library, 2009, lines 365–375.

In their plea, the Danaids refuse to accept their predicament, that by taking sanctuary at public shrines they have made themselves suppliants not of an individual, the king Pelasgos, but of the Argive State.

Some readings of Aeschylus' tragedy, in attempting to explain the forceful authoritative voice of the suppliant women, position them alongside outdated aristocratic networks: the old oligarchic regime and the threat of tyranny.[24] The hosts, Pelasgos and the Argives, on the other hand, are meant to represent Athens' nascent democracy. Furthermore, the suppliants' incomprehension of a political system in which the people have the final decision-making power has been attributed to their ambivalent otherness.[25] Yet it is they, in the end, who hold the ultimate power, and they succeed in their pleas. The historical context of the play's creation for a mid-fifth-century BCE Athenian audience is important. In this period we can perceive an ideological move away from the Archaic oligarchic mindset of supra-State elite networks, towards a more exclusive, if imperialistic, Classical democracy of Periclean Athens (from 461 BCE). It was a new setting that did not tolerate internal class divisions. With this change one can witness a shift from the private ties of hospitality to the more public ones of asylum, which now required a *proxenos* – a sponsor or intermediary.[26] The new location of appeals from the distance of public shrines created different conditions to those of the family hearth and the knees of Arete, in front of which Odysseus performed his supplication ritual.

The historical context alone is not enough to explain the authoritative voice of Aeschylus' Danaids, nor those of numerous other suppliants whose tales have come down to us from the ancient world, whether mythical or not. These stories reveal the agency which suppliants and refugees possess and enact, and not through direct voice alone, but also through their being and their existence as part of a group of displaced people. Its potency remains even when it is veiled by the rituals of supplication that brand the body with the symbol of vulnerability.[27] The paradox of the asylum-seeker's position is acknowledged by Aeschylus in his tragedy, when the father of the Danaids counsels on how his daughters should present themselves to the Argives:[28]

24 Geoffrey, W. Bakewell, *Aeschylus's Suppliant Women: The Tragedy of Immigration*, University of Wisconsin Press, Madison, WI, and London, 2013, pp. 13, 30–32; Susan G. Cole, *Landscapes, Gender, and Ritual Space: The Ancient Greek Experience*, University of California Press, Berkeley, CA, 2004, p. 63; Froma Zeitlin, "The Politics of Eros in the Danaid Trilogy of Aeschylus", in Ralph Hexter and Daniel Seldon (eds), *Innovations of Antiquity*, Routledge, London and New York, 1992.

25 Lynette G. Mitchell, "Greeks, Barbarians and Aeschylus' 'Suppliants'", *Greece & Rome*, Vol. 53, No 2, 2006, p. 214.

26 G. W. Bakewell, above note 24, pp. 30–31; Robert Garland, *Wandering Greeks: The Ancient Greek Diaspora from the Age of Homer to the Death of Alexander the Great*, Princeton University Press, Princeton, NJ, and Oxford, 2014, p. 13; Michael B. Walbank, *Athenian Proxenies of the Fifth Century B.C.*, Samuel Stevens, Toronto, 1978, pp. 2–3.

27 J. J. Bagelman, above note 10, p. 6; John Gould, "Hiketeia", *Journal of Hellenic Studies*, Vol. 93, 1973; Fred S. Naiden, *Ancient Supplication*, Oxford University Press, Oxford, 2006.

28 Aeschylus, above note 23, lines 191–199.

> [H]old reverently in your left hands your white-wreathed suppliant- branches,
> sacred emblems of Zeus the enforcer of respect,
> and answer the natives in words that display respect, sorrow and need,
> as it is proper for outsiders to do,
> explaining clearly this flight of yours which is not due to bloodshed.
> Let your speech, in the first place, not be accompanied by arrogance,
> and let it emerge from your disciplined faces and your calm eyes
> that you are free of wantonness.

Recognizing the inconsistency of their predicament, he goes on to stress:

> Remember to be yielding – you are a needy foreign refugee:
> bold speech does not suit those in a weak position.

The ritual of supplication might give the appearance of a helpless, pitiful victim, but beneath it remains the asylum-seeker with a strong voice.

A similar exposition of the continuum that exists between victimhood and power is evident in the more historic case of the failed plea by the Plataeans to the Athenians, which is recounted in Isocrates' 14th speech *Plataicus*. The events he reports took place in the Hellenistic period, some 100 years after Aeschylus' play was performed. The Plataean predicament was the result of the Theban takeover of their home in the 370s BCE, forcing the city's population to seek refuge and assistance from Athens. In their appeals, which were made by an orator to the Athenian assembly in 373 BCE, they seem to shift between three different modes. At first they appear as weak, destitute and helpless, at the mercy of their potential hosts.[29] At the same time, however, they manage to present themselves on a more equal footing with the Athenians, by pointing to their shared experience of exile, which Athens too had suffered in its own former wars.[30] They go further, by warning that the Athenian response to their plea will affect the balance of international diplomatic relations and alliances. In other words, if Athens does not heed their request, it will lose its allies to Sparta.[31] Suppliants could exert further pressure by pointing to how the hosts' actions would be judged globally among their peers, whether through praise or loss of honour. Surely Athens would not want to lose her ancestral reputation of being kind to strangers, by ignoring the requests of the Plataeans? The image of asylum-seekers from the ancient world is one not of passive, waiting victims, but of actors who keep the pressure on to have their claims addressed. This holds true even if in more cases than not they are unsuccessful and the rejection of their requests leads to expulsion, enslavement or death.

29 Isocrates 14, *Plataicus*, lines 11–14, 46–48.
30 *Ibid.*, lines 50, 57.
31 *Ibid.*, lines 11–18.

Positive reasons for requesting asylum

Collective appeals for asylum in the ancient world were usually made on the basis of two positive criteria: kinship and service. These tended to be preceded by assertions of the just cause for seeking refuge.[32] Such clarification was necessary because protection, especially at sanctuaries, was also sought by those fleeing from retribution for criminal acts, including murder. Aeschylus' suppliant women, for example, make it clear that they are not requesting asylum due to any fault of their own. One of the strongest arguments for their request, which explains why they have chosen to seek refuge in Argos, is based on the claim that their mythical ancestors came from this land, meaning that they are the distant kin of the Argives. Kinship provides the foundation for one of the most robust claims that can be made, implying an ancestral right to hospitality. The suppliant Egyptian Danaids of Aeschylus' tragedy recount how they are the descendants of Io, a priestess of Hera from Argos whom Zeus took as his lover before she was turned into a heifer that wandered the world, eventually ending up in Egypt, where she was given human form again. Such mythical claims are part of the diplomatic toolkit which we find used throughout the centuries, even in historical contexts. At the time of the Roman Republic, for example, the people of Ilium – a city believed to be the site of ancient Troy – tried to obtain Rome's favour by playing on the idea that they were Trojan kin, and their city ultimately that of the Roman ancestors.[33] Rome found this to be dubious grounds for giving in to their requests. The historian Polybius is scathing about such mythical kinship claims, and exposes their fabrication and proliferation for political ends.[34]

More difficult to discount are historical claims of kinship, such as those of the Plataeans in their pleading for Athenian protection:[35]

> For indeed we are not aliens to you; on the contrary, all of us are akin to you in our loyalty and most of us in blood also; for by the right of intermarriage granted to us we are born of mothers who were of your city. You cannot, therefore, be indifferent to the pleas we have come to make.

In their appeal, the Plataeans remind the Athenians of their joint family ties through intermarriage.[36] These date back to the previous century, when Athens had taken in Plataean refugees who had escaped the takeover of their city by Thebes in 428–27

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32 A. Chaniotis, above note 22, pp. 84–85.
33 Polybius 22.5. For examples of communities using Roman links with Troy to their own advantage, see Filippo Battistoni, "Rome, Kinship and Diplomacy", in Claude Eilers (ed.), *Diplomats and Diplomacy in the Roman World*, Brill, Leiden and Boston, MA, 2009; Richard Gordon and Jane Reynolds, "Roman Inscriptions 1995–2000", *Journal of Roman Studies*, Vol. 93, 2003, pp. 222–223. The inscription from Lampsakos demonstrates the way that an embassy to Rome used its connection to Ilium, and kinship in diplomatic negotiations: see Roger S. Bagnall and Peter S. Derow (eds), *Historical Sources in Translation: The Hellenistic Period*, 2nd ed., Blackwell, John Wiley & Sons, Oxford, 2004, No. 35.
34 Polybius 22.5.
35 Isocrates 14, *Plataicus*, trans. George Norlin, Loeb Classical Library, 1980, lines 51–52.
36 Isocrates 14, *Plataicus*, line 51.

BCE.[37] They claimed that as there had been intermarriage, many of those from Plataea were actually descendants of the Athenians. It is worth noting that the Plataeans make no recourse to Zeus as the protector of guests and suppliants in their historic plea to the Athenians. The most effective pleas are those which succeed in reducing the gap between the host and guest or suppliant, by bringing the seemingly unknown into the realm of the familiar. Through the revelation of pre-existing ties or the potential of future ones, the suppliant is able to shift from being an outsider to a position within the inner circle of the host, to whom obligations are owed.

The other criteria for claiming asylum is based on past and/or potential future services provided by those seeking refuge. The Plataeans, drawing on their former alliances and loyalty to the Athenians, indicate that they would continue to support the Athenians in any forthcoming ventures. It was they, after all, who had fought alongside Athens against the Persians at Marathon in the fifth century BCE.[38] This element of service, especially the potential of future service, appears increasingly important. In the context of Roman mythology, Virgil's epic *Aeneid,* written at the end of the first century BCE, recounts the journey of the Trojan refugee-hero Aeneas and his followers, as they seek a new home after the destruction of their city of Troy. Eventually, with divine insistence, they arrive in Italy and put themselves in the service of king Latinus, who allows them to settle on nearby land once they help him overcome his enemies. The utility offered by the suppliants, therefore, acts almost as a compensation for their inability to provide reciprocal duties of *xenia*.[39] This is some way from the idealized unconditional *xenia* of the Homeric world, and we may question whether the institution of guest-friendship remains applicable when hospitality and asylum are granted on the basis of utility. The ultimate "violence of the question", the antithesis of Derrida's hyperbolic hospitality, is that it can reduce human life to its bare utility. The destitute, war-ravaged Gallic Alesians, who made it to Caesar's Roman camp, pleaded to be given refuge. They even offered themselves up as slaves in exchange for food, only to have Caesar tell his troops to set up guards at the gate, preventing their entry. We know about this episode from Caesar's own account of it in his *Gallic Wars*.[40] The banality of its description, lacking any fear of retribution from the gods or the judgement of peers, reads as an act against humanity. The Alesians did not even have enough utility to be enslaved.[41]

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37 Thucydides 2.2; 2.71; 3.20.2.
38 Isocrates 14, *Plataicus*, lines 45–47, 57; Isocrates, *Panathenaicus*, line 93; Herodotus 6.108–111.
39 Elizabeth Belfiore, "Harming Friends: Problematic Reciprocity in Greek Tragedy", in Christopher Gill, Norman Postlethwaite and Richard Seaford (eds), *Reciprocity in Ancient Greece*, Clarendon Press, Oxford, 1998, p. 144.
40 Caesar, *Bellum Gallicum*, 7.78.
41 On utility of foreigners in the ancient context, see Josiah Ober, "The Instrumental Value of Others and Institutional Change: An Athenian Case Study", in Ralph M. Rosen and Ineke Sluiter (eds), *Valuing Others in Classical Antiquity*, Brill, Leiden and Boston, MA, 2010. On a similar note, Arendt explores with raw clarity the notions of utility during the Nazi regime, confronting the murder of millions who too were deemed not to have enough utility even to be enslaved: H. Arendt, above note 11.

These brief forays into ancient responses to appeals for refuge and hospitality only touch the surface of the subject, leaving many vital questions unanswered.[42] To what extent, for example, is utility a constant factor through history when making decisions about reaching out to strangers across the threshold, even when it is couched in the duties of *xenia*?[43] What is the difference in treatment between elite and non-elite groups?[44] In what way does the context of the events influence the response: are some deemed more or less deserving, even if their predicament is the same?[45] How significant for the host's decision is the length of time that the guest or suppliant might stay, or the likelihood of a return to their home? (This issue does not seem to be of interest at the point of appeal.) How does the "international" standing of the host community influence their potential to take in asylum-seekers? Is it the case that the more powerful and wealthy the community, the more resistant it is to asylum claims, with better-developed mechanisms to avoid them in the first place?[46]

All these questions – and one could think of many more – are equally relevant today, as evidenced by the numerous studies that take on the challenges they bring.[47] Fundamentally, what they address is the gap or the tension between the ethical argument for responding to the needs of those who request hospitality or asylum, and the factors on the ground that affect the ultimate decision to welcome or to turn away people who are displaced. At the core of this tension and the discourse itself are the people about whom the decision is being made, although often they appear silent. Even these questions, which are mainly posed from the perspective of communities organized into States, seem to deny them the possibility for action, as their displacement positions them outside of the system. The aim here is to identify the potential for agency under such conditions. Furthermore, it is to show the interdependence between those who consider themselves on the inside and those on the outside of State-based structures.

Three modes of displaced agency

What follows is a propositional model for displaced agency based on three modes: contingent, willed and compelled. In exploring the robustness of this framework, the aim is to expose the way these diverse forms of agency are generated under conditions of displacement, even if they are not unique to it. It is not the intention to provide a comparative study of how these modes play out in ancient and modern times. Rather, through an expansive view from a different

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42 Many of the themes in the following questions will be addressed in the forthcoming special issue of *Humanities* on "Displacement and the Humanities: Manifestos from the Ancient to the Present", edited by Elena Isayev and Evan Jewell.
43 R. M. Rosen and I. Sluiter, above note 41.
44 C. Gill, N. Postlethwaite and R. Seaford, above note 39.
45 D. Kasimis, above note 17.
46 For the twenty-first-century context, this issue is controversially addressed in J. H. Carens, above note 15.
47 G. Baker, above note 15; S. Benhabib, above note 15; M. Bradley, above note 15; M. J. Gibney, above note 15; M. Kuzma, P. Lafuente and P. Osborne, above note 15.

somewhere and somewhen, it is to allow for the emergence of patterns and perspectives that may be difficult to recognize at close quarters.

Contingent

At its most basic, "contingent" refers to that mode of agency which is unforeseen, with latent qualities that are conditionally activated – in this context – at the moment of displacement. Displaced persons, in the resulting juxtaposition with those who are "placed", provide the privileged view of the outsider which affects "insider" communities' self-definition and articulation of boundaries.[48] They also hold the power to influence how such communities are perceived globally, as the treatment of people seeking refuge becomes a gauge for levels of "civilization" or humanity. Throughout history, responses to requests for asylum and hospitality have been central to the discourse on morality, and in formulating the character of society, allowing for the isolation of the barbaric from the rest. A State's reputation can be created or destroyed depending on its response to appeals for asylum, which becomes a tool for glorification by friends or vilification by enemies. The Plataeans, aware of this, use it in making their argument when supplicating the Athenians.[49] They praise their reluctant host for being known as a friend to refugees, welcoming and open from the time of their ancestors. This, they stress, has brought Athenians glory, which they would risk losing by refusing the pleas of the Plataeans. Hence, the very existence of these Plataean refugees gives Athens an opportunity for glory, or conversely for its loss. In their own myths, the Athenians prided themselves for not giving in to external pressure to give up their asylum-seekers or deny them shelter – an attitude which seems to echo the spirit of today's *non-refoulement* clause in Article 33 of the UN 1951 Geneva Convention on Refugees.[50] Such decisions, however, were not easy, nor necessarily popular. *Children of Herakles*, the tragedy of Euripides, is in part about the community tensions that result from having to make such decisions. Within this play, despite the threat of war, there is resistance to giving up the suppliants sheltering in the sanctuary of Zeus at Marathon. The ultimate decision to provide shelter, while celebrated in the play, was hardly unanimous. The king of Athens, Demophon, laments his decision:[51]

> Now you will see crowded assemblies being held, with some maintaining that it was right to protect strangers who are suppliants, while others accuse me of folly. If I do as I am bidden, civil war will break out.

48 Just two of the many works that grapple with this theme are Francois Hartog, *The Mirror of Herodotus: The Representation of the Other in the Writing of History*, University of California Press, Berkeley, CA, 1988; and Edward Said, *Orientalism*, Pantheon Books, New York, 1978.

49 Isocrates 14, *Plataicus*, lines 1–2, 39, 53.

50 Convention relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entered into force 22 April 1954).

51 Euripides, *Children of Heracles*, trans. David Kovacs, Loeb Classical Library, 1995.

The sentiment of ambivalence expressed in Euripides' tragedy stems from a seemingly deep-rooted fear of the stranger who comes unexpectedly – a guest who has the potential of turning conqueror. Narratives of such encounters are not uncommon, where welcoming locals are overwhelmed by their guests, either leading to political takeover or the expulsion of the host community. The legend of the women from Locri who became city founders in Italy, set in the seventh century BCE, is one such example. Polybius' version of it is the most detailed and provides one particular reading of the events some 500 years after their time.[52] He recounts how women from Greek Locri, having abandoned their husbands, took their slaves and set sail for South Italy, where they arrived in the land of the Sicels. This group of outsiders, who were at first welcomed, soon turned on their hosts. After expelling the Sicels, they proceeded to rename their town Locri Epizephyrii, but interestingly continued to practice some of the local rituals, which were still going at the time of Polybius. Debates about this narrative were already prevalent in the ancient world, and were of interest to such thinkers as Aristotle, Timaeus and Polybius. This strange tale transforms from being one of encounter, with undertones of refugeehood, into a foundation myth. The refugee story of Aeneas and that of Romulus' asylum[53] are, equally, versions of foundation myths with similar undertones of displacement. Through them, Rome could be presented as an open city that was welcoming to refugees. At their most basic, however, these are narratives of colonization.

Athenians, unlike Romans, believed themselves to be autochthonous – primordial inhabitants sprung from the land – yet their self-presentation was also one of being open to refugees and outsiders.[54] This image was in part intended as a contrast to their Spartan enemies, who threw outsiders out – a practice depicted as inhuman in ancient writings, perhaps comparable to disregarding *non-refoulement* directives.[55] According to the Greek historian Thucydides, the insults between these two great *poleis* in the run-up to the Peloponnesian War (431–04 BCE) included the other's disregard for *hiketeia* – supplication.[56] Such things mattered not only for a city's reputation on the global stage, but also, and perhaps more importantly, as a way of showing that the city was not transgressing the will of the gods, for whom guests and suppliants were sacred. Whether the two *poleis* were in fact that different from each other may be

52 Polybius 12.4d–12.12a. On the myth, see James M. Redfield, *The Locrian Maidens: Love and Death in Greek Italy*, Princeton University Press, Princeton, NJ, 2003, pp. 203–308; Christiane Sourvinou-Inwood, "The Votum of 477/6 B.C. and the Foundation Legend of Locri Epizephyrii", *Classical Quarterly*, Vol. 24, No. 2, 1974; Frank W. Walbank, "Polemic in Polybius", *Journal of Roman Studies*, Vol. 52, No. 1–2, 1962.

53 Livy 1.8.6.

54 For autochthony, see Nicholas Purcell, "Mobility and the Polis", in Oswyn Murray and Simon Price (eds), *The Greek City from Homer to Alexander*, Clarendon Press, Oxford, 1990; P. Horden and N. Purcell, above note 3, p. 384; John-Paul Wilson, "Ideologies of Greek Colonization", in Guy Bradley and John-Paul Wilson (eds), *Greek and Roman Colonization: Origins, Ideologies and Interactions*, Classical Press of Wales, Swansea, 2006 p. 32.

55 Thucydides 1.144.2, 1.67, 139.1, 2.39.1; Herodotus on Sparta being closed to strangers: 1.65.6–9; 1.69–79. See also U. Sinn, above note 22, p. 71; R. Garland, above note 26, pp. 95–98, 126.

56 Thucydides 1.126–128.

questionable. Athens' exclusionary citizenship policy, in line with the myth of autochthony, makes the extent of its openness suspicious. Yet, such a position need not be contradictory. There is some evidence of a separation between living on the land and sharing in the political affairs of the community, which we witness emerging in the Classical period of the fifth century BCE, particularly in tragedy.[57] The city could be a place of refuge and even a permanent home to foreigners, while it separated out those who were perceived as not having an equal investment in the polis. It is a distinction which is embodied in the status of the metic – the resident alien.[58] A similar distinction is made some centuries later by the Roman statesman Cicero, in his *De Officiis,* but in relation to foreigners in general:[59]

> [N]o cruelty can be expedient; for cruelty is most abhorrent to human nature, whose lead we ought to follow. They do wrong, those who would debar foreigners from our cities and would drive them out (as was done by Pennus in the time of our fathers, and recently by Papius.) Of course it is right not to permit the rights of citizenship to one who is not a citizen (on which point a law was secured by two of our wisest consuls, Crassus and Scaevola). Still, to debar foreigners from using the city is clearly inhuman.

This dilemma about the right of access to the land and to community membership has not subsided in the world of territorial States. The tension was there right at the advent of the nation-State, as expressed in Kant's articulation of the cosmopolitan right to hospitality.[60] It delimited the civic space by regulating relations among members and strangers. For both Cicero and Kant, although operating in very different contexts, hospitality lay at the boundary of civic society and the international community, in the space between civil rights and human rights. For De Genova, deportation becomes the locus for theoretical elaboration of the "co-constituted problems of the state and its putative sovereignty, on the one hand, and that elementary precondition of human freedom, which is the freedom of movement".[61] These examples demonstrate instances throughout history when the conceptualization and treatment of strangers, within the broad context of hospitality, allows not only for the measure of a community's humanity, but also for an articulation of the nature and intrinsic meaning of community at a given moment in time. Outsiders have the power to shape the character of States and help in their self-definition. The current, almost weekly political marches across the world, and local resistance in response to the increasingly harsh policies of

57 G. W. Bakewell, above note 24, pp. 58, 103–105, 121–125.
58 D. Kasimis, above note 17.
59 Cicero, *De Officiis*, trans. Walter Miller, Loeb Classical Library, 1928, 3.11.47. Translation by author, adapted from the translation by W. Miller; the brackets are my own.
60 See Immanuel Kant, *Perpetual Peace, and Other Essays on Politics, History, and Morals*, trans. Ted Humphrey, Hackett Publishing, Indianapolis, IN, 1983, and discussion in S. Benhabib, above note 15, pp. 27, 40.
61 N. De Genova, above note 16, p. 39.

Western countries towards those who seek asylum, are rapidly redefining the meaning of community, nationhood and citizenship.[62]

From the perspective of people who consider themselves to be citizens or nationals, displaced persons such as refugees become a particular form of outsider – the "other". This is an "otherness" not constituted through any claims to a specific ethnicity or place of origin, but resulting from the condition of displacement itself. The perceived disconnection from any community, or any recognizable political structures or institutions, is what causes discomfort for those who are State-based. There is a volatility to the actions of people who have been displaced which defies their positioning on a recognizable political spectrum, making any such group a potential threat to existing structures and the status quo. Such fear is most directly expressed in Polybius' account of the Mercenary War that threatened Carthage in the wake of its defeat by Rome in the mid-third century BCE.[63] While the group he focuses on are neither asylum-seekers nor refugees, the predicament of the mercenaries who gather at Sicca has many affinities with that of people who end up in a suspended state of existence in refugee camps. The basic story is that following the First Punic War, the mercenaries who had fought with the Carthaginians in Italy returned to Carthage to collect the fees for their services. However, Carthage could not afford to pay them, so it insisted that they wait in a camp at Sicca, some 200 kilometres west of Carthage. Tired of waiting for a Carthaginian response, the mercenaries, who were from diverse backgrounds, organized themselves in a loosely representational system of governance. Polybius associated them with the worst kind of populist movements and radical politicians, which he presents as the antithesis to the polis.[64] The mercenaries had enough authority and organizational capacity to gain other States as allies and to pressure Carthage to honour its commitment. In Polybius' presentation of the group, there is no recognition that these mercenaries were also likely citizens of other States. What mattered to him was that in their mass, in their mixity and statelessness, they formed the extreme end of a spectrum, at the opposite end of which was the exemplary polis, embodying the ideal and only acceptable form of politics and community.

The same attitude may be detected in Isocrates' writings in the fourth century BCE, which show little sympathy for those who wander helpless and homeless on the grounds that they present a threat to civilized society.[65] In positioning displaced people as stateless, their particular otherness is maintained. Reflecting on this in the context of the twenty-first-century crisis of mass displacement, Bradley argues that the persistent and un-nuanced conflation of

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62 For example, the refusal of federal appeal courts in the United States, including that of Hawaii, to uphold the president's order of 6 March 2017 banning people from six Muslim-majority countries from entering the United States: see Dan Levine and Lawrence Hurley, "Another U.S. Appeals Court Refuses to Revive Trump Travel Ban", *Reuters*, 12 June 2017.

63 Polybius 1.66–1.67.

64 Craige B. Champion, *Cultural Politics in Polybius's Histories*, University of California Press, Berkeley, CA, and London, 2004, p. 207; E. Isayev, above note 3, Ch. 8.

65 Isocrates 19, *Aegeneticus*; R. Garland, above note 26, p. 24.

refugeehood and statelessness represents a potential disservice to the displaced.[66] The danger is that it may perpetuate a mistaken impression of refugees as politically impotent victims, and unintentionally undermine their compelling claims against their States of origin. Building on Arendt's examination of statelessness, Gundogdu demonstrates the way in which the resulting condition of rightlessness is challenged by the political practices of people who are displaced.[67]

The potency of contingent agency is perceptible in the extent to which those who are displaced are deeply embedded in the discourse of community boundaries. Furthermore, merely through finding themselves in the position of being displaced, such people create a measure for society by providing the opportunity for acts of honour, heroism and charity.

Willed

The second form of agency is willed, anticipated, resolute and conscious. It refers to the power that people seeking refuge have in their appeals for protection, asylum or recognition. The paradox is that despite the necessity for active persuasion, they are often positioned as helpless victims. Such conflicts are explicitly addressed in ancient literature, confronting issues of obligation and the host's struggle over whether to give asylum, as in the Greek tragedies of Aeschylus and Euripides. Unlike contingent agency, which affects internal and inter-State relationships, willed agency concerns the relationship between the asylum-seeker and the host. It also includes the relationship of both to an ambivalent higher power, whether divine will, ancestral tradition, international law, or the directives of an organization such as the UN.

Appeals for refuge may be made on the basis of both negative and positive criteria, as outlined above. Key to their success is the process of petitioning, or what is referred to in the ancient world as supplication, which requires willed agency. There is a carefully measured and methodical process to the ritual of public supplication, often conducted from the protective site of a sanctuary.[68] This brings it into the realm of politics, with god and altar acting as intermediaries in a transaction between suppliant and polis. The sanctuary is thus revealed as a site of contestation.[69] On the surface, the supplication ritual may appear as a power game conducted between the seemingly powerless suppliant, the powerful polis and the most powerful god.[70] However, if the suppliant was indeed so powerless, the transaction would not work. In ancient literature, at least, the possibility of punishment for not addressing suppliant appeals is taken seriously. In deciding whether to help the Danaids, the Argive king Pelasgos is wary of the heavy wrath of Zeus Hikesios, the protector of suppliants, stating that the fear of him is the

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66 M. Bradley, above note 15, pp. 101–103, 107.
67 H. Arendt, above note 11, p. 267; A. Gundogdu, above note 11, especially Ch. 4.
68 R. Garland, above note 26, pp. 125–126; J. Gould, above note 27, p. 101; F. S. Naiden, above note 27.
69 J. J. Bagelman, above note 10, p. 85.
70 F. Zeitlin, above note 24, p. 211.

greatest a mortal can have.[71] It was not just the removal of suppliants from a sanctuary that was considered a sacrilege;[72] divine retribution could result from the pollution of sanctuaries and altars, through a final extreme act of defiance by those seeking refuge. Aeschylus' *Suppliant* chorus plead with Pelasgos the Argive king:[73]

> Think, and become wholeheartedly
> our pious sponsor
> do not betray the fugitive
> who comes from afar, set in motion
> by an impious expulsion

Standing against the looming statues of their divine protectors, they threaten that if their entreaties are ignored,

> With all speed [we will] hang ourselves from these gods.

When voice has failed, the last resort is to use the one remaining vehicle of agency: one's being, the body, through the threat of its destruction by suicide. In its many forms, this is still the most potent act of willed agency by refugees and asylum-seekers. Its power, however, and arguably that of other acts of supplication, is dependent on having witnesses present. Who are the witnesses to such acts today? Proximity to those seeking protection is increasingly lacking, as the buffer zone of intermediaries and the bureaucratic apparatus, with its expanding document-based procedures, all but removes accountability in a process of dehumanization. It reduces people as inherently complex beings to what Stevens, in her analysis of the "alien who is a citizen", casts in the image of "stick figures who possess just one thin and arbitrary set of characteristics of interest for the law: their own government-written documents and references to these in state registries".[74]

Unsympathetic treatment of suppliants always has moralistic undertones in ancient literature, and its power may be seen in the many legends that arose over the centuries from the crimes against them.[75] The madness of Kleomenes, king of Sparta, is attributed to divine retribution for putting to death thousands of Argive suppliants, who were taking refuge in a sacred grove.[76] The earthquake and tidal wave that buried the ancient Achaean city of Helike in 373 BCE were perceived as a response by the gods to the city's crime against the suppliants sheltering in its sanctuary of Poseidon.[77] Natural catastrophes that affected ancient Sparta,

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71 Aeschylus, above note 23, lines 347, 472–479.
72 R. Garland, above note 26, pp. 122, 125–126; F. Zeitlin, above note 24, p. 206.
73 Aeschylus, above note 23, lines 418–423.
74 Jacqueline Stevens, "The Citizen Who Is an Alien", in Benjamin Rawlance and Jacqueline Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness*, Duke University Press, Durham, NC, and London, 2017, p. 219. This volume of collected papers as a whole addresses the way in which the document manifests society.
75 E. Belfiore, above note 39, pp. 143–144; U. Sinn, above note 22, p. 71.
76 Herodotus 6.75.3.
77 Pausanias 7.25.1. Also, the Spartan earthquake was blamed on their ejection of the Helots from the Poseidon Sanctuary in 464 BCE: see Thucydides 1.128.1.

Sybaris, Metapontum, Croton, Aegina and a number of other *poleis* are traced back to the mistreatment of suppliants.[78] These stories may be symbolic of the power that such threats could potentially have, but they also show the numerous instances when such appeals were ignored and, despite the threats of divine retribution, were unsuccessful. The question is, to what extent is there any real power in being held to account, and does the pressure come from the outside or from within? The current policies on refugees and asylum-seekers, in such States as the United Kingdom, the United States and Australia, for example, suggest that there is little weight to any pressure from such higher powers as the UN. Nevertheless, it is evident that some power remains, paradoxically, in the great pains that States take to follow the letter of the law when it comes to human rights, in search of legal loopholes to reduce the number of refugees they would have to support. In the ancient world one of the avoidance tactics was to prevent asylum-seekers from reaching the safety of the sanctuary in the first place, for example by prohibiting foreigners' entry into the sacred precincts, where they would be under the protection of the gods.[79] Today's creative approaches to avoiding responsibility owed to those who seek refuge have led some States to declare their airport arrival areas and other border entry points not part of their territory for purposes of asylum.[80]

Compelled

The final form of agency is that which is compelled. It emerges out of necessity during extended periods of displacement or waiting, whether at a sanctuary, camp or other liminal space – a condition that has been labelled a "state of exception".[81] The workings of compelled agency are evident in the relationships and systems that form within displaced groups and which can result in creative politics. Such lengthy suspended states are rare in ancient historical contexts, as are similar spaces of extended liminality, such as refugee camps. The waiting period for those seeking protection appears to have been much shorter, generally a matter of days or even months, but rarely years. In part, this may have been due to the fact that responses to asylum requests were given comparatively quickly. A failed decision that did not result in death often led to the dispersal of the suppliant group to other sites, where the lucky ones may have been accepted into communities on an individual basis, while others continued their wandering. From what is known, any long-term residency at sanctuaries, for example, was exceptional, not least because these sites continued to be used for religious

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78   U. Sinn, above note 22, Appendix III.
79   A. Chaniotis, above note 22, p. 73.
80   J. H. Carens, above note 15, pp. 198–200.
81   For the state of exception, see G. Agamben, above note 2; J. Huysmans, above note 2; C. Schmitt, *The Concept of the Political* and *Political Theology*, above note 2. On theories of migrant detention and detainability, see N. De Genova and N. Peutz, above note 16; Nicholas De Genova, "Detention, Deportation, and Waiting: Toward a Theory of Migrant Detainability", Global Detention Project Working Paper No. 18, November 2016.

celebrations and festivals such as the Olympic Games.[82] During these events, suppliants mixed with festival-goers under the protection of the gods. Furthermore, while suppliants may have been common at these sites,[83] the priests, who were their custodians, had limited capacity to sustain sizeable groups for any length of time. Displacement for any extended period may also be hard to recognize in the ancient world because after a certain point the people living under such conditions, if they are not killed or enslaved, are no longer portrayed as the displaced. Once they are in a position of engaging in politics, their status changes (even if not in the form of citizenship) and ancient authors write about them as founders, conquerors or colonizers. So the stories of asylum sought by Romulus and Aeneas, who come in as outsiders, transform into the founding myths of Rome. Their agency can no longer be defined as compelled once they are part of autonomous entities, and their condition stops being one of transience.

Although more rare, there are ancient contexts where traces of such agency may be recognized. Most simply, it emerges in the way that asylum-seekers organize themselves when making their appeals. The Danaids of Aeschylus' tragedy, for example, in the form of a chorus, resolve how to plead with the Argives – what supplicating position they will take and which arguments they will put forward.[84] Beyond the realm of myth and drama, the predicament of the Carthaginian mercenaries in the camp at Sicca provides a more profound insight into the workings of compelled agency within historical groups in a state of transience. While, as noted earlier, this group was not made up of people in search of refuge, arguably aspects of their condition reflect those experienced by asylum-seekers while waiting for their claims to be addressed. What we witness of this experience, through the writings of Polybius, perhaps comes closest to the practices of collective decision-making and action that may have developed at other liminal sites of refuge such as sanctuaries, if on a smaller scale. As we have already seen, the historian Polybius, who recounts their exploits, has his own reasons for presenting mercenary deliberations and decision-making in a particular light: as dynamic populism, which he finds abhorrent.[85] Still, whatever the nature of the organizational process of this group, what is of interest is what this new entity was able to achieve. These mercenaries of different backgrounds, speaking diverse languages, did not just wait passively; they challenged their suspended state. In activating their common ground, they gained enough power to wage war against Carthage and to draw in allies beyond the mercenary group, who joined in their campaign. At Sicca, as in Aeschylus' mythical Argive sanctuary, or Romulus' asylum of future Rome, it is not states of exception devoid of agency that are found, but dynamic meshworks and crucibles of a new exceptional politics.

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82 R. Garland, above note 26, pp. 22, 125–126.
83 U. Sinn, above note 22; A. Chaniotis, above note 22, p. 69.
84 Aeschylus, above note 23, lines 191–199 and throughout.
85 Polybius 1.66–1.67.

Politics of exception

Today's protracted states of suspension are extreme, not only because of refugee camps, but also because of the prevention of mobility itself. Although protected under Article 13 of the Universal Declaration of Human Rights, freedom of movement is to be understood not as a right, but as inseparable from being human. In De Genova's articulation, it is "a necessary premise for the free and purposeful exercise of creative and productive powers", the foundation for all properly social praxis.[86] Despite the denial of autonomous movement, as its existence is an affront to State sovereignty,[87] in such liminal spaces as the camp that elicit compelled agency, one can trace the emergence of systems which allow communities to function beyond mere survivalism, while still eluding normalization. This final example will serve to demonstrate the workings of compelled agency in the context of the twenty-first century. The conceptualization of exceptional politics has emerged from the experience of refugee camps in Palestine. It appears in such initiatives as the Collective Dictionary – a type of dynamic constitution – created through the Campus in Camps programme.[88] In one of the volumes related to it, called *The Suburb*, it presents what may appear, at first, an absurd predicament.[89] In 2012, a new neighbourhood on the edge of Dheisheh Refugee Camp was created, mainly, but not exclusively, by refugees who had moved out from the cramped conditions of Dheisheh itself – a camp established in 1949 for 3,000 inhabitants but now housing some 15,000 people.[90] The capacity of this new suburb was equivalent to that of nearby villages and other surrounding municipalities, such as the city of Doha. It was therefore not surprising that the city council of the adjacent village of Irtas requested that the suburb should join it by coming under its jurisdiction.[91] However, the community of Al-Shuhada refused these offers and instead made the seemingly impossible request to become part of the camp. This is technically inconceivable because of the protective and constraining UN cordon that outlines the camp territory.

In their investigation of this seemingly absurd situation of Dheisheh and the suburb, the authors of the volume sketch out the delicate and dynamic practices that showcase the camp as a site of innovative and influential, if exceptional, politics. They trace the emergence of systems which balance the need for allowing the functioning of community beyond mere survivalism and articulating the refugee voice without normalizing the existence of the camp. The residents of Al-Shuhada wanted their suburb to be part of the camp because it was there that they felt they could be most well represented, protected and heard

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86   N. De Genova, above note 16, p. 39.
87   *Ibid.*, p. 39.
88   Campus in Camps, available at: www.campusincamps.ps (all internet references were accessed in March 2017).
89   Qussay Abu Aker and Ahmad Al Lahham, *The Suburb: Transgressing Boundaries*, Campus in Camps, Dheisheh Refugee Camp, 2013, available at: www.campusincamps.ps/projects/05-the-suburb/.
90   Data as of 14 June 2017: see UNRWA, "Dheisheh Camp", available at: www.unrwa.org/where-we-work/west-bank/dheisheh-camp.
91   Q. Abu Aker and A. Al Lahham, above note 89, p. 24.

beyond the camp, within and outside Palestine. This dynamism challenges Arendt's predominant characterization of refugees as having been stripped of their political agency, and Agamben's conception of the camp as the depoliticized state of exception. Instead, as the architect and educator Alessandro Petti has observed, "the prolonged exceptional temporality of this site has paradoxically created the condition for its transformation: from a pure humanitarian space to an active political space".[92] It also challenges the conventional model of the city as the primary site of politics. As the authors state in their reflection on writing *The Suburb*:[93]

> The study of the suburb is an occasion to highlight some of these strengths and achievements so that we can use these accomplishments in the narration of our story. In proving that refugees have the right to return we can show everything they have achieved in exile, rather than only showing ourselves as weak, poor, and victims.

In conclusion

Ancient Sicca and modern Dheisheh are over 2,000 years apart, and the circumstances of their creation and existence are hardly similar. What they have in common is their seemingly transient and suspended state of being, where a compelled agency leads to an exceptional politics. Despite not being recognized as a political community, they have made their actions and their speech relevant – the defining practices of such a community.[94] Whether these communities are pioneering or threatening, they defy the conventional model of the city as the primary site of politics and demand engagement from nation-State actors. They require consideration of how extra-State actors can engage directly with global institutions and legal frameworks. The alleged transience of such enterprises as refugee camps is increasingly gaining permanence and fixity: almost seventy years old, some camps in Palestine are fast becoming heritage sites, and these are only the most well-known. Yet the "right to have rights", as Arendt defined it, despite advances in the institutionalization of human rights norms, still remains within the confines of a State-centric international law.[95] How long will people be expected to continue living in such transient states in these and other sites, which most people on the street have never heard of, such as the enormous Dadaab Refugee Complex, which by its size would be equivalent to the second-largest "city" in Kenya?[96] This situation is no longer transient or exceptional – it is unsustainable doublethink. Instead, by acknowledging the agency of people who

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92   *Ibid.*, p. 9.
93   *Ibid.*, p. 69.
94   On rightlessness, see H. Arendt, above note 11.
95   *Ibid.* Reading Arendt against the grain to address practices that increasingly challenge such constraints, see A. Gundogdu, above note 11.
96   Ben Rawlence, *City of Thorns: Nine Lives in the World's Largest Refugee Camp*, Portobello Books, London, 2016.

are displaced, both current and historical, it becomes possible to explore its diverse forms and potency. In so doing, an opening can be created for modes of engagement with the innovative, socio-political models that arise from exceptional conditions, ones that are neither idealized nor reactionary. It forces a rethinking of the model of political agency, encouraging a reconceptualization of the political in terms that move beyond citizenship.[97] Drawing on the deep, intergenerational expertise and creativity of such lived experience, held by a population in the tens of millions, has the potential to overcome the seemingly intransient, State-based understanding of rights and power.

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97 The need for such innovation is also articulated in Nicholas De Genova, "The Queer Politics of Migration: Reflections on 'Illegality' and Incorrigibility", *Studies in Social Justice*, Vol. 4, No. 2, 2010. Problematizing birthright (and "as if" birthright) citizenship, see B. Rawlance and J. Stevens, above note 74.

Addressing the protection and assistance needs of migrants: The ICRC approach to migration

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Abstract

The vulnerability of migrants and the threats to which they are exposed during their journey, on land, at sea, or in countries where they have settled, raise serious humanitarian concerns that cannot be ignored. In view of the transregional nature of migration, the International Committee of the Red Cross (ICRC) and other components of the International Red Cross and Red Crescent Movement (the Movement) draw on their presence all along migration routes to contribute to the humanitarian response and alleviate the suffering of vulnerable migrants. The Movement's proximity to vulnerable migrants through its solid and experienced network of responders along migratory routes is one of its specific advantages. The aim of this article is to explain the ICRC's view on and approach to migration. It underlines that the ICRC's response is dictated by humanitarian needs, and stresses that these needs can be greatly reduced when States abide by their commitments under international law and adopt and implement policies that take into account the protection and assistance needs of migrants. It acknowledges the diverse and complex human realities behind migration and outlines the main

protection and assistance concerns of migrants in countries and regions where the ICRC operates.

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Introduction

Migration[1] is a complex global phenomenon and is intrinsic to the history of mankind. More than 244 million people around the world are migrants.[2] Although most arrive safely in their country of destination and integrate into new communities, a significant minority face hardship and need protection or assistance along their journey as they travel from their home country, often through other countries, to their intended destination. Migration is a challenging reality, although it is neither new nor limited to a certain region of the world. The causes behind migration are many and often multifaceted. Migration can be voluntary or involuntary, but people often act on a combination of choices and constraints that include armed conflicts and other situations of violence, persecution, human rights violations, poverty, the effects of climate change, and the desire to be reunited with family members abroad. Whatever the reasons, migrants may become vulnerable at many stages of the journey and the vulnerabilities and risks they face can shift along the route. Countless migrants continue to risk their lives in search of safety and a better future for themselves and their families. Many face extreme peril, often travelling over great distances; in the case of irregular migration,[3] people are often placed in situations of great vulnerability and may be detained or deported. Globally, an unknown number of

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1   In this article, the term "migration" is used in the sense of "international migration". The International Red Cross and Red Crescent Movement (the Movement) describes migrants as "persons who leave or flee their habitual residence … to seek opportunities or safer and better prospects. Migration can be voluntary or involuntary, but most of the time a combination of choices and constraints are involved." See International Federation of Red Cross and Red Crescent Societies (IFRC), "Policy on Migration", November 2009, available at: www.ifrc.org/en/what-we-do/migration/migration-policy/ (all internet references were accessed in August 2017). See also the section "The ICRC Vulnerability Approach", below.

2   This represents about 3.3% of the world's 7 billion people. The proportion of migrants relative to the world's population has been relatively stable over the last fifty years. For further information see United Nations (UN), *International Migration Report 2015*, UN Doc. ST/ESA/SER.A/384, Department of Economic and Social Affairs, Population Division, September 2016, available at: www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015.pdf.

3   This term is used by the International Committee of the Red Cross (ICRC) to describe the movement of individuals who are not or are no longer authorized to stay, enter or reside in the territory of a country of which they are not nationals (transit or destination countries). Thus, it includes both migrants who have entered a country without the necessary authorization and those whose residence permit or visa has expired.

migrants have died or have gone missing during their journey – at least 5,000 people in the Mediterranean alone in 2016.[4]

While it is debated whether the past years have witnessed a hardening of migration policies,[5] it is undeniable that a large number of States are adopting measures designed to prevent and deter foreign nationals from arriving on their territory, including through the establishment of new border barriers, the systematic resort to detention and the curtailment of migrants' rights in host countries. Such containment strategies and other policies aiming essentially to prevent onwards movement of people create greater hardship and suffering.

Studies indicate that over-reliance on securitization of borders and restrictive migration policies do not prevent people from starting a journey as long as migrating is perceived as being the best or sole option.[6] For instance, some reports argue that stricter border control measures, far from deterring migrants from taking the journeys, actually compel them to rely on longer and more dangerous routes, exposing them to greater risks.[7] Specifically, as armed conflicts keep on raging and legal channels to reach safe ground are becoming more limited, people will continue to turn to the only options they are afforded – however risky those may be.

The plight of migrants is a critical concern for the International Committee of the Red Cross (ICRC) and the International Red Cross and Red Crescent Movement (the Movement) as a whole.[8] Traditionally, the ICRC is known for its humanitarian work on behalf of victims of armed conflict and other situations of violence. Less well-known is its action for vulnerable migrants.[9]

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4   See, for instance, the latest global figures recorded by the International Organization for Migration (IOM) Missing Migrants Project, available at: missingmigrants.iom.int/latest-global-figures. As noted, these are minimum figures and should be taken as estimates.

5   See, for instance, Hein De Haas, Katharina Natter and Simona Vezzoli, "Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies", *International Migration Review*, Autumn 2016, available at: onlinelibrary.wiley.com/doi/10.1111/imre.12288/pdf.

6   See, for example, the report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, *Banking on Mobility over a Generation: Follow-up to the Regional Study on the Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants*, UN Doc. A/HRC/29/36, 8 May 2015.

7   Hein de Haas, "There Is No 'Silver Bullet' Migration Policy", 16 December 2016, available at: heindehaas. blogspot.ch/2016/12/there-is-no-silver-bullet-migration.html. See also Washington Office on Latin America (WOLA) reports: Maureen Meyer, Adam Isacson and Carolyn Scorpio, *Not a National Security Crisis: The U.S.-Mexico Border and Humanitarian Concerns, Seen from El Paso*, WOLA, October 2016; Adam Isacson, Maureen Meyer, and Hannah Smith, *Increased Enforcement at Mexico's Southern border – An Update on Security, Migration, and U.S. Assistance*, WOLA, November 2015.

8   The Movement is made of the world's 191 National Red Cross and Red Crescent Societies (National Societies), the IFRC and the ICRC. The three components of the Movement, in accordance with their respective mandates, specific roles and expertise, cooperate closely and coordinate their efforts to respond to the protection and assistance needs of vulnerable migrants in a complementary manner. The ICRC plays a leading role in the Movement's protection work, notably by visiting detained migrants and restoring family links. For further information, see, for instance, Council of Delegates of the International Red Cross and Red Crescent Movement, Resolution 5, "International Migration", 24 November 2007, available at: www. icrc.org/eng/resources/documents/resolution/council-delegates-resolution-5-2007.htm.

9   The term "vulnerable migrants" is used by the ICRC to refer to migrants in need of humanitarian assistance and protection. This includes migrants who find themselves in danger because they are caught in a situation of armed conflict or other situations of violence, are in distress at sea or on land, or lack access to essential services. It also includes specific categories of people, such as children, elderly persons, disabled persons and victims of trafficking.

The ICRC has a long-standing presence in many of the countries from which people are fleeing. It is often disrespect for the rules of international humanitarian law (IHL), which are applicable in situations of armed conflict, and international human rights law (IHRL) that forces people to flee within their country[10] or across borders.[11] Protracted conflicts and their compounded effects may also result in population movement.[12] The ICRC's work shows that strengthening the protection of the civilian population through greater respect for IHL[13] and through respect for people's human rights[14] could contribute to preventing and reducing forced displacement.[15]

However, an exclusive focus on forced displacement does not take into account the fate of a large number of migrants who are not on the move because

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10 Internally displaced persons (IDPs) are outside the scope of this article, which focuses exclusively on people outside their country of origin or habitual residence. The Movement has made a deliberate choice to call for greater clarity on policies and responses for migrants and IDPs, and has developed two distinct operational approaches to highlight the specific vulnerabilities and risks faced by IDPs and migrants and address their respective protection and assistance needs, as well as the fact that different legal frameworks may apply. See IFRC, above note 1; Council of Delegates of the International Red Cross and Red Crescent, Resolution 5, "Movement Policy on Internal Displacement", Nairobi, November 2009, available at: www.icrc.org/en/publication/1124-movement-policy-internal-displacement-resolution-no-5-2009-council-delegates. See note 11 below for further information.

11 Internal displacement can be a first stage leading to further movement across borders, notably because IDPs might be unable to find safety and protection in their own country or lack prospects for a durable solution. Furthermore, returnee migrants (including refugees) may become internally displaced (again or for the first time) if their return to their countries of origin is premature or involuntary, particularly if they are returned to conditions of insecurity. However, it is important not to systematically infer a nexus between internal displacement and migration. The situation and needs of IDPs should not be considered exclusively through the lens of migration. Indeed, two thirds of the total number of forcibly displaced worldwide as a result of armed conflict, other situations of violence, persecution or human rights violations do not cross an international border and remain within their country of origin. For further information, see Office of the UN High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2016*, Geneva, 2017, available at: www.unhcr.org/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html.

12 For further information, see ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 2016, p. 15, available at: www.icrc.org/en/publication/4265-protracted-conflict-and-humanitarian-action-some-recent-icrc-experiences.

13 IHL expressly prohibits forced displacement of civilians for reasons related to an armed conflict, unless the security of the civilians involved or imperative military reasons so demand. In addition, respect for other rules of IHL, such as the prohibition on attacks directed against civilians and civilian objects or indiscriminate attacks, the prohibitions against the use of starvation of the civilian population as a method of warfare or attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, and the rules on the conduct of hostilities, can prevent displacement.

14 The Guiding Principles on Internal Displacement prohibit the "arbitrary" displacement of persons, including in situations of armed conflict and of generalized violence.

15 Forced displacement as a general term (distinct from the understanding of this notion under IHL) refers to the movement across international borders of refugees and asylum-seekers. It also includes IDPs. This encompasses individuals forcibly displaced worldwide as a result of persecution, armed conflict, generalized violence or human rights violations. See, for instance, UNHCR, above note 11. The World Bank also uses this term with the same meaning: see World Bank, "Forced Displacement: A Growing Global Crisis FAQs", 16 December 2015, available at: www.worldbank.org/en/topic/fragilityconflictviolence/brief/forced-displacement-a-growing-global-crisis-faqs. Note this term's specific meaning under IHL, above note 13.

of conflict or violence, but can still be in dire situations. They might not have been vulnerable when they left their country of origin, but might become so on their way. Furthermore, migrants may be even more "invisible", particularly when caught in armed conflicts or other situations of violence along the route. Indeed, many migrants are living in – or crossing through – countries affected by armed conflict or other situations of violence in different parts of the world. All migrants in countries affected by armed conflict are generally part of the civilian population and are protected as such under IHL;[16] they are included in the ICRC's response on behalf of all civilians while taking into account their specific vulnerabilities.

Further to the ICRC's operational response in armed conflict and other situations of violence, its expertise on protection matters and presence along migratory routes contribute to the humanitarian response to the needs of vulnerable migrants. Together with National Red Cross and Red Crescent Societies (National Societies), the ICRC strives to mitigate individual vulnerabilities along migratory routes and alleviate some of the humanitarian consequences linked to migration, preventing further suffering of migrants and their families. At all times, attention is paid to the resilience and capacities of migrant communities and strategies to build on existing coping mechanisms.

In light of this reality, more than sixty ICRC delegations work on behalf of vulnerable migrants, either through broad or more targeted programmes.[17] This work is a testimony to the migration-related challenges faced in all regions – with some common and some distinctive features – which prompt contextualized and individualized responses based on migrants' varying needs and vulnerabilities.[18]

In the past years, the ICRC's engagement on behalf of vulnerable migrants has evolved, taking shape within various ICRC fields of expertise, notably restoring family links (including tracing missing persons and accompanying their families), ensuring proper and dignified handling of human remains and other humanitarian forensic services, and activities for detained migrants. The ICRC neither prevents nor encourages migration but engages in a dialogue with authorities to ensure that the rights of migrants are respected throughout their journeys. While the ICRC is not a migration agency and has no aspiration to become one, it is committed to its role as a reference humanitarian organization in the field of protection, building on its field experience and domains of expertise to meet people's needs. Efforts are focused on bridging existing protection and assistance gaps along migration routes, working together with National Societies;[19] and reducing, where possible, migrants' vulnerability and

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16 For further information, see Helen Obregón Gieseken, "The Protection of Migrants under International Humanitarian Law", in this issue of the *Review*. See also the section "Main Protection Concerns and ICRC Response on Behalf of Vulnerable Migrants", below.

17 Note that migration is featured in the ICRC Institutional Strategy 2015–2018 as one of the priorities, see ICRC, *ICRC Strategy 2015–2018*, 18 June 2014, available at: www.icrc.org/en/publication/4203-icrc-strategy-2015-2018-adopted-icrc-assembly-18-june-2014.

18 For further information on ICRC activities, see the regional factsheets on ICRC activities for migrants available at: www.icrc.org/en/migrants.

19 For an overview of ICRC activities for vulnerable migrants and their families around the world, see ICRC, *Activities for Migrants*, booklet, available at: www.icrc.org/en/document/activities-migrants-brief.

exposure to risks, for example by promoting self-care messages[20] and helping migrants to restore and maintain contacts with their family members.

The ICRC engages directly and confidentially with all concerned authorities in order to seek to ensure that States fulfil their obligations to protect the lives, preserve the dignity and alleviate the suffering of vulnerable migrants. It also contributes to migration policy debates in a range of multilateral, regional and global fora, with the aim of ensuring that migration-related policies respect States' obligations under international and domestic law and align with humanitarian considerations.

This article presents the ICRC's approach to migration and its main protection concerns, and argues that while the ICRC can respond to certain humanitarian needs, a greater commitment by States to adopt and implement policies that do not create further humanitarian suffering is required.

The ICRC vulnerability approach

In the absence of a universally accepted definition, the ICRC and the other components of the Movement describe migrants as persons who are outside of their country of origin or habitual residence.[21] They may be, for instance, migrant workers[22] or migrants deemed irregular by public authorities. They can also be refugees, asylum-seekers and/or stateless persons entitled to special protection under international law.[23] The Movement's description is deliberately broad to include all people who leave or flee their home to seek safety or better prospects abroad, and who may be in distress and need protection or humanitarian assistance.

The ICRC uses this inclusive description to capture without discrimination the full extent of humanitarian concerns related to migration and to provide sufficient flexibility to address migrants' often complex situations. It seeks to take into account the fact that journeys are often non-linear and involve a great deal of risk, fear and uncertainty; migrants who were not necessarily vulnerable when they left their country of origin might become vulnerable on their way or in the country of destination. The ICRC's specific added value lies in this distinct vulnerability-based approach.

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20 See, for instance, ICRC, "Mexico and Central America: Practical Advice for Migrants", leaflet, August 2016, available at: www.icrc.org/en/document/mexico-and-central-america-migrants-advices.
21 See IFRC, above note 1.
22 The term "migrant worker" is defined in Article 2.1 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UN Doc. A/RES/45/158, 18 December 1990 (entered into force 1 July 2003).
23 For further information, see, notably, Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954) (Refugee Convention); Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967) (1967 Protocol); Convention relating to the Status of Stateless Persons, 360 UNTS 117, 28 September 1954 (entered into force 6 June 1960); Convention on the Reduction of Statelessness, 989 UNTS 175, 30 August 1961 (entered into force 13 December 1975).

Such an approach intends to reflect the complexity of migration patterns. It acknowledges that "mixed migration" or "mixed flows" involve people with varying protection profiles, reasons for migrating and needs, such as refugees, asylum-seekers and other migrants using similar routes and transports, generally in an irregular manner. The concept of "mixed flows" has been used to highlight the presence within these movements of people who are eligible for international protection and others who are not. More generally, much of the current migration discourse tends to make a distinction between "voluntary" and "forced" movements. In reality, however, this distinction is not clear-cut and determining who is in need of protection is more complicated than simply differentiating between refugees and non-refugees. For instance, some people fleeing armed conflict or other situations of violence may not be recognized by all States as being legally entitled to refugee status under the 1951 Refugee Convention, but may nevertheless have (international) protection needs and might be unable to return home safely.

Using this inclusive description allows us to highlight the broad "umbrella" protection that all persons enjoy under several bodies of international law. Notably, all migrants are entitled to the protection of IHRL.[24] Recognizing this, the ICRC's approach underlines that all individuals have rights and that they must not fall into a legal or protection gap.

The ICRC's action seeks to ensure that persons are afforded the full protection to which they are individually entitled under international law, in accordance with their legal status (e.g., the special protection afforded to certain categories of persons such as refugees and asylum-seekers[25]) and/or depending on their particular circumstances (e.g., protection under international humanitarian law when in a situation of armed conflict). This is an individualized approach that respects each individual's rights, including those of irregular migrants, and recognizes the fact that some categories of migrants are entitled to more extensive legal protection (refugees, asylum-seekers and stateless persons).

The ICRC's action does not aim to reach all migrants but focuses on people who have protection or assistance needs and are particularly vulnerable, in line with the Movement's Fundamental Principles.[26] These Principles, notably humanity,

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24 For more information on the legal protection of migrants under international law, in particular IHRL, see, for example, UNHCR, *Report on the Promotion and Protection of the Human Rights of Migrants in the Context of Large Movements*, UN Doc. A/HRC/33/67, Geneva, 2016; Office of the UN High Commissioner for Human Rights (OHCHR), *Situation of Migrants in Transit*, UN Doc. A/HRC/31/35, Geneva, 2016; OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, Report of the UN Secretary-General on Protection of Migrants, Geneva, 2014.

25 Refugees and asylum-seekers are afforded, in addition to the general protection of IHRL and other bodies of international law, special protection under international refugee law. The key legal instruments are the 1951 Refugee Convention and its 1967 Protocol, which grant refugees and asylum-seekers specific rights and minimum standards of treatment. See above note 23.

26 See the thematic issue on "Principles Guiding Humanitarian Action", *International Review of the Red Cross*, Vol. 97, No. 897–898, 2015, and specifically the article by Jérémie Labbé and Pascal Daudin, "Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross", available at: www.icrc.org/en/international-review/article/applying-humanitarian-principles-reflecting-experience-international.

impartiality, neutrality and independence, are relevant to building a response that addresses vulnerabilities without discrimination. Together, the Fundamental Principles are the Movement's compass for a humanitarian action solely shaped by the needs of vulnerable migrants, and they help it to navigate the complex and highly politicized environment of migration.

Main protection concerns and ICRC response on behalf of vulnerable migrants

Many migrants endure great hardship that can affect their physical integrity, mental health and well-being, and that of their families. All along their routes, they make easy targets for abuse and exploitation, and face countless other risks. Some migrants lose contact with their families; many suffer accidents or serious illness and cannot get access to medical care; others are detained for entering or remaining in a country irregularly. Still others face discrimination when they seek help. Every year, thousands of migrants die or disappear along the way, leaving their families to wait in anguish for answers.

Ensuring protection along migratory routes remains critical for the ICRC, particularly when migrants are stranded in a country affected by armed conflict, which may expose them to new and greater threats. Migrants in countries affected by armed conflict are generally considered to be a part of the civilian population and are thus entitled to the full protection granted to civilians by virtue of IHL.[27] Further, foreigners can often be the most vulnerable among the civilian population in such situations. They run a greater risk of violence and abuse and are often the first victims of various groups that seek to take advantage of their vulnerability. In situations of armed conflict, their vulnerability may be exacerbated by not speaking the language of the country they are in,[28] or because of discrimination in access to basic services such as health care and assistance. Furthermore, migrants may be detained and may even be at risk of being transferred to countries where they fear a violation of certain fundamental rights.[29] Families of migrants in countries of origin and in the diaspora may also be desperate to know the fate and whereabouts of their loved ones, in particular knowing that they may be caught in a situation of armed conflict. Some migrants

27 That protection can be lost if and for such time as they directly participate in hostilities. On another note, in international armed conflicts, a migrant may, by virtue of his or her nationality, or if he or she is considered a refugee or a stateless person within the meaning of those terms under IHL, also enjoy the special protection granted to certain categories of aliens in the territory of a party to a conflict or in occupied territory. For further information, see Helen Obregón Gieseken, "The Protection of Migrants under International Humanitarian Law", in this issue of the *Review*.

28 Migrants often do not receive information in a language they can understand, affecting their ability to make an informed decision, or are not provided with the necessary support to communicate their needs. For further information, see, for instance, Translators without Borders, *Putting Language on the Map in the European Refugee Response*, research report, September 2017, available at: translators withoutborders.org/wp-content/uploads/2017/04/Putting-language-on-the-map.pdf.

29 For further information, see the section "Return of Migrants", below. See also ICRC, "Note on Migration and the Principle of *Non-Refoulement*", in this issue of the *Review*.

may also have limited consular support. The ICRC's action on behalf of vulnerable migrants and their families mostly takes place in these situations.

The Movement has on several occasions, including at the International Conferences of the Red Cross and Red Crescent,[30] reiterated the increasing scale of humanitarian needs linked to migration, and reaffirmed its commitment to alleviating the plight of vulnerable migrants. The ICRC contributes to responding to the needs of vulnerable migrants, notably by helping to prevent family separation, restoring family links, ensuring proper and dignified handling of human remains, activities for detained migrants and other protection aspects. These areas of expertise are anchored in a protection dialogue (in addition to delivery of direct services or support when relevant), reminding State authorities of their primary obligations to protect and assist vulnerable migrants.

The humanitarian cost of immigration detention[31]

Restrictive migration policies often result in the use of coercive measures, including systematic resort to detention, and moves to criminalize immigration infractions. Systematically resorting to the detention of irregular migrants, regardless of their personal circumstances, is in contradiction with the right to liberty and security of person – which is one of the most fundamental human rights.[32] Migrants may be held for months, sometimes years while waiting for status determination or deportation. Depriving people of their liberty is a severe measure, and often has serious consequences for the individuals concerned. Detention may reactivate past trauma and expose migrants to additional ones. Further, detained migrants are particularly vulnerable as they are less likely to have local support networks or an understanding of national procedures, including those for seeking asylum. The ICRC encourages States to treat irregular migration as an administrative

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30 See, for instance, 30th International Conference of the Red Cross and Red Crescent, Resolution 1, "Together for Humanity", 2007; 31st International Conference of the Red Cross and Red Crescent, Resolution 3, "Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion", 2011. Migration was also a central theme at the 32nd International Conference in 2015, during which various events were organized and where pledges were made, notably to reassert the importance of implementing Resolution 3.

31 The term "immigration detention" is used by the ICRC to refer to administrative detention for reasons of irregular entry or stay in a country's territory. Migrants are placed in administrative detention, for example, for identity verification or to prevent them from absconding during status determination or deportation procedures.

32 The right to liberty and security of person is set down in several international legal documents, such as the Universal Declaration of Human Rights, UNGA Res. 217 A(III), 10 December 1948, Arts 3, 9; and the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 9.1. At the regional level, the right to liberty and security of person is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 4 November 1950 (entered into force 3 September 1953), Art. 5; the American Convention on Human Rights, 22 November 1969 (entered into force 18 July 1978), Art. 7; the African Charter on Human and People's Rights, CAB/LEG/67/3 Rev. 5, 21 ILM 58, 27 June 1981 (entered into force 21 October 1986), Art. 6; and the Arab Charter on Human Rights, 15 September 1994, Art. 14. This right is not absolute and does not prohibit detention; rather, it requires that detention not be unlawful, namely that it be based on such grounds and procedures as established by law. Moreover, the decision to detain must not be arbitrary.

infraction rather than a criminal offence.[33] Criminalization of irregular entry or stay may hinder detained migrants' access to specialized services, further stigmatize irregular migrants as a group, and prevent such migrants from finding the social, medical or psychological support they may need following previous exposure to violence and abuse.

The ICRC visits people detained in relation to their migratory status in both criminal and dedicated immigration detention facilities along the migration routes.[34] It is a daily witness to the negative, lasting and potentially irreversible damage caused by detention to the mental health and well-being of migrants.[35] A large body of research has shown that administrative detention is particularly harmful, especially for migrants' mental health, because of uncertainty about the administrative process and fears for the future. These fears compound the trauma that migrants may already have suffered.[36] Migrants may have pre-existing physical and mental health issues that might be exacerbated by the detention environment. Other humanitarian organizations, such as Médecins Sans Frontières, have also raised concerns about the detrimental impact of detention on migrants' health and well-being based on their experience in this area.[37]

During detention visits, and through ongoing confidential dialogue with the authorities, the ICRC seeks to make sure that the principle of *non-refoulement*[38] is upheld, and that detained migrants are afforded due process of law, are treated humanely and held in conditions that preserve their dignity, and are able to maintain contact with the outside world, such as with their families and consular authorities, if they wish to do so.

33 For further information, see UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/7/4, 10 January 2008, para. 53. See also Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, UN Doc. A/HRC/20/24, 2 April 2012, para 13; Conclusion No. 44 (XXXVII) on the Detention of Refugees and Asylum-Seekers, adopted by the UNHCR Executive Committee in 1986; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Geneva, 2012, para 32.

34 The ICRC has worked on behalf of detained irregular migrants for many years as part of its activities for detainee populations in general, but has only recently started implementing specific programmes for migrants in immigration detention in countries of transit and destination.

35 The ICRC also provides expertise and support to National Societies that work with migrants in immigration detention. It holds workshops on immigration-related detention, which are an opportunity to discuss good practices and ways to help detained migrants more effectively.

36 See Mary Bosworth, "The Impact of Immigration Detention on Mental Health: A Literature Review", in Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office by Stephen Shaw*, January 2016, Appendix 5; Janet Cleveland, Cécile Rousseau and Rachel Kronick, *The Harmful Effects of Detention and Family Separation on Asylum Seekers' Mental Health in the Context of Bill C-31*, brief submitted to the House of Commons Standing Committee on Citizenship and Immigration concerning Bill C-31, the Protecting Canada's Immigration System Act, April 2012; Colin Neave, *Suicide and Self-Harm in the Immigration Detention Network*, report of the Commonwealth and Immigration Ombudsman, No. 02/2013, May 2013.

37 See Ioanna Kotsioni, "Detention of Migrants and Asylum-Seekers: The Challenge for Humanitarian Actors", *Refugee Survey Quarterly*, Vol. 35, No. 2, 12 April 2016, available at academic.oup.com/rsq/article/35/2/41/2223324/Detention-of-Migrants-and-Asylum-Seekers-The.

38 For further information on the principle of *non-refoulement*, see the section "Return of Migrants", below. See also ICRC, "Note on Migration and the Principle of *Non-Refoulement*", in this issue of the *Review*.

The ICRC holds that detention should be a measure of last resort; a decision to detain can only be ordered on the basis of an individualized assessment. It must not be based on a mandatory rule for a broad category of persons. The suffering that it causes can be prevented or significantly alleviated by considering liberty as the norm; if there are grounds for deprivation of liberty, alternatives to detention should be considered first.[39] Any detention must be determined to be necessary, reasonable and proportionate to a legitimate purpose. When migrants are held in administrative detention, it is critical not to restrict their liberty beyond what is strictly necessary,[40] and migrants must be allowed to have contact with family members. Furthermore, the rights of detainees must be respected and a number of key procedural safeguards observed, as required by existing law or as a matter of policy and good practice.[41] The special circumstances of certain categories of especially vulnerable migrants, such as children,[42] victims of torture or trafficking, disabled people, people suffering from serious or chronic diseases, and elderly people, should be considered. The ICRC maintains that detention of these vulnerable groups should be avoided.

Missing migrants and their families: The complexity of working across borders

Throughout the migratory routes, family separation remains pervasive, with thousands of migrants losing contact with their families and going missing every year.

Family separation occurs in situations of large movements of people, as well as when members of a single family lose contact along the route. Countless hurdles put family members at risk of separation. Separation of families and disappearances can notably result from restrictive migration policies and containment strategies that compel migrants to take more dangerous routes, exposing them to greater risks. Family members who started their journey together can be separated at various points along the journey, including during border crossing or the process of registration, while boarding trains or buses, or during medical evacuations. The

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39 The International Detention Coalition (IDC) research report *There are Alternatives* provides readers with guidance on how to avoid unnecessary detention and to ensure that community options are as effective as possible. IDC, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, revised ed., Melbourne, 2015, available at: idcoalition.org/publication/view/there-are-alternatives-revised-edition/.
40 For instance, migrants should be able to move freely within their place of detention.
41 See ICRC, *ICRC Policy Paper on Immigration Detention*, Geneva, 2016, available at: www.icrc.org/en/document/migrant-detainees-icrc-policy.
42 See ICRC, "Second Comment on the Global Compact for Safe, Orderly and Regular Migration: Focus on Immigration Detention", Geneva, 2017, available at: www.icrc.org/en/document/icrc-comment-global-compact-safe-orderly-and-regular-migration.

number of unaccompanied children along migration routes is staggering;[43] some left their country of origin alone, while others were separated from relatives along the way. Children are exposed to greater risks than adults, and separation is a major factor that increases their vulnerability.

Many migrants die[44] along migratory routes and are never identified – their remains are often not handled with dignity and may be poorly documented or untraceable, including many buried in anonymous graves in countries of transit and destination.[45] Families live in anguish not knowing where their loved ones are or what happened to them, and in some cases feeling responsible for their fate. Although the tragic situation of thousands of migrants who perish while trying to cross the Mediterranean Sea en route to Europe has caught much attention recently, the plight of missing migrants worldwide is largely ignored. Recent initiatives have tried to capture the scope of the phenomenon, but figures can never truly convey the great suffering of migrants and their families.

Restoring family links (RFL) is one of the long-standing activities of the ICRC and its Central Tracing Agency,[46] and of the network of National Societies.[47] Drawing on their presence in countries of origin, transit and destination, the ICRC and the National Societies have expanded and adapted their activities to assist persons separated as a result of migration. These activities seek to prevent separation and restore and maintain contact between family members. They also aim, when and where possible, to reunite family members and help people clarify the fate and whereabouts of their loved ones reported missing. Carrying out RFL activities across numerous borders is complex and challenging, not only because migration routes pass through several countries and

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43 According to UNHCR, data indicate that the number of unaccompanied or separated children seeking asylum on an individual basis has increased significantly over recent years. In 2015, nearly 100,000 unaccompanied or separated children filed claims for asylum in seventy-eight countries. This total represented nearly a threefold increase over the previous year and the highest number of applications since UNHCR began compiling these data in 2006. UNHCR noted that not all countries report information on the numbers of unaccompanied or separated children seeking asylum; thus it is very likely that the reported figure is an under-estimate. It should also be noted that this number only counts children who have reached a destination country and filed an asylum claim. See UNHCR, *Global Trends in Forced Displacement in 2015*, Geneva, 2016; UNICEF, *Uprooted: The Growing Crisis for Refugee and Migrant Children*, Geneva, 2016.

44 See above note 4.

45 Cristina Cattaneo, Morris Tidball Binz, Lourdes Penados, J. Prieto, Oran Finegan and M. Grandi, "The Forgotten Tragedy of Unidentified Dead in the Mediterranean", *Forensic Science International*, Vol. 250, May 2015. For a detailed analysis of this phenomenon, see also: Cristina Cattaneo and Marilisa D'Amico, *I diritti annegati: I morti senza nome del Mediterraneo*, Franco Angeli, Milan, 2016.

46 The Central Tracing Agency provides a range of tracing services worldwide that enable detainees and civilians affected by conflict, disaster and other situations to restore contact with members of their families. For more information on the role of the Central Tracing Agency, see: ICRC, "ICRC Central Tracing Agency: Half a Century of Restoring Family Links", interview, 7 April 2010, available at: www.icrc.org/eng/resources/documents/interview/centra-tracing-agency-interview-070410.htm; 25th International Conference of the Red Cross, Resolution 16, October 1986, available at: www.icrc.org/eng/resources/documents/article/other/57jmdk.htm.

47 The Family Links Network is made of all tracing services of the 191 National Societies as well as the Central Tracing Agency of the ICRC. The ICRC has a lead role within the Movement in the field of restoring family links, provides support and guidance, and coordinates the work of the Family Links Network. More information is available at: familylinks.icrc.org/en/Pages/home.aspx.

the migrants may have gone missing in any of them, but also because illness, injury, lack of resources or being detained may restrict migrants' access to means of communication. Some migrants may be forcibly prevented from contacting their families, while others may not wish to make contact in order to stay "invisible", especially when they are in an irregular situation or out of fear of reprisals against their families in their countries of origin.[48]

Losing contact with family causes stress and anguish, disrupts cultural and community ties, damages self-protection mechanisms and generally increases vulnerability of migrants and their families. Moreover, separation from loved ones occurring during the journey can further impact migrants' well-being and resilience. Interventions for migrants and their families focus on helping people to stay connected along migration routes and, in doing so, contribute to preventing people from going missing. In the recent past, a growing number of RFL initiatives, sometimes experimental, have been developed on behalf of migrants. Better involvement of the people affected in the assessment of their needs and in designing an appropriate response – including through the use of new technologies[49] – is essential. Digital technology has brought about new opportunities but also new risks linked to the protection of personal data. The Family Links Network has developed a code of conduct for data protection which provides a means of protecting the fundamental rights and freedoms of individuals using RFL services, in particular the right to privacy as well as the protection of personal data.[50]

The supply of telephone services, connectivity and power along migration routes for those who have their own devices has proved to be effective. On the other hand, disappearances of migrants still raise a considerable number of difficulties which require a specific and long-term follow-up. The most vulnerable of those affected still rely on the ICRC and National Societies to search for their loved ones through traditional tracing efforts.[51] Coordinated transregional strategies along migration routes, including the provision of services based on a common methodology, are required in order to be able to restore and maintain family links and to help people clarify the fate and whereabouts of their loved ones. The Family

48 The best interests of the person benefiting from the Red Cross and Red Crescent services and his/her family must be taken into account when deciding on the type of action to be undertaken to solve their case. Once located, a person can choose whether or not to disclose his/her address to the enquirer. Respecting the wishes of the sought migrants themselves and obtaining their consent, after they have been traced, is paramount.
49 See Olivier Dubois, Katharine Marshall and Siobhan Sparkes McNamara, "New Technologies and New Policies: The ICRC's Evolving Approach to Working with Separated Families", *International Review of the Red Cross*, Vol. 94, No. 888, 2012, available at: www.icrc.org/en/international-review/article/new-technologies-and-new-policies-icrcs-evolving-approach-working.
50 The RFL Code of Conduct on data protection is available at www.icrc.org/en/document/rfl-code-conduct. See also the 2013 Professional Standards for Protection Work Carried out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence, which capture a set of common professional ethics that aim to make protection work safer and more effective, and in particular Chapter 6 on information management, available at www.icrc.org/en/publication/0999-professional-standards-protection-work-carried-out-humanitarian-and-human-rights.
51 For further information on ICRC RFL activities, see the ICRC leaflet "Are You Looking for a Family Member?", available at: www.icrc.org/en/publication/4102-are-you-looking-family-member-familylinks icrcorg-can-help-you.

Links Network also supports innovative methods and tools[52] for finding missing migrants and adapts support to families of missing migrants to their wide array of needs in order to help them face the anguish and the consequences they suffer when relatives disappear.[53]

Analogies can be drawn with the long-lasting experience of the ICRC in clarifying the fate and whereabouts of persons who went missing in situations of armed conflict.[54] Families of migrants who go missing along migratory routes endure the same suffering as families faced with the disappearance of their loved ones as a result of armed conflict or natural disaster: the need to know the fate and whereabouts of their missing relatives is no different.[55] Data collection from families of missing migrants (including *ante mortem* data when necessary), coupled with effective data gathering and management in countries where migrants may have disappeared, will prove fundamental in this process.[56]

Proper and dignified handling of the human remains of deceased migrants is also essential in the complex endeavour to identify migrants who died during their journey. Their identification is often impossible without information from their families: the search for and identification of missing migrants requires matching and triangulation of information between authorities and families in different countries. ICRC interventions in this area include support to national forensic institutions, from a humanitarian forensic perspective, to ensure that human remains of dead migrants are handled in a dignified manner and that the chances of identification are safeguarded and enhanced.[57]

States should take all feasible measures, including adopting adequate policies, to prevent family separation, paying particular attention to vulnerable groups such as children. When family members are separated, measures should be taken to reunite them whenever possible and without delay. If migrants go missing, countries of origin, transit and destination should endeavour to clarify their fate and whereabouts, including through the setting up of transregional coordination channels (mechanisms), and communicate information about the missing to their families, in compliance with applicable data protection and privacy laws, and in their absence, with the standards set out in the Council of Europe Convention for

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52 See, for example, the Trace the Face project, available at: familylinks.icrc.org/europe/en/Pages/Home.aspx.
53 See, for instance, ICRC, "Senegal: New Hope for Families of Missing Migrants", 21 July 2016, available at: www.icrc.org/en/document/senegal-new-hope-families-missing-migrants. See also ICRC, "'Barça ou Barsak': Etude sur les besoins actuels des familles de migrants sénégalais disparus" Senegal, 2013, available at: familylinks.icrc.org/fr/Pages/ActualitésEtRessources/Ressources/FNAmigrantsSenegal.aspx.
54 For further information, see the thematic issue on "Missing Persons", *International Review of the Red Cross*, Vol. 84, No. 848, 2002, available at: www.icrc.org/en/international-review/missing-persons.
55 The ICRC efforts have developed to better understand the specific needs of the families of missing migrants, be they socio-economical, legal/administrative, psychological or psychosocial needs, and to set up "accompaniment programmes", when possible and relevant, to respond to these needs and to mobilize authorities and other service providers to do so.
56 In this respect, the ICRC promotes in its activities respect for data protection principles. For further information, see above note 50.
57 In the case of Mexico, for instance, the ICRC helped the authorities to develop the first national protocol for the management and identification of the dead, *Protocolo para tratamiento e identificacion forense*, available at: coordinacionsemefotoluca.files.wordpress.com/2012/04/protocolo-tratamiento-e-identificacion-forense-final.pdf.

the Protection of Individuals with regard to Automatic Processing of Personal Data.[58] Improving practices of and coordination between national forensic services[59] is also critical to identifying migrants who have died during their journey.

ICRC experience shows that minimizing the risk of migrants going missing, treating those who perished with dignity, and supporting families to clarify the fate and whereabouts of their loved ones are all actions within reach. They require political will from States and international cooperation among States and relevant organizations.

Health consequences of unsafe migration

Migrants may be exposed to other types of risks and abuses along their journey. Their vulnerability may arise from their age, gender[60] or other personal attributes; lack of documents, information, family or community networks, material resources or language skills can make them easy targets for abuse, extortion, exploitation and sexual violence. They may also face hazardous conditions during their journey, including when boarding fragile, overloaded vessels or when stranded in inhospitable terrain.

Migrants who have directly suffered the effect of armed conflicts and other situations of violence or who have been persecuted, abused or exploited in their home country or during their journey have specific needs, beyond shelter and legal avenues. The person's history in his or her country of origin and the way he or she left will create specific needs that must be taken into account. Further, the implementation of restrictive migration policies may not only fail to curtail migration but can also often result in migrants undertaking more dangerous journeys, requiring reliance on smugglers or increasing the risk of falling prey to traffickers.[61] En route, they may be robbed, held for ransom and/or tortured. As highlighted above, they might also lose contact with people from their family or group and/or witness deaths or injuries.

For all these reasons, migrants are far more likely than the general population to have trauma-related mental health problems. More generally, the health needs of migrants are usually greater than those of the general population as migrants may

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58 See Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, Strasbourg, 28 January 1981, available at: rm.coe.int/1680078b37.

59 See, for example, the ICRC's "First Conference on the Management and Identification of Unidentified Decedents, with an Emphasis on Dead Migrants: The Experience of European Mediterranean Countries", Milan, 2013; and "Second Conference on the Management and Identification of Unidentified Decedents, with an Emphasis on Dead Migrants: The Experience of European Mediterranean Countries", Barcelona, 2015.

60 Children and women may be more vulnerable to trafficking and sexual violence. For more information, see, for instance, UNHCR, *Children on the Run: Unaccompanied Children leaving Central America and Mexico and the Need for International Protection*, Geneva, March 2014; UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico*, Geneva, October 2015.

61 For an explanation of the differences between smuggling and trafficking, see OHCHR, *Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc. E/2002/68/ Add.1, Geneva, 2010. See also Inter-Agency Coordination Group against Trafficking in Persons, "What Is the Difference between Trafficking in Persons and Smuggling of Migrants?", Issue Brief No. 01, October 2016, available at: icat.network/sites/default/files/publications/documents/UNODC-IB-01-draft4.pdf.

have had limited access to health care in their own country, may not have access to health services during their journey and may face other ordeals such as exhaustion due to long journeys on foot or limited access to drinking water. Moreover, once in their country of destination they may not have access to basic health-care services due to their irregular status, local legislation and/or a lack of support networks.

These wider physical and psychological needs must be addressed. Like any other person, all migrants, irrespective of their status, have the right to the enjoyment of the highest attainable standard of physical and mental health.[62] Further, early identification and referral mechanisms for the most vulnerable individuals (persons with specific needs, such as unaccompanied children, elderly people, victims of torture or trafficking, people with mental health or physical illnesses or disabilities, and pregnant women) should be put in place by States with the support of other organizations when necessary.

While States have the primary responsibility to assist migrants, depending on the circumstances, the ICRC may provide direct relief often in close cooperation with National Societies or help migrants access services provided by National Societies, governments or other actors. This assistance can include supplying drinking water or providing primary health care and physical rehabilitation for people who are seriously injured or have an amputated limb.[63]

Other humanitarian concerns

Use of force

While the arrival of large numbers of migrants in a country creates challenges for the authorities, measures taken to manage migration must be in line with States' obligations and must respect the rights of those concerned.[64] When confronted with situations where migrants are seeking to cross international borders irregularly, unnecessary or excessive force has, in some instances, been used, resulting in suffering that could have been avoided. Furthermore, national security considerations may lead to militarization of borders. This, in turn, can entail a greater risk of recourse to excessive or unnecessary force. Military forces are generally not prepared or equipped to perform law enforcement tasks such as managing migration flows, which obey other rules and require a specific set of skills and equipment.

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62 See International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976), Art. 12. In its General Comment No. 14 (2000, para. 34), the Committee on Economic, Social and Cultural Rights provided that States have an obligation to ensure that all migrants have equal access to preventive, curative and palliative health services, regardless of their legal status or documentation.

63 See, for instance, ICRC, "Mexico, Central America and Cuba: Helping the Most Vulnerable", 30 September 2014, available at: www.icrc.org/en/document/mexico-central-america-and-cuba-helping-most-vulnerable.

64 For obligations related to the use of force, see ICRC Advisory Service on International Humanitarian Law, –"The Use of Force in Law Enforcement Operations", factsheet, September 2015, available at: www.icrc.org/en/document/use-force-law-enforcement-operations; ICRC, *Violence and the Use of Force*, Geneva, July 2011, available at: www.alnap.org/help-library/violence-and-the-use-of-force. See also the UN Code of Conduct for Law Enforcement Officials of 1979 and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990.

Whether at borders, in transit or in destination countries, force may only be used as a last resort, when other available means remain ineffective or without any promise of achieving the intended result. In line with IHRL, any use of force must be consistent with the principles and requirements of legality, necessity, proportionality, precaution and accountability. In any event, intentional use of lethal force may only be resorted to when strictly unavoidable in order to protect life. International law and standards on the use of force undoubtedly bind States' police and military forces. Similarly, if States task private security companies with exercising elements of governmental authority, such as border guarding, such actors are considered agents of the State, meaning that the State is responsible for their actions and must ensure that these actors comply with the State's international obligations.[65]

In line with the above, force should not be used simply to prevent migrants from crossing borders or to deter them from seeking access to international protection. In all circumstances, including in a detention setting, any approach privileging prevention, mediation and de-escalation should be encouraged.

Furthermore, it is important that political authorities and security forces factor in the enormous suffering that some migrants may have undergone. They should therefore be able to identify and take into account migrants' specific vulnerabilities and needs and provide or direct them towards the necessary support.

The ICRC has a long-standing practice of engaging in a dialogue with armed actors on the use of force, and a specific protection dialogue is being further developed with the relevant authorities and law enforcement agencies to address the humanitarian dimensions of migration.

Return of migrants[66]

In recent times, within political discussions on migration governance, the question of return has gained renewed momentum. While the circumstances surrounding return are complex and wide-ranging, in all situations[67] States must comply with their obligations under international law, including the principle of *non-refoulement*.

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65   See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1, November 2001, Art. 5, available at: www.refworld.org/docid/3ddb8f804.html. For further information, see Tilman Rodenhäuser, "Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control", *International Journal of Refugee Law*, Vol. 26, No. 2, 2014.

66   The ICRC generally uses the term "return" broadly to refer to the process of going back to one's State of origin or transit, or another third State. The return may be voluntary or forced. "Return" therefore encompasses deportation, expulsion and removal, as well as other circumstances.

67   It has been suggested that there is no clear-cut boundary but rather a gradual scale from voluntary to involuntary return. Some migrants may return out of their own free will, whereas others may be forcibly returned in a coercive manner to places where they may have almost no connection. In between, there is a wide array of potential scenarios. The authorities may create conditions that deprive the individual migrant of any real alternative to leaving. Migrants may be given incentives to return that may ultimately result in withdrawing their asylum claim, they might be pressured into accepting return when, for instance, indefinite detention is the only alternative offered by a State migration policy, or they might not be well informed about their rights. Some of these situations may also be considered as "forced returns". It is important to stress that there is no authoritative legal test for ascertaining the voluntariness of a return. However, a determination of whether a return is "voluntary" or "forced" can only be made on an individual basis, assessing the particular circumstances.

Migrants may not have access to procedures to determine their need for international protection. They may also be at risk of being returned to countries in violation of the principle of *non-refoulement*,[68] or the return may be carried out in a way that is not compliant with their rights and dignity.

All persons seeking international protection[69] must be afforded the effective right to seek asylum and have fair and efficient access to procedures to determine their status and protection needs. In addition, although it is within the sovereign prerogative of States to regulate the presence of foreigners in their country and to decide on the criteria for admission and expulsion of non-nationals, that prerogative is not absolute. It must be exercised within the limits established by international and domestic law, as preventing people from accessing a territory or returning them to another country can have grave or fatal consequences.

When planning to transfer a migrant, a State is required to assess carefully and in good faith whether there are substantial grounds to believe that a particular individual would be in danger of being subjected to a violation of his/her rights in the country of return, and therefore be protected under the principle of *non-refoulement*. This individual determination must not be replaced by a collective one: the specific situation, needs and rights of each individual must be assessed. Moreover, migrants alleging a violation of their rights must be afforded effective remedies against the decision to return them, meaning at the very least that they need to be informed of the transfer in a timely manner, they must have the opportunity to challenge the transfer decision before an independent and impartial body, and their transfer must be suspended during the review process.[70] Expedited or fast-track procedures may be too rushed for this to happen.

The principle of *non-refoulement* prohibits the transfer of persons from one authority to another when there are substantial grounds to believe that the person would be in danger of being subjected to violations of certain fundamental rights. This is especially recognized in respect of torture or cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life, or persecution. Depending on the applicable universal or regional instruments, risks related to, notably, enforced disappearance, death penalty, trial by a special or *ad hoc* court, flagrant denial of justice, underage recruitment and participation in hostilities, or, in exceptional cases,

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68 For more information on the principle of *non-refoulement*, see, for instance, Cordula Droege, "Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges", *International Review of the Red Cross*, Vol. 90, No. 871, 2008; Emanuela-Chiara Gillard, "There's No Place Like Home: States' Obligations in Relation to Transfers of Persons", *International Review of the Red Cross*, Vol. 90, No. 871, 2008; Laurent Gisel, *The Principle of Non-Refoulement in Relation to Transfers: Proceedings of 15th Bruges Colloquium*, October 2014.

69 It should be noted that refugee status is declaratory. This is relevant for the issue of migration, particularly taking into account the mixed nature of movements, as in practice it entails that all persons who intend to apply for asylum (as a refugee or other person in need of international protection) must be given access to fair and efficient asylum procedures and allowed to remain in the country as long as their application is being examined.

70 There may be higher standards depending on the applicable human rights instruments or domestic law. This will need to be assessed on a case-by-case basis to ensure that the broadest protection to which a migrant is entitled is granted.

serious mental or physical illness (depending on the quality and availability of health care in the country of return) will also need to be considered.[71]

The principle of *non-refoulement* is found expressly in IHL,[72] IHRL and refugee law, although with different scopes in each of these bodies of law. The gist of the principle of *non-refoulement* has also become customary international law. The scope of the protection afforded by international law against *refoulement* for a specific migrant will depend on the treaties ratified by the country he/she is in and the particular circumstances of the concerned person.

Importantly, under IHRL, this principle extends to all individuals, irrespective of their legal status. It is generally recognized that the principle of *non-refoulement* applies to admission and non-rejection at the border, interdiction (or interceptions) and rescue operations on the high seas. Further, it should be noted that policies such as expedited asylum procedures can never relieve States of their obligations under the principle of *non-refoulement*.

Even if a deportation[73] is not contrary to the principle of *non-refoulement*, the way deportations are carried out must also respect international law. Issues of concern during deportation processes may include family separations and lack of medical follow-up for sick and injured migrants. Migrants being deported have the right to humane treatment and the right to family unity,[74] and their specific and individual vulnerabilities should be taken into account.

Under the right conditions, the option for people to return to their homes is a positive development, as this is often people's preferred long-term solution. Nevertheless, experience suggests that returns will only be durable if they take place in safety and with dignity. Returning people to already difficult environments, in particular countries affected by armed conflict and other situations of violence, where the State and humanitarian organizations are struggling with massive needs, may create additional gaps and vulnerabilities. For instance, people may become internally displaced (again or for the first time) if their return to their countries of origin is premature or involuntary, particularly if they are returned to conditions of insecurity.

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71 For a more comprehensive analysis of the principle of *non-refoulement* under different bodies of international law, see ICRC, "Note on Migration and the Principle of *Non-Refoulement*", in this issue of the *Review*.

72 See H. Obregón Gieseken, above note 16.

73 In this text, "deportation" means that the person concerned does not consent to leave the country and that he/she is therefore compelled to do so by force. The ICRC generally uses the term "deportation" and "expulsion" to mean the same thing.

74 In international humanitarian law, respect for family life is provided for in Customary IHL Rule 105 and Articles 27(1) and 82(3) of Geneva Convention IV (GC IV). Rules relating to maintenance of family unity are found in Articles 49(3) and 82(3) of GC IV and Articles 4(3)(b) and 5(2)(a) of Additional Protocol II (AP II). The Commentary to Customary IHL Rule 131 on the treatment of displaced persons includes practice that requires respect for family unity in general terms, and is not only limited to displacement and facilitating the reunion of dispersed families; see GCIV, Art. 26; Additional Protocol I, Art. 74; AP II, Art. 4(3)(b). Under IHRL, the protection of the family is provided for in the International Covenant on Civil and Political Rights (ICCPR), in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in regional human rights conventions: see ICCPR, Art. 23(1); ICESCR, Art. 10(1); American Convention on Human Rights, Art. 17(1); African Charter on Human and Peoples' Rights, Art. 18. With respect to separation of children from their parents, the Convention on the Rights of the Child provides that "States Parties shall ensure that a child shall not be separated from his or her parents against their will" (Art. 9(1)).

Conclusion

Migration is an intricate global phenomenon. Daily, events around the world continue to show the great suffering of migrants and their families. Too often, migration is portrayed as a source of tension and people who leave or flee their homes are frequently viewed through numbers or dealt with through quotas. Behind the figures, there are human beings who often endure great hardship in their place of origin and along their journeys, and who have their own stories and aspirations. All too often, the inability or unwillingness of the national and international systems results in a failure to protect migrants and to respond to their most basic needs. Migration policies that have detrimental humanitarian consequences are still implemented. Addressing this global human and social phenomenon requires strong State commitments to international law and humanity. It also necessitates practical cooperation between States, international organizations, civil society and businesses.

While the ICRC recognizes that States have a responsibility to uphold public order and security as well as a right to regulate migration, these must not be the only considerations shaping migration policies. In fact, security and the protection of migrants should not be seen as mutually exclusive. Enacting State policies that uphold migrants' rights, complying with international and domestic obligations and focusing on the humanity, dignity and safety of migrants[75] can contribute to greater security and stability.[76]

The ICRC and other components of the Movement will continue to contribute to the humanitarian response for migrants, particularly in the ICRC's areas of expertise, and will strive to address vulnerabilities along migratory routes in order to alleviate humanitarian consequences and prevent further suffering. The ICRC recognizes that the plight of migrants requires concerted efforts and effective cooperation.

However, States bear the primary responsibility for ensuring that migrants receive protection and assistance. They can do a lot to prevent and alleviate the suffering of migrants. They should carefully and regularly assess and adapt their migration practices and policies to address their potential humanitarian

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75 Resolution 3 from the 31st International Conference of the Red Cross and Red Crescent Movement (entitled "Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion") is an important guide to State practice: States are reminded, in line with relevant international law, of their responsibility to ensure that their national legislation and procedures at international borders include adequate safeguards to protect the safety and dignity of migrants and to ensure access for migrants to essential services. Further, the Resolution requests States "to ensure that relevant laws and procedures are in place to enable National Societies, in conformity with the Statutes of the Movement and, in particular, the Fundamental Principles, to enjoy effective and safe access to all migrants without discrimination and irrespective of their legal status". Available at: www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-3-2011.htm.

76 See, for instance, "Statement by Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights, at the Future of the Human Rights Covenants", 6 October 2016, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20647&LangID=E; the Report of the UN High Commissioner for Human Rights to the Human Rights Council, *Promotion and Protection of the Human Rights of Migrants in the Context of Large Movements*, UN Doc. A/HRC/33/67, Geneva, October 2016, available at: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A_HRC_33_67.docx.

consequences, including the risks that people go missing. New and existing migration practices and policies should be driven by the principle of humanity, focusing on the dignity and safety of migrants at every stage of their journey, alongside other legitimate concerns, and they must always be in line with international obligations.

The protection of migrants under international humanitarian law

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Abstract

*The movement of migrants across international borders may result in grave
humanitarian consequences and protection and assistance needs for those involved.
Although many reach their destinations safely, others may find themselves in a
country experiencing armed conflict – either because they live there or are
travelling through there – and may endure great difficulties and be particularly
vulnerable. In these situations, as civilians, migrants are protected under
international humanitarian law (IHL) against the effects of hostilities and when in
the hands of a party to the conflict. This article will provide an overview of the
protection afforded by IHL to migrants as civilians in international and non-
international armed conflicts. It will then examine more closely certain particularly
relevant rules for the issue of migration, notably those related to the movement of
migrants, family unity, and missing and dead migrants. In this way, this article
will show that IHL provides important legal protections for migrants finding
themselves in situations of armed conflict.*

Keywords: legal framework, international humanitarian law, international human rights law, international refugee law, migrants, refugees, stateless persons.

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Introduction

Armed conflicts in various parts of the world, including Afghanistan, the Central African Republic, the Democratic Republic of the Congo, Somalia, South Sudan and Syria, continue to cause immeasurable hardship for entire populations, prompting increasing numbers of people to flee within countries or across international borders. By the end of 2015, the number of refugees, asylum-seekers and internally displaced persons forcibly displaced worldwide due to armed conflicts, other situations of violence, persecution or human rights violations reached an unprecedented 65.3 million.[1] In 2015, the number of migrants[2] – a term covering a broad set of persons, including refugees as a specific legal category under international refugee law – reached 244 million worldwide.[3] Among the migrants who have left their countries of origin or of habitual residence (whether forcibly or voluntarily), many can subsequently find themselves in a third country experiencing armed conflict. In these situations, migrants, like the rest of the civilian population, endure great difficulties. They may be affected by the hostilities, lose contact with their families, go missing or die, often with no record of their fate or whereabouts. As foreigners, they tend to have additional vulnerabilities, encountering problems in accessing basic services or being subjected to restrictions of personal liberty. They may also be at risk of being sent back to their countries of origin or to other countries, potentially in violation of international law.

The migration discourse today focuses primarily on the movement of migrants in the Mediterranean, the Americas and beyond, towards European or North American land borders and shores. In these discussions, the plight of migrants in their country of origin, along the migration routes and in third countries where they reside (temporarily or permanently) is often largely forgotten and their protection and assistance needs not adequately addressed.[4] Notably, migrants who live in – or are crossing through – countries affected by armed conflict may be particularly vulnerable. This article primarily seeks to address the case of migrants caught in situations of armed conflict and how they are protected under international humanitarian law (IHL), rather than migrants in countries of destination. However, several IHL rules are also pertinent for migrants who have fled for reasons related to an armed conflict and who find themselves in a destination country that is at peace. This article will thus also

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1 Office of the United Nations High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2015*, Geneva, 20 June 2016, pp. 3, 16–18, available at: s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf (all internet references were accessed in June 2017).

2 The definition used in this article for the term "migrants" will be explained below in the section "Who Are 'Migrants', and How Does IHL Address Their Protection?".

3 United Nations (UN), Department of Economic and Social Affairs, Population Division, *International Migration Report 2015*, ST/ESA/SER.A/384, New York, 2016, available at www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015.pdf.

4 For further discussion on the protection and assistance needs of migrants caught in situations of armed conflict, see Stéphanie Le Bihan, "Addressing the Protection and Assistance Needs of Migrants: The ICRC Approach to Migration", in this issue of the *Review*.

briefly refer to some of these rules, such as the obligations of parties related to the re-establishment of family links and to accounting for the dead and the missing. These may continue to apply to migrants who no longer find themselves in a country in conflict, or beyond the end of an armed conflict.

In all situations, migrants are protected by different bodies of international law within their respective scopes of application, in particular international human rights law (IHRL) and, in the case of refugees and asylum-seekers, international refugee law. These bodies of international law remain applicable in situations of armed conflict.[5] Migrants are also protected by the domestic law of the State they are in. When migrants live, or are in transit, in the territory of a State in which there is an armed conflict,[6] they are also protected by IHL. While only applicable in armed conflicts, certain rules of IHL should already be considered in peacetime, and some remain applicable even after the end of an armed conflict. The latter is the case for situations that are the direct consequence of, or are directly related to, an armed conflict or occupation and whose effects extend beyond the conclusion of these.[7] As a result, even if an armed conflict has come to an end or a migrant is no longer on the territory of a country experiencing armed conflict, they may continue to enjoy protection under certain rules of IHL.[8]

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5   International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports 2004*, para. 106; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports 2005*, para. 216. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), pp. 299–305; UN Office of the High Commissioner for Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflict*, New York and Geneva, 2011, available at: www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf.

6   For the meaning of international and non-international armed conflicts under IHL, see Articles 2 and 3 common to the four Geneva Conventions; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 1(4); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 1. See also ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., 2016 (ICRC Commentary on GC I), commentary on common Arts 2 and 3, available at: ihl-databases.icrc.org/ihl/full/GCI-commentary; ICRC, "How Is the Term 'Armed Conflict' Defined in International Humanitarian Law?", Opinion Paper, March 2008, available at: www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 31IC/11/5.1.2, October 2011 (ICRC Challenges Report 2011), pp. 7–11, available at: www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32IC/15/11, October 2015 (ICRC Challenges Report 2015), pp. 7–16, available at: www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.

7   Anna Petrig, "Search for Missing Persons", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, 1st ed., Oxford University Press, Oxford, 2015, p. 269; Eric David, *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012, p. 262; Marion Haroff-Tavel, "Do Wars Ever End? The Work of the International Committee of the Red Cross When the Guns Fall Silent", *International Review of the Red Cross*, Vol. 85, No. 851, 2003, pp. 476–477.

8   For instance, parties will remain bound by obligations relating to the re-establishment of family links if migrants fled to another country – or internally – for reasons related to the armed conflict, as well as by their obligations related to accounting for the dead and the missing.

This article will explore how IHL protects migrants in situations of armed conflict. Although other branches of international law will be mentioned where relevant, a detailed analysis of these and their interplay with IHL are outside the scope of this article.[9] In the first part, the article will provide an overview of how the term "migrant" is used and address general issues relating to the protection of migrants in armed conflicts. It will also examine the IHL principle of non-discrimination, which provides an overall framework for considering the protection of migrants. The second part will survey the different categories of persons that migrants can fall under in IHL as well as in other bodies of international law, and the rules applicable to migrants in international armed conflicts. The third part will look at these issues in the context of non-international armed conflicts. Finally, the fourth part will consider select IHL issues that are particularly topical for migration, notably those related to the movement of migrants as well as to family unity and the rules concerning the missing and dead. Given the large number of relevant rules, this last section will not aim to be exhaustive, either in the themes that it covers or in the way it addresses them.

General considerations on the protection of migrants in armed conflicts

Who are "migrants", and how does IHL address their protection?

In international law, there is no universally accepted definition of the term "migrant", although some categories are defined in specialized international instruments.[10] Furthermore, various organizations define a migrant as "any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence".[11] The

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9   For an analysis of the interplay between IHL, IHRL and international refugee law, see, for instance, Emanuela-Chiara Gillard, "Humanitarian Law, Human Rights and Refugee Law – Three Pillars", statement at the International Association of Refugee Law Judges world conference, Stockholm, 21–23 April 2005, available at: www.icrc.org/eng/resources/documents/statement/6t7g86.htm; Stephane Jaquemet, "The Cross-Fertilization of International Humanitarian Law and International Refugee Law", *International Review of the Red Cross*, Vol. 83, No. 843, 2001; Vincent Chetail, "Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law and International Human Rights Law", in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014; David James Cantor, "Laws of Unintended Consequence? Nationality, Allegiance and the Removal of Refugees during Wartime", in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014.

10   The term "migrant worker", for instance, is defined in Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UN Doc. A/RES/45/158, 18 December 1990.

11   OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, Geneva, 2014, Ch. I, para. 10, available at: www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf. The International Organization for Migration (IOM) proposes a similar, albeit more detailed, definition: see IOM, "Glossary on Migration", 2nd ed., in *International Migration Law*, Vol. 25, Geneva, 2011, pp. 61–62, available at: publications.iom.int/system/files/pdf/iml25_1.pdf. UNHCR, however, refers to refugees and migrants separately: see, for instance, UNHCR, *UNHCR Viewpoint: "Refugee" or "Migrant" – Which Is Right?*, July 2016, available at: www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html.

International Committee of the Red Cross (ICRC), and the International Red Cross and Red Crescent Movement (the Movement) as a whole, use a broad description as provided for in the IFRC Policy on Migration, which covers "persons who leave or flee their habitual residence … to seek opportunities or safer and better prospects".[12] This article will rely on this understanding of migrants, as an "umbrella category" for different categories of persons. It will also refer to specific legal categories, including refugees[13] and stateless persons, when addressing the special protection to which they are entitled under IHL (and other bodies of international law).

When it comes to the protection of migrants under IHL, an important starting point is that this body of law does not contain specific rules about migration or about the protection of migrants as a category of persons. This does not, however, mean that migrants are left outside the scope of IHL or that they are neglected by it. As civilians, migrants are covered by the rules providing general protection to the civilian population in both international and non-international armed conflicts. In international armed conflicts, migrants are also protected as aliens in the hands of a party to the conflict or occupying power provided that they are "protected persons"[14] and may enjoy protection as "refugees".[15] To determine how migrants are protected under IHL, the second and third parts of this article will look at the distinction between "civilians" and members of the armed forces or members of an organized armed group in international and non-international armed conflicts respectively. As most migrants are considered civilians, the focus of this article will be on their protection under IHL as civilians.[16] It will also examine who is considered a "protected person", a "refugee" and/or a "stateless person" in international armed conflicts, and how migrants fit into these categories.

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12   The Policy on Migration also recognizes that certain categories of persons, such as refugees and asylum-seekers, enjoy special protection under international and domestic law. See International Federation of Red Cross and Red Crescent Societies, "Policy on Migration", November 2009, available at: www.ifrc. org/PageFiles/89395/Migration%20Policy_EN.pdf. For the reasons behind the use of this definition by the ICRC and its approach to the issue of migration, see S. Le Bihan, above note 4.

13   While the protection under IHL of migrants as a broad category of individuals has not been the subject of study, the question of whether and how refugees (and internally displaced persons) are protected has been widely discussed. See, notably, David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014; Mélanie Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law*, Cambridge University Press, Cambridge, 2012, pp. 156–184; François Bugnion, "Refugees, Internally Displaced Persons, and International Humanitarian Law", *Fordham International Law Journal*, Vol. 28, No. 5, 2004; S. Jaquemet, above note 9, pp. 651–673; Karen Hulme, "Armed Conflict and the Displaced", *International Journal of Refugee Law*, Vol. 17, No. 1, 2005; Jean-Philippe Lavoyer, "Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC", *International Review of the Red Cross*, Vol. 26, No. 305, 1995; Françoise Krill, "ICRC's Action in Aid of Refugees", *International Review of the Red Cross*, Vol. 23, No. 265, 1988; Yoram Dinstein, "Refugees and the Law of Armed Conflict", *Israel Yearbook on Human Rights*, Vol. 12, 1982.

14   Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 4; AP I, Art. 73.

15   As will be seen, IHL contains specific protections for "refugees", and the meaning of this term will be explained in the second part of this article. See GC IV, Arts 44, 70(2); AP I, Art. 73.

16   For more information on the protection of migrants considered combatants for the purposes of an international armed conflict in IHL, see the second part of this article.

The principle of non-discrimination

International humanitarian law confers protection on migrants as civilians, irrespective of their migratory status, and adverse distinctions cannot be made on the basis of that status. Under this body of law, certain distinctions can nevertheless be made, for instance based on nationality. As migrants may be more vulnerable to discrimination than nationals of a State due to their origin, ethnicity, race or nationality, it is important to briefly consider the principle of non-adverse distinction under IHL, which is found in many specific provisions of the Geneva Conventions and their Additional Protocols.[17] This is IHL's approach to the principle of non-discrimination in international human rights law.[18] Unlike general non-discrimination provisions in IHRL,[19] IHL does not expressly require equal treatment for all individuals.[20]

Under IHL, the principle of non-adverse distinction prohibits certain distinctions while allowing – and even requiring – in some circumstances that individuals be treated differently to ensure humane treatment.[21] For instance, IHL contains several provisions that justify differential treatment based on a person's state of health, age, sex or rank.[22] Meanwhile, parties to international and non-international armed conflicts are required to treat civilians and persons *hors de combat* humanely without "adverse distinction". The prohibited "adverse" distinctions under IHL are based on several non-exhaustive criteria, which will

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17 See, notably, common Art. 3; Geneva Convention I, Art. 12; Geneva Convention II, Art. 12; Geneva Convention III (GC III), Art. 16; GC IV, Arts 13, 27(3); AP I, Arts 9(1), 69(1), 70(1), 75(1); AP II, Arts 2(1), 4(1), 18(2).

18 For an overview of the principle of non-discrimination in IHRL, see, notably, Manfred Nowak (ed.), *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., Kehl am Rhein, 2005, commentary on Arts 2, 26; Daniel Moeckli, "Equality and Non-discrimination", in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, 2nd ed., Oxford University Press, Oxford, 2013.

19 See, for instance, Universal Declaration of Human Rights, UN Doc. 217 A (III), 10 December 1948 (UDHR), Art. 7; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (ICCPR), Art. 26; American Convention on Human Rights, 22 November 1969 (ACHR), Art. 24; African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 ILM 58, 27 June 1981 (ACHPR), Art. 3; Arab Charter on Human Rights, 15 September 1994, Art. 11; Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012, Arts 20–21. Certain IHRL provisions have an accessory character, notably ICCPR, Art. 2; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950 (ECHR), Art. 14; ACHR, Art. 1; ACHPR, Art. 2; Arab Charter on Human Rights, Art. 3.

20 This must be considered against the backdrop of the Geneva Conventions, which are premised on the protection of different categories of persons depending on their status, including considerations of nationality. The Additional Protocols also provide for the possibility of making certain distinctions based on nationality: see, for example, AP I, Art. 78(1); AP II, Art. 17(2). See also Gabor Rona and Robert J. McGuire, "The Principle of Non-Discrimination", in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 7, p. 195.

21 ICRC Commentary on GC I, above note 6, paras 574–575: common Article 3 "does not prohibit non-adverse distinctions, i.e. distinctions that are justified by the substantively different situations and needs of persons protected". See also Jelena Pejic, "Non-discrimination and Armed Conflict," *International Review of the Red Cross*, Vol. 83, No. 841, 2001, p. 186.

22 See, for instance, GC IV, Arts 27(2)–(3), 68(4); AP I, Arts 76, 77–78; AP II, Arts 4(3), 6(4).

determine the exact scope of the principle.[23] The scope will also depend on the persons covered.[24] Under customary IHL, adverse distinctions based on race, colour, sex, language, religion or belief, political or other opinion, or national or social origin, as well as wealth, birth or other status, or any other similar criteria, are prohibited.[25]

Although "nationality" is not the only basis for potential discrimination against migrants, and it can often be rooted rather in a migrant's origin or race and the fact that they may be in an irregular situation, it remains an important ground. Where not explicitly provided in a rule, nationality should arguably be interpreted as an impermissible criterion for adverse distinction under IHL, except where IHL expressly provides otherwise.[26] When considering this, it is important to recognize that, during the Diplomatic Conference, nationality was not "regarded as implicitly included" in Article 27 of Geneva Convention IV (GC IV).[27] The rationale behind this was that the rules of GC IV relating to "protected persons" allow for differences based on a person's nationality, notably on the measures of control and security that may be necessary as a result of an international armed conflict.[28] Nevertheless, "the absolute obligation of humane treatment contained in Article 27(1) of GC IV exists independently" of the fact that differential treatment

23 The criteria provided by the Geneva Conventions and the Additional Protocols under which adverse distinction is prohibited are not exhaustive, as can be seen from the wording of the relevant provisions and the commentaries to these provisions. See, for example, common Art. 3 ("or any other similar criteria"); GC IV, Arts 13 ("or on any other similar criteria"), 27 ("in particular"); AP I, Arts 9, 75 ("or on any other similar criteria"); AP II, Art. 2 ("or on any other similar criteria").

24 Common Article 3 applies to persons taking no active part in the hostilities, Article 13 of GC IV to the whole of the populations of the countries in conflict, Article 27 of GC IV to protected persons in the territories of parties to the conflict and in occupied territories, Article 2 of AP II to all persons affected by an AP II armed conflict, and Article 4 of AP II to all persons who do not take a direct part or who have ceased to take part in hostilities whether or not their liberty has been restricted.

25 ICRC Customary Law Study, above note 5, Rule 88.

26 While Article 13 of GC IV explicitly lists nationality, this is not the case in common Article 3 or Article 27 of GC IV. Meanwhile, the Additional Protocols refer to "national origin".

27 Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, pp. 640–641, 643: the delegate of the ICRC noted that nationality was omitted "because internment or measures restricting personal liberty were applied to enemy aliens precisely on grounds of nationality". However, others (representatives of Afghanistan, the Netherlands and Mexico) advocated for the inclusion of nationality as a prohibited criterion. The representative of Norway noted that "a form of words should be found forbidding all distinction based on nationality, except in cases covered by the present Convention or other treaties". See also Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (ICRC Commentary on GC IV), p. 206; G. Rona and R. J. McGuire, above note 20, p. 200.

28 In international armed conflicts, the notion of "protected persons" under IHL covers a special category of civilians which includes persons "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". See GC IV, Art. 4.

is allowed for enemy nationals on certain issues.[29] Parties to the conflict must treat all protected persons humanely, regardless of their nationality. Under Article 3 common to the four Geneva Conventions, nationality is not explicitly listed as a prohibited criterion for adverse distinction.[30] This was based on the consideration that the State is at liberty to decide whether it treats aliens involved in a non-international armed conflict differently to its own nationals or not.[31] While justified, this rationale does not affect the essential premise that all persons who have not participated or are no longer participating in hostilities must be treated humanely without any adverse distinctions.[32] As noted in the updated Commentary to Geneva Convention I, nationality must "be understood as falling within the concept of 'other similar criteria' under common Article 3".[33] Finally, the Additional Protocols refer to "national origin" as an impermissible criterion for adverse distinction.[34] While this term refers to a persons' ethnic group and not to his or her formal nationality, nationality should at least be regarded as an "other status" or as a status based "on any similar criteria" for the purposes of Article 75 of Additional Protocol I (AP I).[35] Given that the prohibited criteria should be considered as uniform throughout the Additional Protocols, nationality should be seen as an impermissible criterion for the purposes of those Protocols.[36]

How are migrants covered by IHL in international armed conflicts?

Overview of the protection of migrants in international armed conflicts

In international armed conflicts, migrants enjoy protection, first and foremost, under the general rules of IHL covering the civilian population. In addition, if

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29 ICRC Commentary on GC I, above note 6, p. 200; ICRC Commentary on GC IV, above note 27, p. 40: "It will be seen that the idea of nationality has not been included in Article 27. That does not in any way mean that people of a given nationality may be treated in an arbitrary manner; everyone whatever his nationality is entitled to humane treatment." See also Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (1952 ICRC Commentary on GC I), p. 56; Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960 (ICRC Commentary on GC III), p. 41.
30 For an explanation of why it was not included, see ICRC Commentary on GC I, above note 6, paras 571–572.
31 Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-B, p. 94.
32 ICRC Commentary on GC I, above note 6, para. 572. See also 1952 ICRC Commentary on GC I, above note 29, p. 56; ICRC Commentary on GC III, above note 29, p. 41; ICRC Commentary on GC IV, above note 27, p. 40.
33 ICRC Commentary on GC I, above note 6, para. 572. See also 1952 ICRC Commentary on GC I, above note 29, p. 56; ICRC Commentary on GC III, above note 29, p. 41.
34 AP I, Arts 9, 75; AP II, Arts 2, 4. See also Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, with the collaboration of Martin Eaton, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, Leiden, 2013, p. 722: the criteria in Article 2 apply to other articles where the term "adverse distinction" is used.
35 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, pp. 515–516, commenting on AP I, Art. 75.
36 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 112.

they are considered protected persons, they also benefit from the protections for aliens in the hands of a party to the conflict or occupying power. Furthermore, certain migrants are specifically protected as "refugees". When looking at who is a refugee for the purposes of IHL, it is important to note that there are different understandings of who is covered by this term, depending on the applicable rules, and what it means for their protection.[37] Indeed, a migrant may be considered a refugee for the purposes of Articles 44 or 70(2) of GC IV. If covered by Article 44, he or she is also a protected person under GC IV. Meanwhile, if a migrant is a refugee for the purposes of Article 70, he or she is not a protected person (unless AP I applies and the individual meets the criteria to be considered a refugee). Finally, a migrant may also be a refugee under Article 73 of AP I, in which case he or she would be a protected person for the purposes of GC IV. Although AP I extends protected person status to all those considered refugees, thus increasing protection, the term "refugee" in this instrument has a narrower meaning than under GC IV. The protection of migrants as refugees, and the meaning of the term "refugees" for the purposes of GC IV and AP I, will be further discussed in the sections on "Migrants as Protected Refugees" and "Specific Protection of Migrants as Refugees" below.

Protection of migrants as part of the civilian population

In international armed conflicts, the protection that IHL provides to migrants will depend on whether they are civilians or combatants. Members of the armed forces (other than medical personnel and chaplains) are combatants.[38] All persons who are not members of the armed forces of a party to the conflict are civilians.[39] As previously mentioned, although some migrants may be considered combatants in some circumstances, most are civilians.

A number of IHL rules that apply in international armed conflicts protect the entire civilian population, no matter whether a person is a citizen of another State, including a national of an "enemy" State or of a State engaged in an armed conflict with the country in which the person finds him or herself. Since these rules apply to all civilians regardless of their nationality, they also apply to

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37 According to Article 44 of GC IV, refugees are protected persons "who do not, in fact, enjoy the protection of any government". Meanwhile, Article 70 of GC IV covers "[n]ationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State". Finally, in Article 73 of AP I, refugees (or stateless persons) are "persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence".

38 The conditions for combatant and prisoner of war (PoW) status are found in GC III, Article 4. Participants in a *levée en masse* fall within these conditions and are not considered civilians. See also AP I, Arts 43, 44; ICRC Customary Law Study, above note 5, Rule 3; ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009 (ICRC Interpretative Guidance), pp. 21–26, 30–35.

39 AP I, Art. 50: "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol". ICRC Commentary on GC IV, above note 27, paras 1913–1917; ICRC Customary Law Study, above note 5, Rule 5; ICRC Interpretative Guidance, above note 38, pp. 20–21, 26–30, 36.

migrants. Migrants who are civilians under IHL are thus protected against the effects of hostilities. For instance, indiscriminate attacks and attacks directed against civilians are prohibited.[40] It is also prohibited to use starvation of civilians as a method of warfare.[41] The rules protecting migrants from the effects of hostilities also contribute to preventing and minimizing the displacement of migrants for reasons related to the conflict.[42] Civilians – including migrants – are protected unless they take a direct part in hostilities; however, even if they do participate, they do not lose their civilian status, and they lose protection against attack only for such a time as they continue to participate.[43]

If migrants fall into enemy hands, their exact protection will depend on their status.[44] As civilians, migrants are covered by the general rules for the protection of the civilian population contained in GC IV and in AP I. Part II of GC IV,[45] for the "whole of the populations of the countries in conflict", extends to all migrants who do not have combatant or prisoner of war (PoW) status.[46] It introduces minimum safeguards for all civilians, irrespective of their nationality, against "the sufferings caused by war".[47]

Where applicable, beyond the general rules protecting the civilian population, migrants are also protected by the provisions relating to missing and dead persons in Part II, Section III of AP I, as well as those relating to relief in favour of the civilian population and to the treatment of persons when in the power of a party to the conflict, which are contained in Part IV, Sections II and III[48] of AP I respectively. Importantly, GC IV and AP I contain rules on the reunion of dispersed families and the search for missing and dead persons.[49] Given their relevance for the many migrants that become separated from their families, go missing or die during armed conflicts, as well as for their families, these rules will be further explored in the fourth part of this article. GC IV and AP I also include specific provisions governing humanitarian relief, which recognize that the civilian population in need is entitled

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40   AP I, Arts 51(2), 51(4)–(5).

41   *Ibid.*, Art 54.

42   The fourth part of this article will examine other IHL rules relating more specifically to the movement of migrants.

43   *Ibid.*, Part IV, Section I, notably Arts 48, 51, 57, 58; ICRC Customary Law Study, above note 5, Ch. 1.

44   The application of the provisions conferring the relevant status, rights and protections of individuals once in enemy hands in international armed conflicts will be determined by their precise personal scope of application, notably whether a migrant is a "protected person" under Article 4 of GC IV. ICRC Commentary on GC IV, above note 27, p. 50.

45   This extends not only to protected persons but to all persons in a territory belonging to or occupied by a party to the conflict. See GC IV, Arts 4(3), 13; ICRC Commentary on GC IV, above note 27, p. 118; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, pp. 495, 498.

46   Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on APs), paras 1908–1909, 1913, 1917; ICRC Commentary on GC IV, above note 27, p. 46.

47   GC IV, Art. 13; ICRC Customary Law Study, above note 5, Rule 88.

48   These rules are not limited to protected persons; they also cover nationals of an adverse party in occupied or domestic territory as well as a party's nationals. However, the exact scope of application of each article in this section will need to be examined in order to determine if it is applicable to a party's own nationals. For further analysis of the scope of application of Part IV, Section III of AP I (Arts 72–79), see M. Bothe, K. J. Partsch and W. A. Solf, above note 34, pp. 495, 498–500.

49   GC IV, Arts 25–26; AP I, Art. 74; ICRC Customary Law Study, above note 5, Rule 105.

to receive assistance.[50] They regulate the conditions for providing humanitarian assistance and require that parties to the armed conflict and all States concerned allow and facilitate relief operations for civilians, subject to their right of control, and the distribution of relief as rapidly as possible, once accepted in principle.[51] Finally, AP I contains a number of rules, in particular the fundamental guarantees contained in Article 75, that are especially important as they provide minimum protection for all migrants who are in the power of a party to the conflict and do not benefit from more favourable treatment under the Geneva Conventions or under AP I.[52] Today, the fundamental rules and principles of IHL concerning the treatment of civilians in the hands of the enemy, which are critical for the protection of migrants, are rules of customary international law.[53]

While the majority of migrants are considered civilians under IHL, they may instead, depending on their status under the Geneva Conventions and AP I,[54] be combatants and, once in enemy hands, enjoy protection as PoWs. For instance, migrants are combatants if they are members of the armed forces of a State involved in an international armed conflict or members of other militias belonging to a party to the conflict fulfilling the conditions set out in Article 4(A)(2) of Geneva Convention III (GC III).[55] As such, once they fall into the hands of a State party to the international armed conflict in which they are involved, they are entitled to PoW status should they fulfil the conditions set by IHL.[56] As previously mentioned, this article will focus on the protection of migrants as civilians and will not enter into further detail about the protection of migrants as combatants or PoWs.

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50 AP I, Arts 68–71, building on GC IV, Art. 23; ICRC Customary Law Study, above note 5, Rules 55, 56.

51 ICRC, "Q&A and Lexicon on Humanitarian Access", June 2014, available at: www.icrc.org/eng/resources/documents/article/other/humanitarian-access-icrc-q-and-a-lexicon.htm; ICRC Challenges Report 2015, above note 6, pp. 26–30.

52 AP I, Art. 75; ICRC Commentary on APs, above note 46, p. 850; ICRC Customary Law Study, above note 5, Section V, "Treatment of Civilians and Persons Hors de Combat".

53 ICRC Customary Law Study, above note 5, Rules 87–105.

54 The protection of migrants once in enemy hands will depend on their status under Article 4 of GC III and Article 43 of AP I. For more on the protection of migrants as combatants or PoWs, see S. Jaquemet, above note 9, pp. 651–673; Y. Dinstein, above note 13, pp. 94–109; Françoise J. Hampson, "The Scope of the Obligation Not to Return Fighters under the Law of Armed Conflict", in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014; Reuven (Ruvi) Ziegler, "*Non-Refoulement* between 'Common Article 1' and 'Common Article 3'", in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014.

55 GC III, Art. 4; AP I, Art. 43.

56 Persons not meeting the criteria for combatant privilege and PoW status under IHL, and who do not enjoy protection under GC III, are entitled to protection under GC IV if they fulfil the criteria of Article 4 of GC IV, subject to certain derogations. For a general overview of the protection of "unprivileged combatants", see Knut Dörmann, "The Legal Situation of 'Unlawful/Unprivileged Combatants'", *International Review of the Red Cross*, Vol. 85 No. 849, 2003; Laura M. Olson, "Status and Treatment of Those Who Do Not Fulfil the Conditions for Status as Prisoners of War", in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 7, pp. 922–924.

Special protection of migrants as protected persons under GC IV

In international armed conflicts, in addition to the general rules covering the civilian population, migrants may benefit from the more detailed and protective regime found in Parts I and III of GC IV if they qualify as "protected persons".[57] Many migrants, as aliens present in the territory of a party to the conflict or in occupied territory, will be protected persons if they meet the nationality requirement of Article 4.[58] However, some migrants are excluded: nationals of the party/power by which they are being held; nationals of a co-belligerent State or a neutral State with normal diplomatic relations (except in the case of occupied territories, where nationals of a neutral State are always protected persons); and persons who enjoy protection under one of the three other Geneva Conventions.[59] In this way, the nationality criteria of GC IV Article 4 may leave out some migrants who do not in fact enjoy the protection of any State.[60] For instance, nationals of an occupying power who find themselves in the territory of the occupied State are not protected.[61] This has led to questions about the adequacy of the definition of "protected persons". According to some views, "all civilians who do not owe allegiance to, or receive diplomatic protection from, their State of nationality should be recognized as 'protected persons'" under Article 4 of GC IV.[62] The International Criminal Tribunal for the former Yugoslavia (ICTY) has held that the crucial factor for determining protection is not the formal link of nationality but rather "the lack of both allegiance to a State and diplomatic protection by this State".[63] However, this interpretation has been met with criticism.[64]

Under GC IV, the rules applicable to protected persons, including migrants, depend on the situation in which they find themselves. All protected migrants are

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57 This may be subject to certain derogations: see GC IV, Arts 4(1), 5. For the definition of "protected persons" in Article 4 of GC IV, see above note 28.

58 As will be seen in the sections below on stateless persons and refugees, where AP I is applicable, persons falling within the meaning of these terms will be considered protected persons under Article 4 of GC IV based on Article 73 of AP I.

59 GC IV, Arts 4(2), 4(4). Although nationals of a State that has not ratified GC IV are also excluded, the Geneva Conventions are universally ratified. See also ICRC Commentary on GC IV, above note 27, p. 47; ICRC Commentary on APs, above note 46, p. 848, paras 2947–2948.

60 However, see sections below on refugees regarding the effects of Article 73 of AP I as well as on the protection provided for refugees under Article 70(2) of GC IV.

61 ICRC Commentary on GC IV, above note 27, p. 46: the only provision in GC IV explicitly applying to the nationals of a State party to an international armed conflict is Article 70(2) of GC IV. Although individuals may be considered refugees under this article, they are not covered by Article 4 of GC IV (unless AP I applies and the criteria of Article 73 of this Protocol are met). See sections below on refugees.

62 M. Jacques, above note 13, pp. 163–164, 42–48, 160; Elizabeth Salmón, "Who Is a Protected Civilian?", in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 7, pp. 1142–1145.

63 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras 163–169.

64 Marco Sassòli and Laura M. Olson, "The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case", *International Review of the Red Cross*, Vol. 82, No. 839, 2000, pp. 743–747; Jean-François Quéguiner, "Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie: Évaluation de l'apport de sa jurisprudence au droit international humanitaire", *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 302–303.

covered by Section I common to the territories of the parties to the conflict and to occupied territories. They are entitled to respect for their lives, their dignity, their family rights, and their political, religious and other convictions. They must not be subjected to torture, cruel or degrading treatment or corporal punishment, and must be protected against all acts of violence or reprisals. Section II of GC IV provides additional protection to migrants in the territory of a party to the conflict. Importantly, this section provides that if migrants remain in the country – either by choice or due to detention – their situation will continue to be regulated by the provisions concerning aliens in time of peace.[65] This includes domestic law as well as IHRL and international refugee law, as applicable. In any case, migrants must be granted a number of rights related to their conditions of living (e.g., the right to receive individual or collective relief, medical attention on an equal footing with nationals, freedom of religion).[66] Among the relevant provisions in Section II are those relating to the movement of migrants, notably the principle of *non-refoulement* and the right to leave the territory.[67] Section II also regulates the measures of control and security that may be taken against protected persons if deemed "necessary as a result of the war".[68] According to the Commentary on GC IV, these measures may include restrictions on freedom of movement[69] or assigned residence and internment, at the most severe.[70]

Migrants in occupied territory are further protected by the rules in Section III of GC IV. As a starting point, the occupying power must respect the laws in force in the occupied territory before the occupation began.[71] As inhabitants of occupied territory, migrants are protected from arbitrary behaviour by the occupying power. For instance, measures of control must be necessary for imperative reasons of security.[72] Other provisions of relevance for the protection of migrants are those on the movement of protected persons[73] as well as on food and medical supplies, relief actions, penal legislation and procedure.

Migrants as protected stateless persons

Stateless migrants also qualify as protected persons under Article 4 of GC IV, as "owing to its negative form the definition covers persons without any nationality".[74] GC IV does not define stateless persons; what matters is that a person does not have a nationality. This understanding of "stateless persons" is broader than the definition

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65   GC IV, Art. 38; ICRC Commentary on GC IV, above note 27, p. 244.
66   GC IV, Art. 38.
67   See the section on "Rules Governing the Movement of Migrants", below.
68   GC IV, Arts 27, 41–43. See also Art. 37.
69   See, notably, *ibid.*, Art 49(5); ICRC Commentary on GC IV, above note 27, pp. 282–283.
70   ICRC Commentary on GC IV, above note 27, p. 207.
71   Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, 187 CTS 227, 1 Bevans 631, The Hague, 18 October 1907 (entered into force 26 January 1910) (1907 Hague Regulations), Annex, Art. 43.
72   GC IV, Art. 78.
73   See the section on "Rules Governing the Movement of Migrants", below.
74   ICRC Commentary on GC IV, above note 27, pp. 46, 47; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 502.

in the 1954 Convention relating to the Status of Stateless Persons, which was subsequently adopted. The 1954 Convention excludes, for instance, persons already receiving protection or assistance from United Nations (UN) organs different to the Office of the UN High Commissioner for Refugees (UNHCR).[75]

Where AP I applies, "stateless persons" are those covered by "the relevant international instruments", notably the 1954 Convention, or "the national legislation of the State of refuge or State of residence".[76] If persons became stateless before the beginning of hostilities, AP I explicitly includes them in the category of protected persons under GC IV, and they will receive protection as such "in all circumstances and without any adverse distinction."[77] Nonetheless, regardless of whether AP I applies, stateless persons (including those who became stateless after the outbreak of hostilities) are in any case already considered protected persons under GC IV, as seen above.[78] The temporal restriction contained in AP I thus does not have any practical consequences for stateless persons.[79] Where both GC IV and AP I apply, protected person status extends to "persons who, 'before or after' the beginning of hostilities are considered as stateless persons" under relevant international instruments and national legislation.[80]

Migrants as protected refugees

As seen above, many refugees may fall under the definition of "protected persons" in Article 4 of GC IV and benefit from the full range of protections (including Article 44 of GC IV[81]). However, there may be some individuals who do not enjoy protection from their State of origin, but who are also not "protected persons" under IHL.[82] This lacuna resulted in the adoption of Article 73 of AP I.[83] In addition to stateless persons as seen above, this provision grants refugees, as

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75 According to Article 1(1), a stateless person is "a person who is not considered as a national by any State under the operation of its law". Although this definition seems wide, its second paragraph excludes certain individuals. See Convention relating to the Status of Stateless Persons, 360 UNTS 117, 28 September 1954 (entered into force 6 June 1960).

76 AP I, Art. 73; see also ICRC Commentary on APs, above note 46, paras 2957–2958.

77 AP I, Art. 73; see also ICRC Commentary on APs, above note 46, paras 2974, 2976; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 502.

78 ICRC Commentary on APs, above note 46, paras 2978–2979; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 504.

79 ICRC Commentary on APs, above note 46, paras 2955, 2978–2980.

80 *Ibid.*, para. 2980.

81 This article provides specific protection to migrants considered "refugees". See the section on "Specific Protection of Migrants as Refugees", below.

82 ICRC Commentary on GC IV, above note 27, p. 47; ICRC Commentary on APs, above note 46, p. 848, paras 2947–2948. Refugees who are nationals of the occupying power are not considered protected persons. Despite not enjoying the wider protections of GC IV, they enjoy specific protection under Article 70(2) of GC IV. See the section on "Specific Protection of Migrants as Refugees", below.

83 At the 1972 Conference of Government Experts that considered the draft protocols, UNHCR and the ICRC expressed the view that GC IV did not provide the necessary protection for all refugees and recommended that all refugees and stateless persons be considered protected persons for the purposes of GC IV. See ICRC, *Report on the Work of the Conference: Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Second Session (Geneva, 3 May–3 June 1972)*, Geneva, 1972, Vol. 1, para. 3.125, and Vol. 2, p. 82.

defined under AP I, protected person status, irrespective of their nationality and of the party into whose power they have fallen.[84] Refugees are those who (1) are considered as such "under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence", (2) "before the beginning of hostilities". These two criteria must be met cumulatively for a migrant to be considered a refugee, qualifying as a protected person for the purposes of GC IV. This is in contrast to Articles 44 and 70(2) of GC IV, which have a broader understanding of the term "refugee" than that found in AP I, as will be seen below.[85]

According to the first criterion in Article 73 of AP I, the definition of a "refugee" is based on binding instruments, such as the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention), and non-binding resolutions and declarations that have been "accepted by the Parties concerned", such as the Cartagena Declaration on Refugees.[86] Importantly, the decision of a State to grant refugee status is binding upon all parties to the conflict and they must treat refugees as protected persons, even if they have not accepted the international instrument on which the refugee status determination was based.[87] They must also respect this decision if it was based on domestic law. In addition, if a State has recognized the competence of UNHCR with regard to persons that the organization considers as refugees based on its mandate, a refugee status determination carried out by UNHCR will also be binding on all parties to the conflict.[88] The second criterion of Article 73 limits the personal scope to those considered refugees "before the beginning of hostilities".[89] This leaves an important gap in protection for those who became refugees after the outbreak of hostilities and are not protected persons under GC IV. This has led to the criticism that the temporal criterion introduces "an arbitrary and unnecessary distinction, in direct contradiction to the humanitarian principles of protection of the Geneva Conventions".[90]

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84 ICRC Commentary on APs, above note 46, para. 2981; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 505.
85 See the section on "Specific Protection of Migrants as Refugees", below.
86 ICRC Commentary on APs, above note 46, paras 2952, 2959–2973. See also Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954); Cartagena Declaration on Refugees, 22 November 1984 (Cartagena Declaration). For further details on the different definitions of a "refugee" under international refugee law, see, for instance, Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., Oxford University Press, Oxford, 2007, pp. 15–50.
87 ICRC Commentary on APs, above note 46, paras 2952–2953.
88 *Ibid.*, para. 2969. The definition of a "refugee" within UNHCR's mandate is based on the UNHCR Statute, which contains a definition almost identical to that of the 1951 Refugee Convention and has throughout the years been extended by resolutions of the UN General Assembly, the Economic and Social Council and UNHCR's Executive Committee to include persons "outside their country of origin or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order". See UNHCR, *Resettlement Handbook*, July 2011, pp. 80–81, available at: www.unhcr.org/46f7c0ee2.pdf.
89 ICRC Commentary on APs, above note 46, para 2956.
90 M. Jacques, above note 13, p. 162.

In sum, where AP I applies, migrants meeting the "refugee" criteria under Article 73 are explicitly recognized as protected persons for the purposes of GC IV "in all circumstances and without any adverse distinction".[91] They are entitled to all the protections contained in Parts I and III of GC IV.[92] This is especially relevant for refugees who are nationals of the occupying power, as it significantly improves their protection beyond merely Article 70(2) of GC IV.[93] They may not, for instance, be prosecuted or convicted for acts committed or opinions expressed before the occupation, except with respect to breaches of the laws and customs of war.[94]

Specific protection of migrants as refugees

As discussed above, refugees may be considered protected persons under GC IV in some circumstances, and – provided they meet its definition of "refugee" – they will always be considered protected persons where AP I applies.[95] They are entitled to the full range of protections provided by GC IV and AP I.[96] Refugees also enjoy special protection under two provisions applying specifically to them: Article 44 of GC IV for protected refugees in the territory of a party to the conflict, and Article 70(2) of GC IV for refugees (not considered protected persons) in occupied territory. The term "refugee" is not defined in GC IV. According to the Commentary on Article 44, it should be given a broader meaning than in international refugee law, which is "too technical and too limited in scope".[97] The key consideration for being considered a refugee under GC IV, and for being protected either by Article 44 or Article 70(2), is that the individual in question does not "enjoy the protection of any government".[98] All migrants fitting this criterion will be considered refugees. Individuals benefiting from complementary forms of protection and those not falling under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees could nevertheless be

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91 GC IV, Art. 73; ICRC Commentary on APs, above note 46, para 2976. See the section on "Special Protection of Migrants as Protected Persons under GC IV", above.

92 The explicit reference to Part III of GC IV in Article 73 of AP I is to ensure that each of the provisions of GC IV is "interpreted in the most favourable light for refugees" (e.g., refugees are protected by Article 4(2) of GC IV even if they are not enemy nationals). See ICRC Commentary on APs, above note 46, para. 2982.

93 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 505; ICRC Commentary on APs, above note 46, para. 2985.

94 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 505.

95 Stateless persons, as seen above, will always be considered protected persons, based on GC IV and/or AP I.

96 ICRC Commentary on APs, above note 46, pp. 847, 850, paras 2944, 2956.

97 ICRC Commentary on GC IV, above note 27, pp. 263–264. It is worth noting that the 1967 Protocol relating to the Status of Refugees contains a broader refugee definition than that contained in the 1951 Refugee Convention, which is that referred to in the Commentary (as the former instrument had not yet been adopted). However, the 1967 Protocol definition contains certain limitations and it is argued that the refugee definition for the purposes of GC IV should be considered to be broader than that contained in the Protocol. See Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967), Art. 1.

98 ICRC Commentary on GC IV, above note 27, p. 264. See also ICRC Commentary on APs, above note 46, para. 2942. This criterion should not be confused with "absence of normal diplomatic relations" in Article 4 of GC IV; "it is only the rupturing of the presumed and enduring *de facto* relationship of allegiance between a State and its nationals that qualifies the person as a 'refugee'". D. J. Cantor, above note 9, pp. 357–358.

considered refugees for the purposes of GC IV.[99] GC IV would also cover individuals meeting the Refugee Convention inclusion criteria (even if the opposite is not necessarily true).[100] Unlike for Article 73 of AP I, Article 44 of GC IV does not require that refugees be recognized as such before the beginning of hostilities. Thus, for instance, a person who deserted into the adversary's territory during hostilities would be protected by Article 44 of GC IV in the same way as a person who had been granted asylum before the beginning of the armed conflict.

Refugees who are formally enemy aliens when their country of origin is involved in an armed conflict with their country of asylum no longer have a link of allegiance with their State of origin and are thus not automatically a potential threat to their host State. As enemy nationals on the territory of a party to the conflict, however, they are nevertheless particularly vulnerable to measures of control and security. Article 44 of GC IV recognizes this by adjusting the nationality criteria for the purposes of Article 4 and inviting parties to consider other factors evidencing the "spiritual affinity" or "ideological allegiance" of a protected person.[101] Although authorized measures of control may still be imposed if refugees represent a danger to the security of the State,[102] Article 44 requires that, when deciding upon such measures, refugees not be treated as enemy aliens solely on the basis of their nationality. According to the Commentary, beyond measures of control, Article 44 should be applied "in the broadest humanitarian spirit, in order that the maximum use may be made of the resources it offers for the protection of refugees".[103]

As nationals of the occupying power, refugees finding themselves in a territory occupied by the State from which they fled are not protected persons, unless they are considered refugees under Article 73 of AP I as seen in the section "Migrants as Protected Refugees", above. As a result, these migrants do not benefit from the additional protection provided to protected persons by Parts I and III of GC IV.[104] They only enjoy the protection provided to the civilian population[105] as well as specific protection under Article 70(2) of GC IV, which was developed in response to the precarious position refugees may find themselves in. Although described slightly differently, the term "refugee" for the purposes of Article 70(2) is to be given a similar meaning to that under Article 44 of GC IV.[106] Unlike Article 44, to benefit from protection under Article 70(2), all persons – whether already recognized as refugees or not – must have reached the occupied territory "before the outbreak of hostilities".[107] Article 70(2)

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99 V. Chetail, above note 9, p. 707.
100 D. J. Cantor, above note 9, pp. 365–366.
101 ICRC Commentary on GC IV, above note 27, p. 264.
102 GC IV, Art. 44; ICRC Commentary on GC IV, above note 27, pp. 264–265; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 503.
103 ICRC Commentary on GC IV, above note 27, p. 265.
104 See the section on "Special Protection of Migrants as Protected Persons under GC IV", above.
105 See the section on "Protection of Migrants as Part of the Civilian Population", above.
106 ICRC Commentary on GC IV, above note 27, p. 350. See also D. J. Cantor, above note 9, p. 365.
107 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 504.

prohibits the occupying power from arresting, prosecuting, convicting or deporting refugees from the occupied territory. The exceptions to this are if they committed offences against their country of origin after the outbreak of hostilities, or committed ordinary criminal offences before the outbreak of hostilities that would have justified extradition in time of peace under the law of the occupied State.[108] Article 70(2) seeks to guarantee that refugees are not punished merely for having sought asylum or for acts resulting in their departure, and that the right of asylum previously enjoyed by them "continue[s] to be respected by their home country".[109]

Conclusions on the protection of migrants in international armed conflicts

As seen above, all migrants are protected against the effects of hostilities and must be treated humanely under the general rules covering the civilian population. When considered protected persons, all migrants, including refugees and stateless persons, are also entitled to the full spectrum of protection provided by GC IV. Finally, migrants considered "refugees" under GC IV benefit from specific protection under Article 44 of GC IV when in the territory of a party to the conflict or Article 70(2) of GC IV when in territory occupied by their country of origin.

How are migrants covered by IHL in non-international armed conflicts?

In non-international armed conflicts, there is no combatant, PoW or protected person status. All persons who are not, or are no longer, directly participating in hostilities are protected under the relevant provisions of IHL (i.e., common Article 3, and Additional Protocol II (AP II) in certain kinds of non-international armed conflicts).[110] According to the Commentary on common Article 3, "[p]ersons taking no active part in the hostilities"[111] protected under this article are, firstly, civilians, including "former members of armed forces who have been demobilized or disengaged", and secondly, "non-combatant members of the armed forces" (i.e., medical and religious personnel).[112] A third category are

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108 ICRC Commentary on GC IV, above note 27, pp. 350–352.
109 *Ibid.*, p. 351.
110 There are also rules of IHL related to means and methods of warfare that protect persons during the time when they are actively participating in hostilities. As noted in the Commentary to AP II, the Protocol covers all persons affected by an armed conflict, which includes persons who do not or no longer take part in hostilities as well as those "who must, within the meaning of the Protocol, conform to certain rules of conduct with respect to the adversary and the civilian population" See ICRC Commentary on APs, above note 46, para. 4485.
111 For an explanation of the notion of "direct" participation in hostilities in the Additional Protocols, which refers to the same concept as "active" participation in hostilities in common Article 3, see ICRC Interpretative Guidance, above note 38.
112 ICRC Commentary on GC I, above note 6, paras 521–522.

"members of the armed forces who have laid down their arms and those placed *hors de combat*".[113] As noted in the Commentary to AP II, the Protocol covers "all residents of the country engaged in a conflict, irrespective of their nationality, including refugees and stateless persons".[114]

Common Article 3 and AP II do not contain specific references to migrants (or to refugees or stateless persons), but such individuals are protected as persons not or no longer participating in hostilities. They must "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".[115] According to the Commentary on AP II, although security measures may be taken, these "are without prejudice to the guarantees on the treatment of individuals".[116] Migrants are entitled to the fundamental guarantees set out in common Article 3, including the prohibitions on violence to life and person, outrages upon personal dignity and the passing of sentences without a fair trial. Where applicable, AP II contains more specific rules on these prohibitions as well as additional provisions on humane treatment for all persons who do not take a direct part in hostilities, including those subject to a deprivation of liberty.[117] Migrants are also protected by the rules of customary international law applicable in non-international armed conflict, which include the fundamental guarantees of humane treatment.[118]

Despite the lack of combatant or PoW status in non-international armed conflicts, the distinction between civilians and members of the armed forces of a State and of organized armed groups remains essential to determine who is protected against the effects of hostilities.[119] For the purposes of the conduct of hostilities, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians.[120] The armed forces of a State are its regular armed forces as well as other organized armed groups or units that are under a command responsible to the State party.[121] Meanwhile, the armed forces of a non-State party to the conflict are organized armed groups and consist only of individuals with a continuous combat function.[122] In non-

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113 Common Art. 3(1).
114 ICRC Commentary on APs, above note 46, para. 4489.
115 Common Art. 3; AP II, Arts 2, 4; ICRC Commentary on GC I, above note 6, paras 519, 527, 528; ICRC Customary Law Study, above note 5, Rule 87.
116 ICRC Commentary on APs, above note 46, para. 4489.
117 AP II, Arts 4–5.
118 ICRC Customary Law Study, above note 5, Rules 87–105.
119 Although AP II has a narrower scope of application than common Article 3 and uses different terms, both instruments share the same generic categorization of persons. See ICRC Interpretive Guidance, above note 38, p. 29; see also AP II, Arts 1(1), 13(1), 13(3).
120 ICRC Challenges Report 2011, above note 6, p. 43; ICRC Interpretive Guidance, above note 38, p. 27. See also ICRC Commentary on GC IV, above note 27, p. 40: "Article 3 [on the treatment of persons in enemy hands] has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in the hostilities. In this instance, however, the Article naturally applies first and foremost to civilians – that is to people who do not bear arms".
121 ICRC Commentary on GC I, above note 6, paras 530, 532–533; ICRC Commentary on APs, above note 46, para. 4462.
122 ICRC Interpretive Guidance, above note 38, pp. 27–36; ICRC Challenges Report 2011, above note 6, p. 43; ICRC Commentary on GC I, above note 6, para. 534.

international armed conflicts, nationality is not relevant as there is no combatant, PoW or protected person status.

As civilians, migrants enjoy general protection against the effects of hostilities, unless and for such a time as they take a direct part in hostilities or if they assume a continuous combat function on behalf of a party to the armed conflict.[123] They are also covered by the rules protecting the civilian population in Part IV of AP II, including the prohibitions on direct attacks against civilians, acts or threats of violence the primary purpose of which is to spread terror among the civilian population, and the use of starvation as a method of combat.[124] Migrants are also protected against forced displacement.[125] In addition, AP II provides that relief actions for the civilian population in need be undertaken subject to the consent of the high contracting party concerned.[126] Finally, although AP I contains additional – and more detailed – provisions on the protection of civilians in international armed conflicts, customary IHL has extended the applicability of many of these rules to non-international armed conflicts.[127]

Select IHL issues of relevance in the context of migration

As seen, IHL provides important protections in armed conflicts for migrants; some of these are particularly relevant and will be the focus of this part of the article. The first section will examine rules imposing limits on, or permitting, the movement of migrants in international and non-international armed conflicts. It will recall the main features of the principle of *non-refoulement* under IHL and consider other rules that prevent, or are relevant to, the movement of migrants. The second section will explore the rules relating to respect for family life, the maintenance or re-establishment of family links, and the clarification of the fate and whereabouts of missing and dead migrants.

Rules governing the movement of migrants

The main aim of IHL is to avoid the infliction of suffering, which includes preventing and minimizing the forced displacement of civilians, either across international borders or within a country, because of armed conflicts. It does so through the rules providing protection against the effects of hostilities and the express prohibition of forced displacement. When civilians are nevertheless displaced, IHL requires that they be protected and assisted.

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123 AP II, Art. 13(1), 13(3); ICRC Interpretive Guidance, above note 38, p. 27.
124 AP II, Arts 13(2), 14.
125 AP II, Art. 17. See the section on "Rules Governing the Movement of Migrants", below.
126 AP II, Art. 18; ICRC Customary Law Study, above note 5, Rule 55. For further details on the requirement of consent, see ICRC Commentary on GC I, above note 6, paras 830–831.
127 ICRC Customary Law Study, above note 5; see, in particular, Section I (Rules 11–24) and Section III (Rules 53, 55 and 56).

With regard to the movement of migrants, be it their own voluntary movement or that carried out by the parties to the conflict, IHL contains several rules that impose specific and additional limitations and allowances. The lawfulness of such movements will depend on their compliance with IHL rules, including the principle of *non-refoulement*. In general terms, this principle prohibits the transfer of persons from one authority to another in any manner whatsoever if there are substantial grounds for believing that the person would be in danger of suffering a violation of certain fundamental rights.[128] This is recognized, in particular, for torture or cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or persecution.[129] The principle of *non-refoulement* is found, with varying scopes, in IHL, IHRL and international refugee law.[130] The core of this principle is also part of customary international law.[131]

Protected persons in the territory of a party to an international armed conflict

As protected persons, migrants, first and foremost, have the right to leave the affected territory at the outset of, or during, a conflict, unless their departure is contrary to the national interests of the State.[132] Departures may only take place if they are voluntary – which is important, as migrants may choose to stay – and can take place either to a protected person's own country or to other countries.[133] The exercise of the right to leave must be carried out in satisfactory conditions with regard to safety, hygiene, sanitation and food.[134] Departure decisions by the State, including negative ones, must be made in accordance with certain safeguards.[135] Secondly, applicable national law and international law will continue to govern the treatment of aliens in times of peace, except for special measures.[136] As a result, a party to the conflict may only deport migrants based on the legal grounds available in peacetime, subject to

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128 Laurent Gisel, "The Principle of *Non-Refoulement* in Relation to Transfers", in *Detention in Armed Conflicts*, Proceedings of the 15th Bruges Colloquium, 16–17 October 2014, College of Europe and ICRC, *Collegium*, No. 45, Autumn 2015, p. 116. See also ICRC, "Note on Migration and the Principle of *Non-Refoulement*", in this issue of the *Review*.
129 L. Gisel, above note 128, pp. 116.
130 ICRC Commentary on GC I, above note 6, para. 709 and references in fn. 635.
131 ICRC Commentary on GC I, above note 6, para. 709 and references in fn. 636.
132 GC IV, Art. 35(1).
133 ICRC Commentary on GC IV, above note 27, p. 235.
134 GC IV, Art. 36; ICRC Customary Law Study, above note 5, Rule 131. See also ICRC Commentary on GC IV, above note 27, p. 266: "expulsion, if it does take place, must be carried out under humane conditions, the persons concerned being treated with due respect and without brutality".
135 GC IV, Art. 35(1)–(3). See ICRC Commentary on GC IV, above note 27, p. 238: for instance, the protecting power must be informed of a negative decision, except if the individual does not want their home country to know.
136 GC IV, Art. 38.

specific IHL provisions on the removal of protected persons.[137] This requires taking into account the interaction of IHL with other bodies of international law, including IHRL rules on the expulsion of aliens.[138] Thirdly, under customary IHL, civilians have a right to voluntarily return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.[139] This right does not, however, extend to lawfully expelled migrants; it only covers those who have been displaced, either voluntarily or involuntarily.[140]

Beyond these rules, Article 45 of GC IV provides important restrictions on the right of a party to the conflict to transfer protected migrants. The limitations prescribed are absolute and do not allow for derogations or exceptions.[141] As noted in the Commentary, however, limitations must not interfere with the right of protected persons under Article 35 of GC IV to leave the territory at the outbreak of, or during, a conflict.[142] An important first limitation on the right to transfer protected persons is the principle of *non-refoulement*, which finds expression, even prior to the 1951 Refugee Convention, in Article 45 of GC IV.[143] In the ICRC's view, the scope of the principle of *non-refoulement* extends to any type of transfer, such as expulsion, deportation, extradition or return, regardless of its formal designation.[144] According to Article 45(4) of GC IV, a protected person in the territory of a party to the conflict shall in no circumstances "be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".[145] Although the

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137 David James Cantor, "Forced Displacement, the Law of International Armed Conflict and State Authority", 19 July 2011, p. 19, available at: ssrn.com/abstract=2297405; Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice*, Martinus Nijhoff, The Hague, 1995, pp. 135–142. See also ICRC Commentary on GC IV, above note 27, p. 266: deportation of aliens on an individual basis may take place when State security demands such action. "However, practice and theory both make this right a limited one: the mass deportation, at the beginning of a war, of all the foreigners in the territory of a belligerent cannot, for instance, be permitted. … Persons threatened with deportation must be able to present their defence without any difficulty being placed in their way and must be granted a reasonable time limit before the deportation order is carried out, if it is confirmed; in such cases the protecting power must be notified."
138 J.-M. Henckaerts, above note 137, pp. 8–49, 137–138.
139 ICRC Customary Law Study, above note 5, Rule 132. In treaty law, Article 49(2) of GC IV for protected persons in occupied territory provides that persons who have been evacuated must be transferred back to their homes as soon as hostilities in the area in question have ceased.
140 *Ibid.*, Rule 132.
141 ICRC Commentary on GC IV, above note 27, pp. 266, 269. The principle of *non-refoulement* in IHRL is equally absolute. For the exceptions in international refugee law, which need to be narrowly interpreted, see 1951 Refugee Convention, Art. 33(2); Andreas Zimmermann and Philipp Wenholz, "Article 33(2)", in Andreas Zimmermann (ed.), *The 1951 Convention on the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, Oxford, 2011, para. 2.
142 ICRC Commentary on GC IV, above note 27, p. 267.
143 For a more detailed analysis of the principle of *non-refoulement*, see Cordula Droege, "Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges", *International Review of the Red Cross*, Vol. 90, No. 871, 2008; Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*: Opinion", in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003; Emanuela-Chiara Gillard, "There's No Place Like Home: States' Obligations in Relation to Transfers of Persons", *International Review of the Red Cross*, Vol. 90, No. 871, 2008.
144 ICRC, above note 128, p. 2, fn. 1.
145 GC IV, Art. 45(4).

term "persecution" is not defined in IHL, it refers, at a minimum, to serious violations of human rights (right to life, freedom and security) on such grounds as ethnicity, nationality, religion or political opinion.[146]

A second restriction on the transfer of aliens in the territory of a party to the conflict, which is broader than other expressions of the principle of *non-refoulement*, is found in Article 45(3).[147] It prohibits transfers not only in the case of specific grounds normally invoked under IHRL and international refugee law, such as torture or persecution, but also in all cases where the receiving State cannot or will not treat aliens in accordance with the protections granted by GC IV.[148] Logically, given that the receiving State is itself required to comply with Article 45 of GC IV, this means that an onward transfer to a third State in violation of GC IV would also be prohibited (secondary *refoulement*).[149] Thus, a transfer may not take place unless the transferring power is satisfied that the receiving power is willing and able to apply GC IV, including the *non-refoulement* obligation. If protected persons are transferred, the transferring State continues to be responsible and must "take effective measures to correct the situation" or "request the return of the protected persons" if the receiving State does not fulfil its responsibilities under the Conventions.[150] The transferring State also has a duty to ensure respect by the receiving State based on common Article 1, which in turn bolsters the obligations of the latter.[151] Grounded on this, if the transferring State believes that the receiving State is not willing or able to fulfil its responsibilities under the Conventions, it must not transfer individuals as this may encourage, aid or assist in IHL violations.[152] Furthermore, it "must do everything reasonably in its power to prevent and bring such violations to an end" by monitoring the fate of transferred individuals and, if necessary, exercising its influence to ensure that the receiving State respects the Conventions.[153]

Protected persons in occupied territory

In situations of occupation, Article 48 of GC IV provides that "protected persons who are not nationals of the Power whose territory is occupied" have the right to

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146 1951 Refugee Convention, Art. 1; *UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, re-edited, Geneva, January 1992, paras 51–53. See also E.-C. Gillard, above note 143, pp. 723–724 and 727.

147 GC IV, Art. 45(3); see also GC III, Art. 12 for prisoners of war.

148 ICRC Commentary on GC IV, above note 27, pp. 268–269; C. Droege, above note 143, p. 675.

149 Vincent Chetail, "The Transfer and Deportation of Civilians", in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 7, pp. 1199–1200.

150 C. Droege, above note 143, p. 698.

151 ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Synthesis Report from Regional Consultation of Government Experts*, Geneva, November 2013, p. 24 (some experts viewed transfer obligations "as part of a State's obligations under common Article 1 to take appropriate measures to ensure that other States respect IHL"). See also C. Droege, above note 143, p. 699. For a more general view of the obligations under common Article 1, see Knut Dörmann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations", *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014.

152 ICRC Commentary on GC I, above note 6, para. 154.

153 *Ibid.*, paras 154, 168.

leave the territory subject to the conditions of Article 35 of GC IV. The wording of this article explicitly refers to the right to leave the territory, including for protected refugees, and it is not restricted to repatriation.[154] Although the principle of *non-refoulement* is not expressly found in treaty law applicable to occupied territory, the IHRL and international refugee law principle will protect migrants, as relevant, in situations of armed conflict. Moreover, Article 49 of GC IV prohibits individual and mass forcible transfers and deportations of protected persons, regardless of the destination or purpose of the transfer, except where the security of the civilians involved or imperative military reasons require evacuations.[155] This prohibition suffers no exception and applies broadly to the forced displacement of protected migrants, both within or outside the bounds of national territory. It establishes a clear and absolute prohibition, although it only covers "forced" transfers and deportations so that protected persons who wish to leave are not barred from doing so.[156]

Even where a permissible evacuation takes place on the basis of Article 49 (2), it cannot result in displacement outside the bounds of the occupied territory "except where for material reasons it is impossible to avoid".[157] Evacuations – whether permissible or not – must in any case be temporary and meet "to the greatest practicable extent" certain requirements on the treatment of displaced persons, including avoiding the separation of families.[158] Whether persons are forcibly transferred or deported in violation of GC IV or are lawfully evacuated, they must be transferred back to their homes as soon as hostilities in the area in question have ceased.[159] As evacuations may take place to third States in exceptional circumstances, the right to return applies both to displacement inside and outside the occupied territory (whether in the same country or across a border).[160] Finally, under Article 70(2) of GC IV, refugees who find themselves in a territory occupied by their country of origin are entitled to special protection

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154 GC IV, Art. 35; see also ICRC Commentary on APs, above note 46, commentary on AP I, Art. 73, para. 2982, which further confirms this.
155 GC IV, Art. 49; ICRC Customary Law Study, above note 5, Rule 129(A) and commentary. Concerning the implicit prohibition on deportations in the 1907 Hague Regulations, see J.-M. Henckaerts, above note 137, pp. 151–152. For more detailed analyses of the protection provided by IHL against forced displacement, see, for example, V. Chetail, above note 149, pp. 1185–1214; M. Jacques, above note 13, pp. 19–37, 49–71, 177–208; Jan Willms, "Without Order, Anything Goes? The Prohibition of Forced Displacement in Non-International Armed Conflict", *International Review of the Red Cross*, Vol. 91, No. 875, 2009; K. Hulme, above note 13, pp. 91–116; D. J. Cantor, above note 137, pp. 1–23; Emanuela-Chiara Gillard, "The Role of International Humanitarian Law in the Protection of Internally Displaced Persons", *Refugee Law Quarterly*, Vol. 24, No. 3, 2005; J.-M. Henckaerts, above note 137, pp. 143–178.
156 ICRC Commentary on GC IV, above note 27, p. 279. See also V. Chetail, above note 149, p. 1190; J.-M. Henckaerts, above note 137, p. 145.
157 GC IV, Art. 49(2).
158 *Ibid.*, Art. 49(2)–(3); ICRC Customary Law Study, above note 5, Rule 131; ICRC Commentary on GC IV, above note 27, pp. 280, 281. See also M. Jacques, above note 13, pp. 33–34.
159 GC IV, Art. 49(2); ICRC Customary Law Study, above note 5, Rule 132.
160 E.-C. Gillard, above note 155, p. 42; ICRC Customary Law Study, above note 5, Rule 132; ICRC Commentary on GC IV, above note 27, p. 281.

against deportation from the occupied territory, except on certain limited grounds.[161]

Non-international armed conflicts

Common Article 3 and AP II do not contain an explicit prohibition of *non-refoulement*.[162] The ICRC's position is that by virtue of the "categorical prohibitions" contained in common Article 3, which bind all parties to the conflict, the "transfer of persons to places or authorities where there are substantial grounds for believing that they will be in danger of being subjected to violence to life and person, such as murder or torture and other forms of ill-treatment", would also be prohibited.[163] The finding that IHL prohibits *refoulement* in non-international armed conflicts is based on and supported by arguments under IHL and is further reinforced by relevant IHRL.[164] Firstly, similar to the rationale underlying the GC IV *non-refoulement* provision, the law applicable in non-international armed conflicts "should not be circumvented by transferring persons where they would be in danger of being subjected to violations of common Article 3 upon transfer".[165] This is also the logic motivating the reasoning of the UN Human Rights Committee and international jurisprudence on the principle of *non-refoulement*. Secondly, Article 5(4) of AP II requires authorities that "release persons deprived of their liberty to take necessary measures to ensure their safety". Arguably, this should also be required for transfers, which entail that the transferring authority hand over control over individuals.[166] Thirdly, although not explicitly stated, it is considered that returns based on Article 118 of GC III must not result in *refoulement* and that this logic should also apply to non-international armed conflicts.[167] Finally, the *non-refoulement* obligation is further bolstered by the duty of States to respect and ensure respect for IHL as enshrined in common Article 1.[168]

The transfer of persons should not circumvent IHL applicable in non-international armed conflicts.[169] This would arguably cover the fundamental guarantees contained in common Article 3, including humane treatment and the

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161 The exception covers refugees who committed offences after the outbreak of hostilities. It also covers those who committed offences under common law before the outbreak of hostilities which would have justified extradition in time of peace according to the law of the occupied State. See GC IV, Art. 70(2); see also the section on "Special Protection of Migrants as Refugees", above.

162 As mentioned previously, the continued applicability of the principle of *non-refoulement* under IHRL and/or international refugee law as well as customary international law would need to be considered.

163 ICRC Commentary on GC I, above note 6, para 710. For another view, see F. J. Hampson, above note 54, p. 385.

164 ICRC Commentary on GC I, above note 6, paras 710–712.

165 L. Gisel, above note 128, p. 118; ICRC Commentary on GC I, above note 6, para. 710.

166 L. Gisel, above note 128, p. 119.

167 *Ibid.*

168 ICRC, above note 151, p. 24. For an analysis of the obligation of non-belligerent States under common Article 1 relating to the transfer of detainees to States parties to a non-international armed conflict, see R. Ziegler, above note 54, pp. 386–408.

169 ICRC Commentary on GC I, above note 6, para. 710.

prohibitions against hostage-taking and against passing sentences without affording all judicial guarantees.[170] The latter, however, would likely be restricted to trials which are manifestly unfair, taking into account narrower interpretations by human rights bodies.[171] Under IHL, all parties to the conflict, including international organizations and non-State organized armed groups, must abide by the principle of *non-refoulement*.[172] This is relevant when comparing the protection of migrants under other bodies of international law. Furthermore, it is the ICRC's view that the principle of *non-refoulement* applies, irrespective of the crossing of a border, if control over a person is transferred from one authority to another.[173]

Another relevant rule for the movement of migrants is the prohibition in Article 17(1) of AP II against parties 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".[174] This is also a rule of customary international law.[175] As in international armed conflicts, this rule is absolute, though it only covers "forced" displacement – whether within the country or across international borders – and should not be construed as preventing voluntary movement.[176] If displacement takes place, "all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition" and that members of the same family are not separated.[177] As noted in the commentaries to the Additional Protocols and to customary IHL Rule 132, these conditions should be applied to the displacement itself.[178] Civilians also have the "right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist", even if the displacement took place voluntarily.[179] Finally, "all appropriate steps shall be taken to facilitate the reunion of families temporarily separated".[180]

Final considerations

As seen in this section, IHL contains relevant rules for the movement of migrants in international and non-international armed conflicts. When persons are displaced, whether voluntarily or involuntarily, in connection with an armed conflict, some rules will continue to apply beyond the end of the armed conflict until they have

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170 *Ibid.*, para. 710.
171 *Ibid.*, para. 710 and case law references.
172 *Ibid.*, para. 713.
173 *Ibid.*, para. 713.
174 For further detail, see references in above note 155 on the prohibition of forced displacement.
175 ICRC Customary Law Study, above note 5, Rule 129(B).
176 ICRC Commentary on APs, above note 46, para. 4851. See also M. Jacques, above note 13, p. 64.
177 AP II, Art. 17(1); ICRC Customary Law Study, above note 5, Rule 132.
178 ICRC Commentary on APs, above note 46, para. 4856; ICRC Customary Law Study, above note 5, Rule 131.
179 ICRC Customary Law Study, above note 5, Rule 132.
180 AP II, Art. 4(3)(b); ICRC Customary Law Study, above note 5, commentary on Rule 132. See also the section on "Rules on Family Unity and Missing and Dead Migrants", below.

been able to return in safety to their homes or places of habitual residence, if they wish to do so.[181] However, it is possible that the right of return of migrants that have been displaced from a country that is not their own may be limited, particularly if their status within that country was irregular.[182] In any case, States continue to have obligations towards migrants based on domestic law as well as under IHRL and international refugee law, as applicable.[183] Importantly, IHL, IHRL and international refugee law provide complementary protection, including against *refoulement*, to migrants in situations of armed conflict. An important question when considering the protection of migrants under IHL – including the rules regulating their movement – is how this body of law interacts with other relevant branches of international law.[184] For instance, how do the rights to freedom of movement[185] and to leave any country, including one's own,[186] as well as the rules concerning the expulsion of aliens[187] in IHRL, interact with IHL? Linked with this, how does international refugee law interact with IHL and IHRL?[188] Notably, how do the rules relating to the return of refugees to their country of origin at the end of hostilities interact?[189]

Rules on family unity and missing and dead migrants

In situations of armed conflict, many migrants may go missing or die, including because of separation from their families or detention. This is often a direct consequence of IHL violations. In the case of migrants, communication between

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181 See, notably, ICRC Customary Law Study, above note 5, Rule 132.
182 The rules of IHRL (and those found in domestic law) relating to the right to return to one's own country, for instance, will need to be considered.
183 See above note 5.
184 For a more detailed analysis of the interplay between these bodies of law in relation to forced migration, see V. Chetail, above note 9, pp. 701–734. Specifically on the interplay concerning the principle of *non-refoulement*, see C. Droege, above note 143, p. 676 and references.
185 ICCPR, Art. 12(1); Arab Charter on Human Rights, Art. 26(1); ACHR, Art. 22(1); ECHR, Art. 2(1); ACHPR, Art. 12(1).
186 UDHR, Art. 13; ICCPR, Art. 12; ACHPR, Art. 12(2); Arab Charter on Human Rights, Arts 4(2), 27.
187 ACHR, Art. 22(9); Arab Charter on Human Rights, Art. 26(2); ACHPR, Art. 12(5); Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto, 16 September 1963, ETS 46 (ECHR Protocol 4), Art. 4; Human Rights Committee, General Comment 15/27 of 22 July 1986, para. 10 (on the implicit prohibition in Article 13 of the ICCPR); Committee on the Elimination of Racial Discrimination, General Recommendation No. 30, 1 October 2004, para. 26; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, A/RES/45/158, 18 December 1990, Art. 22(1).
188 See, for instance, 1951 Refugee Convention, Article 26, on freedom of movement, and Article 28, under which States parties do not have to deliver travel documents to refugees wishing to leave their asylum State when "compelling reasons of national security or public order otherwise require". In addition, Article 32 (1) of the Refugee Convention concerns the expulsion of refugees lawfully in the territory of a State, which is only permissible on grounds of national security or public order. See also the exceptions to *non-refoulement* in Article 33(2) of the 1951 Refugee Convention.
189 See, notably, GC IV, Art. 134; ICRC Customary Law Study, above note 5, Rule 128; UDHR, Art. 13; ICCPR, Art. 12(4); ECHR Protocol 4, Art. 3(2); ACHR, Art. 22(5); Arab Charter on Human Rights, Art. 27(a); ACHPR, Art. 12(2). On voluntary repatriation of refugees under international refugee law, see Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, 10 September 1969, Art. 5; Cartagena Declaration, para. 12.

family members – often living in different countries – may be especially challenging as they may speak different languages from that of the country they are in and information must be transmitted across borders and through the authorities of different States. This also complicates the collection of proper data for the identification of dead migrants. A further difficulty is that migrants may not wish to re-establish contact with their families out of fear of deportation or reprisals against their families in countries of origin. Finally, if the necessary measures are not taken to identify human remains and to transmit relevant information to families, dead migrants are likely to be reported missing.

Despite practical challenges, IHL provides important rules concerning respect for family life, the maintenance or re-establishment of family links, the clarification of the fate and whereabouts of missing persons, and the search for, collection and identification of the dead that are pertinent for migrants.[190] These primarily aim to prevent persons from going missing and to clarify their fate and whereabouts when they do, in order to provide their family members with any available information on their fate.[191] However, the obligation to account for missing and dead persons is one of means and not of results. Parties to the conflict must use their best efforts to inform families of the fate of their relatives, and when information is available they must provide it to the families.[192] The rules of IHL relating to the re-establishment of family links, the reunion of families and accounting for the dead and the missing may continue to apply beyond the end of an armed conflict. If a person went missing in connection with an armed conflict, these rules remain applicable until the fulfilment of the parties' obligations.[193] Parties continue to be bound by their duty to take all feasible measures to account for persons reported missing and to provide family members with any information they have on their fate. This is also the case for obligations related to dead persons, notably on search, collection and accounting. Furthermore, parties remain bound by their duty to facilitate the tracing efforts of members of dispersed families so that they can restore family links and, if possible, reunite these families.

International armed conflicts

In international armed conflicts, several IHL rules seek to prevent persons from going missing, including by recording their information when they are

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190 See, for instance, GC IV, Arts 26, 27(1) (protected persons), 49(3) (occupied territory), 82(2), 116 (internees); AP I, Arts 32–34, 74, 75(5), 77(4); AP II, Arts 4(3)(b), 8; ICRC Customary Law Study, above note 5, Rules 105, 109, 112, 116, 117, 123, 125, 131.

191 AP I, Art. 32; ICRC Customary Law Study, above note 5, commentary on Rule 117. Regarding dead persons, see ICRC Commentary on APs, above note 46, paras 1203, 1216.

192 ICRC Customary Law Study, above note 5, Rules 116, 117; ICRC Commentary on APs, above note 46, para. 1216. See also Heike Spieker, "Maintenance and Re-establishment of Family Links and Transmission of Information", in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 7, p. 1120.

193 On Articles 33, 34 and 74 of AP I, see ICRC Commentary on APs, above note 46, paras 149, 1239.

detained.[194] Parties to the conflict also have an obligation to enable all persons on their territory, or in a territory occupied by them, to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them.[195] This obligation applies irrespective of the location of families.[196] If migrants are dispersed in connection with an armed conflict, parties must facilitate enquiries made by their relatives with the aim of restoring family links and, if possible, reunification.[197] Importantly, Article 74 of AP I develops Article 26 of GC IV, including by imposing the obligation on parties to the conflict to facilitate the reunion of dispersed families in "every possible way" also on third States party to the Protocol.[198] According to the Commentary, "[t]his is quite logical, since it often happens during armed conflict that nationals of a country involved in a conflict seek refuge or are taken to neutral countries".[199] Even if AP I does not apply, it could be argued that third States may have obligations related to facilitating family reunification stemming from their duty to ensure respect for IHL under common Article 1.[200] This would not, however, necessarily result in an obligation for third States to grant an entry permit.[201] This is relevant as the families of migrants are often not in the territory of a State party to the conflict.

When persons are reported missing, parties must also take all feasible measures to account for and transmit information on them.[202] Building on GC IV, Article 33 of AP I and customary international law extend the obligation to search for missing persons to all other persons not covered by the Conventions, including nationals of States not party to the conflict and persons whose nationality is contested.[203] Although AP I does not extend to the nationals of a party to the conflict, records should be kept in line with the general principle in Article 32 that all activities "shall be prompted mainly by the right of families to know the fate of their relatives".[204] When considering the transmission of information to countries of origin, situations where migrants do not wish to

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194 See, for instance, GC IV, Arts 24(3) (for the whole of civilian populations), 43(2) (protected persons in territory of a party), 50(2) (occupied territory), 105–106 (internees), 136–138, 140 (protected persons); AP I, Arts 33(2), 78(3); ICRC Customary Law Study, above note 5, Rule 123.
195 GC IV, Art. 25 (for the whole of civilian populations). See also Arts 106–107, 112, 125 (internees); ICRC Customary Law Study, above note 5, Rules 105, 125, 126.
196 H. Spieker, above note 192, p. 1100.
197 GC IV, Art. 26 (for the whole of civilian populations); AP I, Art. 74; ICRC Customary Law Study, above note 5, Rule 105. See also Rule 131: "In case of displacement, all possible measures must be taken in order that … members of the same family are not separated."
198 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, pp. 507–508.
199 ICRC Commentary on APs, above note 46, para. 2998.
200 For a more detailed overview of the obligations under common Article 1, see K. Dörmann and J. Serralvo, above note 151, pp. 707–736.
201 H. Spieker, above note 192, p. 1121.
202 See, for instance, GC IV, Arts 136–141 (for protected persons); AP I, Art. 33(1)–(3) (for "persons who have been reported missing by an adverse Party" – wider personal scope than GC IV); ICRC Customary Law Study, above note 5, Rule 117. On the scope of Article 33 of AP I, see M. Bothe, K. J. Partsch and W. A. Solf, above note 34, pp. 198–199. See also A. Petrig, above note 7, pp. 260, 270.
203 ICRC Customary Law Study, above note 5, Rule 117; ICRC Commentary on APs, above note 46, paras 1222, 1256–1259.
204 ICRC Commentary on APs, above note 46, para. 1259.

restore family links[205] or where this could be prejudicial to them or their relatives[206] must be taken into account. As noted in the Commentary to Article 32 of AP I, the right of families to know the fate of their relatives should be balanced with other concerns – for instance, if a prisoner does not wish to communicate with his family.[207] For protected persons under GC IV, the obligation of the National Information Bureau to transmit information is waived if detrimental to the person concerned or to his or her relatives.[208] Parties to the conflict also have an obligation to search for, recover and identify the dead, including migrants, to ensure that their human remains are appropriately handled and to notify families.[209] AP I extends the personal scope of the obligations in GC IV to respect remains and to respect, maintain and mark graves to persons who died for reasons related to occupation, persons who died in detention as a result of occupation or hostilities, or persons who are not nationals of the country in which they died as a result of hostilities.[210] It also covers other unregulated issues, including the protection and return of human remains.[211]

Non-international armed conflicts

In non-international armed conflicts, there are a number of rules that are relevant for preventing persons from going missing or becoming separated, as well as for re-establishing family links and reuniting families.[212] Underpinning all obligations is the right to respect for family life, which is recognized as a rule of customary IHL.[213] Among the pertinent rules, parties must take all appropriate steps to facilitate the reunion of families temporarily separated, including through the identification of children, the establishment of information bureaux and the use of the Central Tracing Agency.[214] In addition, there are rules relating to the exchange of contact between family members.[215] Parties must also take all feasible steps to account for persons reported missing and to inform families of their fate.[216] They must search for and collect the dead, record all available information prior to disposal of bodies with a view to their identification, and ensure that human remains are appropriately handled.[217] The essence of this rule

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205 Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War?*, 3rd ed., Vol. 1, ICRC, Geneva, 2011, p. 12.
206 A. Petrig, above note 7, p. 268.
207 ICRC Commentary on APs, above note 46, paras 1218–1219.
208 GC IV, Arts 137(2), 140; ICRC Commentary on GC IV, above note 27, pp. 531–532.
209 GC IV, Arts 16(2) (whole of the populations), 129(2), 130–131 (internees); AP I, Arts 17, 33, 34; ICRC Customary Law Study, above note 5, Rules 112, 116. See also ICRC Customary Law Study, above note 5, Rules 113–115.
210 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 202.
211 *Ibid.*, pp. 203–204.
212 See, for instance, AP II, Arts 4(3)(b), 5(2)(b); ICRC Customary Law Study, above note 5, Rules 98, 105, 119–120, 123, 132 (preventing family separation in case of displacement).
213 ICRC Customary Law Study, above note 5, Rule 105.
214 AP II, Arts 4(3)(b); ICRC Commentary on APs, above note 46, paras 4553–4554.
215 AP II, Art. 5(2)(b); ICRC Customary Law Study, above note 5, Rules 105, 125, 126.
216 ICRC Commentary on APs, above note 46, Rules 105, 117.
217 AP II, Art. 8; ICRC Customary Law Study, above note 5, Rules 112, 116. See also Rules 113, 115.

is that authorities inform families, as far as possible, about the fate of their relatives and, as noted in the Commentary, on the location of their graves when appropriate.[218]

Conclusion

One of the primary aims of IHL when it comes to the protection of migrants in situations of armed conflict is to prevent the forced movement of persons either internally or externally. This has been one of the main focuses of existing literature on the protection of refugees (and internally displaced persons) under IHL. This article sought to explore the many rules of IHL that protect migrants not only from displacement, but more generally when they find themselves in situations of armed conflict – whether because they live in or are transiting through countries experiencing armed conflict. These rules primarily seek to protect migrants from the effects of hostilities and to ensure that they are treated humanely when in enemy hands. In the first place, IHL protects migrants under the general rules for the civilian population. In addition, they are entitled to special protection in international armed conflicts as protected persons. As refugees, they enjoy special protection under Articles 44 and 70(2) of GC IV. As such, IHL includes important rules for the protection of migrants finding themselves in situations of armed conflict. However, as migrants also continue to enjoy protection under domestic law and under other applicable bodies of international law in international and non-international armed conflicts, the interaction of IHL with other international obligations should be further considered. In particular, the complementary protection provided by IHRL and international refugee law to migrants in situations of armed conflicts and the interplay of these rules with IHL would merit further research. As mentioned above, for instance, it would be important to reflect on how the right to freedom of movement in IHRL and the rules relating to the return of refugees in international refugee law interact with IHL rules relating to the movement of persons.

Although briefly addressed, the potential obligations of third States, either during or after an armed conflict, based on common Article 1 should also be further considered to gain a more comprehensive understanding of the protection of migrants under IHL. For instance, to what extent, if any, is there a duty for third States to endeavour to ensure that parties to an armed conflict comply with their obligations to re-establish family links for migrants displaced in relation to the conflict or to account for missing and dead migrants? If a party to an armed conflict is attempting to restore family links and requires the assistance of a third State to do so, to what extent can the refusal of the latter be seen as contributing to the commission of a violation of IHL? Finally, as part of their duty to prevent violations of IHL, should third States reach out to parties to an armed conflict to

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218 ICRC Commentary on APs, above note 46, para. 4657.

try to facilitate the carrying out of their obligations? Although this article does not address this issue in detail, determining the existence and scope of the potential obligations of third States remains important, for instance to account for missing and dead migrants during or at the end of an armed conflict or to facilitate the voluntary return of migrants, as appropriate.

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OPINION NOTE

Some reflections on the IFRC's approach to migration and displacement

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Abstract

This article provides an overview of the development of the International Federation of Red Cross and Red Crescent Societies' (IFRC) approach to migration and displacement. The focus of the IFRC and its member National Red Cross and Red

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Crescent Societies (National Societies) in this regard has traditionally been on refugees and other so-called "displaced persons" – that is, people who have been compelled to flee their place or country of origin and for this reason are deemed to be particularly vulnerable. However, this focus has been extended recently, in the course of the past decade, to cover all people who find themselves in a vulnerable situation in the context of migration. The IFRC Migration Policy, which was adopted in 2009, has offered much-needed guidance to National Societies in dealing with all migrants, including irregular migrants. However, it is argued that there is a need today – taking into consideration the increasing number of displaced people worldwide and the numerous contexts in which National Societies are dealing with refugees, internally displaced persons or cross-border disaster-displaced persons – to better understand the programmatic aspects that are specific to displacement compared with migration. This is a necessary condition in view of the development of more adequate and effective responses to the vulnerabilities and needs of migrants and displaced persons.

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Introduction

The International Red Cross and Red Crescent Movement (the Movement) has a long-standing commitment to providing assistance and protection in the context of migration and displacement. In many contexts, the components of the Movement – that is, the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and the 191 National Red Cross and Red Crescent Societies (National Societies)[1] – are at the forefront of the response to the humanitarian and protection needs of asylum-seekers, refugees, internally displaced persons (IDPs) and vulnerable migrants.

Within the Movement, the role of the IFRC is to facilitate and promote all humanitarian activities carried out by its member National Societies to improve the situation of the most vulnerable people. It also directs and coordinates international assistance by the Movement for migrants, refugees and victims of natural and technological disasters, as well as in health emergencies. The IFRC works to provide guidance to strengthen the capacities of its member National Societies to carry out effective disaster preparedness, health and social programmes, and acts as their official representative in the international field.

This note provides a general overview of the development of the IFRC's approach to migration and displacement since the adoption of the first resolution

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1   The IFRC is a membership organization made up of 191 individual National Societies.

on such issues by the Movement in 1981.[2] It begins by analyzing numerous resolutions adopted throughout the 1980s and 1990s by the governing bodies of the Movement – the International Conference of the Red Cross and Red Crescent (International Conference) and the Council of Delegates of the International Red Cross and Red Crescent Movement (Council of Delegates)[3] – that focused mostly on "displacement" and "displaced persons". While there is no internationally agreed definition of "displacement",[4] the term is used by the IFRC to refer to movements in which people have been compelled or forced to leave their place or countries of origin due to a life-threatening situation or a risk of being subjected to violations of certain fundamental rights (e.g. in the case of persecution, armed conflict, serious disturbances of public order, natural disasters or when a State is unable or unwilling to protect the human rights of its citizens). Accordingly, the term "displaced person" can be used as an umbrella term to refer to people who have been compelled to flee their place or their country of origin, including, but

2   Throughout this document, the term "the Movement" will be used to refer collectively to the ICRC, the IFRC and all National Societies. Some of the critical policy documents analyzed here apply to the Movement as a whole, while some apply only to the IFRC and its members, and some apply to all components of the Movement and also to States. For instance, the 2009 IFRC Migration Policy was adopted by the governing body of the IFRC (the IFRC General Assembly) and therefore applies to National Societies and the IFRC, but not to the ICRC (or to States). The 2009 Movement Policy on Internal Displacement was adopted by a governing body of the Movement (the Council of Delegates of the International Red Cross and Red Crescent Movement) and is thus applicable equally to National Societies, the IFRC and the ICRC (but not to States). Meanwhile, resolutions of the International Conference of the Red Cross and Red Crescent (International Conference) are adopted not only by the Movement but also by the States party to the Geneva Conventions. Thus, Resolution 3 of the 31st International Conference of 2011 ("Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion"), for instance, includes undertakings by all components of the Movement and also by States.

3   The International Conference is considered "the Movement's supreme deliberative body". It brings together the States party to the Geneva Conventions as well as all components of the Movement. Its decisions (adopted in the form of resolutions) are not legally binding, but carry significant authority. The Council of Delegates is the body in which representatives of all the Movement's components meet to discuss matters which concern the Movement as a whole. It does not include States. The main difference between the International Conference and the Council of Delegates is in the participants – States attend only the International Conference, so the resolutions of the International Conference include their (non-binding) commitments, whereas the Council of Delegates includes only the commitments by the components of the Movement.

4   The terminology used varies considerably from one organization to another. For instance, the Office of the United Nations High Commissioner for Refugees (UNHCR) speaks about "forced displacement" to refer to people fleeing persecution as well as conflict and violence. Forced displacement is defined by UNHCR as the "coerced departure of a person from his/her home or country due, e.g. to a risk of persecution or other form of serious or irreparable harm", adding that "such risks can exist due to armed conflict, serious disturbances of public order, natural disasters, or the inability or unwillingness of a State to protect the human rights of its citizens". See UNHCR, *The 10-Point Plan in Action*, 2016 Update, p. 280. The word "displacement" is understood in the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change as "the primarily *forced* movement of persons", as opposed to migration, which is understood as "the primarily *voluntary* movement of persons" (emphasis in original). See Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, 2015, p. 17. For its part, the International Organization for Migration (IOM) prefers the use of the expression "forced migration" to refer to "a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects)". See IOM, "Key Migration Terms", available at: www.iom.int/key-migration-terms (all internet references were accessed in March 2018).

not limited to, refugees, IDPs and cross-border disaster-displaced persons. It is to be noted, however, that the expression "displaced persons" is not a legal notion; it is rather a descriptive term used to refer to a certain type of vulnerability related to the factors prompting people to leave their home in the first place, and which may potentially prevent them from returning.

Conversely, the humanitarian consequences generated by migration, in particular irregular migration, became the object of increased attention from the Movement at the turn of the century. The second section will thus present a brief overview of the discussions that led to the adoptions of the 2007 resolution "Together for Humanity" and the 2009 IFRC Policy on Migration (IFRC Migration Policy).[5] The IFRC Migration Policy is a landmark document that provides an overall framework for the engagement of the IFRC and its 191 member National Societies in the field of migration.

The third section discusses some of the developments that have taken place since the adoption of the Migration Policy. The Policy has proven instrumental in leading to a considerable increase in the number of activities implemented by National Societies in favour of migrants, irrespective of their status. The arrival of a large number of migrants and refugees to Europe in 2015 and the humanitarian crisis that ensued led to a renewed commitment from the IFRC to provide guidance as well as operational support to those National Societies that were involved or interested in migration-related activities. Henceforth, the IFRC has taken many initiatives to support their work in a more coherent and effective manner while respecting the specificities of regional contexts.

Finally, the fourth section discusses what has emerged as a priority for the IFRC: the need for a better understanding of differences and interlinkages between migration and displacement. While the IFRC Migration Policy was deliberately framed in a broad way, it is argued here that it does not and was never intended to cover the phenomenon of displacement in its entirety. Many of the current IFRC and National Society activities are in favour of refugees and IDPs, but there are also increasing challenges posed by climate-change-induced displacement. Because of this, the IFRC has endeavoured to provide more clarity and guidance regarding the role and scope of National Societies' interventions as well as on programmatic aspects that have to be taken into consideration when working with displaced persons.

An initial focus on refugees and other "displaced persons"

As part of their humanitarian mandate, National Societies have always carried out activities in favour of people on the move, with a traditional focus on persons displaced within or across borders because of armed conflict or natural disasters.[6]

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5   IFRC, *Policy on Migration*, Nairobi, November 2009 (IFRC Migration Policy).
6   While it is difficult to find traces of such activities in the early times of the Movement, there are indications that the Red Cross of Serbia, for instance, was already assisting people displaced within the territory as early as 1876 in the context of the Serbian–Ottoman Wars (1876–78).

The Council of Delegates and the International Conference have also addressed the issue of refugees and displaced persons on numerous occasions since the 1980s. In this sense, an "exclusive approach" focusing on specific groups of people considered as particularly vulnerable – i.e., refugees, returnees and IDPs – while excluding others deemed less vulnerable, in particular people moving primarily for socio-economic reasons, "is also reflected in the history of the International Red Cross and Red Crescent Movement".[7]

The International Conference adopted its first resolution on this issue at its 24th Session, held in Manila in 1981, in the midst of the so-called Indochinese Refugee Crisis which led to the displacement of some 3 million people from Cambodia, Laos and Vietnam. Resolution XXI[8] called upon the Movement to be ready to assist and to protect not only refugees but also "returnees and displaced persons", especially when such persons cannot benefit from any other protection or assistance. The term "displaced person" in this context arguably referred to both IDPs and those who are forced to flee their country but for various reasons "do not fall under the competence" of the Office of the United Nations High Commissioner for Refugees (UNHCR),[9] thus underlying the complementarity between the work of UNHCR and the work of the Movement. Five years later, Resolution XVII, adopted at the 25th International Conference in Geneva, reiterated the role that the Movement could play in favour of "refugees and asylum seekers" while requesting that governments allow the Movement "to come to the aid of persons without any other suitable protection or assistance", such as IDPs in many cases.[10]

This issue was also regularly taken up by the Council of Delegates and other International Conferences throughout the 1990s. In 1991, Resolution 9 adopted by the Council of Delegates reiterated calls for the components of the Movement "to act vigorously in favour of refugees, asylum-seekers, displaced persons and returnees" in accordance with their mandates.[11] While the focus of the Movement had traditionally been on people displaced because of conflicts or natural disasters, this resolution also recognized that

> new forms of movements of persons, due principally to economic and social hardship, frequently leading to severe malnutrition and famine conditions, and often associated with political instability, have emerged, and that these persons, while not fulfilling the international criteria for refugee status, are in need of humanitarian support.[12]

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7   Thomas Linde, "Humanitarian Assistance to Migrants Irrespective of Their Status – Towards a Non-Categorical Approach", *International Review of the Red Cross*, Vol. 91, No. 875, 2009, p. 569.

8   24th International Conference, Resolution XXI, "International Red Cross Aid to Refugees", Manila, 1981 (Resolution XXI).

9   *Ibid.*

10   25th International Conference, Resolution XVII, "The Movement and Refugees", Geneva, 1986 (Resolution XVII).

11   Council of Delegates, Resolution 9, "The International Red Cross and Red Crescent Movement and Refugees", Budapest, 1991 (CoD Resolution 9).

12   *Ibid.*

This seemed to suggest that under certain circumstances situations resulting from socio-economic environment could also give rise to displacement, in which case the Movement could step in to provide protection and assistance.

Two years later, the Council of Delegates adopted Resolution 7, which invited the components of the Movement, in accordance with their respective mandates, "to continue to act vigorously in favour of refugees, asylum seekers, displaced persons and returnees".[13] While the expression "displaced persons" here seems to be mostly referring to people moving within the territory of a State, the Resolution makes reference also to "the protection of those persons who have fled from armed conflict or other situations of extreme danger, but who are not covered by the refugee definition of the 1951 Convention on the Status of Refugees", thus including also people displaced across borders but not recognized as refugees.[14] The Resolution thus encouraged National Societies to put in place programmes for refugees, asylum-seekers and displaced persons which provide emergency assistance as well as long-term solutions.[15]

Moreover, reflecting the discussions at the time that would lead to the development of the United Nations (UN) Guiding Principles on Internal Displacement,[16] Resolution IV, adopted in 1995 at the 26th International Conference, focused more specifically on refugees and IDPs.[17] This resolution invited the components of the Movement, in accordance with their respective mandate, to continue to provide assistance and protection to IDPs, refugees and returnees, and to "devise and apply innovative approaches to humanitarian response" that will enable them to provide timely and appropriate assistance for IDPs and refugees.[18] It also invited National Societies, as auxiliaries to the public authorities, to "offer their services to their governments, in order to respond to the needs of refugees, internally displaced persons and returnees".[19]

In 2001, Resolution 4[20] adopted by the Council of Delegates addressed, in particular, issues of coordination and cooperation within the Movement and with external actors. For the rest, however, it provided very little guidance to the components of the Movement in terms of working with refugees and IDPs. This led the IFRC to adopt, in 2003, a Policy on Refugees and Other Displaced Persons (2003 Policy).[21] The 2003 Policy addressed protection and assistance offered by National Societies and the IFRC "to all those affected by displacement,

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13 Council of Delegates, Resolution 7, "The Movement, Refugees and Displaced Persons", Birmingham, 1993 (CoD Resolution 7).

14 *Ibid.*

15 *Ibid.*

16 Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission Resolution 1997/39, "Addendum: Guiding Principles on Internal Displacement", UN Doc. E/CN/1998/53/Add.2, 11 February 1998.

17 26th International Conference, Resolution IV, "Principles and Action in International Humanitarian Assistance and Protection", Geneva, 1995 (Resolution IV).

18 *Ibid.*

19 *Ibid.*

20 Council of Delegates, Resolution 4, "Movement Action in Favour of Refugees and Internally Displaced Persons", Geneva, 2001 (CoD Resolution 4).

21 IFRC, *Policy on Refugees and Other Displaced Persons*, 2003 (2003 Policy).

regardless of their status and including refugees", with references also to "others not protected by the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol",[22] and recognized in particular the role that National Societies could play in all phases of displacement – that is, preparedness, first emergency response, long-term assistance, solutions and integration. The 2003 Policy noted also as a priority the extension and expansion of existing programmes and services so as to specifically include the displaced.[23]

As the above overview demonstrates, the Movement has long been working with refugees as well as with other specific categories of people on the move such as returnees and displaced persons. As noted above, the expression "displaced persons" has not been defined or used in a consistent manner across the many resolutions adopted by the Movement. While refugees have systematically been mentioned separately due to the fact that they are covered by a specific legal framework and a dedicated UN agency, the 2003 Policy confirms the fact that they are included amongst the ranks of so-called "displaced persons". Apart from refugees, the expression "displaced persons" has come to cover primarily IDPs and to a certain extent also people fleeing across borders but who are not recognized as refugees and who as such do not benefit from the same level of protection and assistance. Additionally, it was suggested in 1991 that socio-economic pressures and constraints could also lead to displacement, although this approach was not clearly supported in subsequent resolutions. The key criterion behind the expression "displaced persons" is arguably the element of coercion and the absence of any alternative: displaced people have no other choice than to leave their homes, no matter the factors that prompted their departure in the first place, and have no possibility of returning to their homes.

It must be emphasized, at the same time, that while all these resolutions focused on specific categories of people, they did not limit the provision of humanitarian support to these groups only. For instance, the 1981 Resolution XXI emphasized the fact that the activities of the Movement should "at all times take due account of the comparable needs of the local population in the areas in which refugees, displaced persons and returnees are accommodated".[24] The need to ensure "a better understanding and mutual acceptance between refugees and their host communities"[25] or to support "the development of refugee hosting areas in the event of mass influxes of refugees, so as to avert any deterioration in living conditions",[26] was noted in subsequent resolutions adopted by the Council of Delegates in 1986 and 1991. The 2003 Policy emphasized the importance of protecting and assisting also those "indirectly affected by the displacement such as host families and local populations".[27] Hence, these resolutions show that the

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22   *Ibid.*
23   *Ibid.*
24   Resolution XXI, above note 8.
25   Resolution XVII, above note 10.
26   CoD Resolution 9, above note 11.
27   2003 Policy, above note 21.

need to take into consideration the situation of the host communities has always been an important aspect for the Movement.

In practice, at the turn of the millennium the various components of the Movement were providing assistance and protection to approximately one third of all refugees and asylum-seekers in more than forty countries,[28] with National Societies being by far UNHCR's largest implementing partner.[29] The principal assistance activities of the Movement for refugees, and more generally for displaced persons, at the time included the provision of food as well as non-food items and medical assistance during the emergency phase, combined with shelter and livelihood activities in the longer term. In terms of protection, activities included providing access to education, legal and social counselling, and tracing and reestablishment of family links for those who had been separated from their relatives. National Societies also contributed to long-term solutions for the displaced, including voluntary repatriation to their home countries and integration into new communities. Building on National Societies' networks of volunteers and their presence within communities, activities were aimed at influencing behaviour in the community in order to reduce discrimination and promote integration of refugees. Since then, such integration activities have become a particularly important aspect of the work of the IFRC and its member National Societies.[30] While recognizing the seriousness of the situation of refugees and IDPs, the IFRC's Strategy 2010, adopted in 1999 to guide the work of National Societies for the years ahead,[31] emphasized the importance of National Societies' efforts to influence community behaviour, citing as examples the need for initiatives to oppose discrimination against asylum-seekers and others, stop violence and build a culture of non-violence in the resolution of differences and conflicts in the community.[32]

Migration as one of the "greatest challenges" for the Movement

While the Movement had long been working in favour of refugees, returnees and displaced persons, as explained above, references to the phenomenon of

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28 Council of Delegates, *Movement Action in Favour of Refugees and Internally Displaced Persons*, CD 2001/6/1, Geneva, August 2001, p. 20.

29 In 2003, to respond to the increasing number of operational partnerships between external organizations and/or agencies, in particular UNHCR, the Council of Delegates adopted Resolution 10, which addresses "minimum elements to be included in operational agreements between movement components and their operational partners". See Council of Delegates, Resolution 10, "Movement Action in Favour of Refugees and Internally Displaced Persons and 'Minimum Elements to Be Included in Operational Agreements between Movement Components and Their Operational Partners'", Geneva, 2003.

30 The Council of Delegates requested the components of the Movement as early as 1991 "to draw the attention of host communities to the problems of humanitarian concerns encountered by refugees, asylum-seekers and displaced persons, and to fight xenophobia and racial discrimination". See CoD Resolution 9, above note 11.

31 IFRC, *Strategy 2010*, 1999.

32 *Ibid.*

migration in the documents adopted by the International Conference or the Council of Delegates are comparatively more recent. The first explicit references to "migrants" and to "migration" in the context of the Movement can arguably be found in the report submitted by the ICRC and the IFRC ahead of the Council of Delegates that took place in 2001. While the report focused primarily on refugees and IDPs, it touched upon the broader issue of migration and the potential vulnerabilities and humanitarian needs of so-called "economic migrants".[33] It went so far as to say, in a quite premonitory way, that "the issue of migration [would be] one of the greatest challenges that the Movement will face in the next 50 years"[34] and that "it [was] increasingly evident that [it would] have to be addressed by the Movement".[35] As a result, Resolution 4 adopted by the Council of Delegates called upon the IFRC, in consultation with National Societies, "to develop proposals for a plan of action on other aspects of population movement" besides refugees and IDPs, including "migration and resultant vulnerability, migrants in irregular situations, and action to address discrimination and xenophobia".[36] In practice, National Societies were already responding to the needs of migrants, but the response varied very much from country to country depending on the mandates of Movement components and the specific domestic context.

The issue of migration would indeed gain increased prominence amongst National Societies in the years following the adoption of Resolution 4 in 2001. For instance, National Societies in Europe and in the Asia-Pacific region adopted a Plan of Action on population movements and migration in 2002.[37] The importance of migration was also highlighted at the European Regional Conference in Istanbul in 2007[38] as well as at the Inter-American Conference held in Guayaquil the same year.[39] While not constitutionally mandated, these regional conferences play an important role in channelling and organizing National Societies' priorities, cooperation and humanitarian diplomacy efforts. In the present case, they produced important debates and statements expressing the concerns of National Societies in relation to migration and associated discrimination and xenophobia, as well as their commitment to what was seen as a rapidly increasing problem for the twenty-first century. The progressive inclusion of "migration" into the agenda of the IFRC during this period was thus essentially the result of a "bottom up" process emerging from the Red Cross and Red Crescent Regional Conferences and reflecting the concerns of National Societies working with migrants but in need of more guidance.[40]

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33 Council of Delegates, above note 28, p. 3.
34 *Ibid.*, p. 24.
35 *Ibid.*, p. 12.
36 COD Resolution 4, above note 20.
37 6th European Red Cross and Red Crescent Conference, Berlin, 14–18 April 2002; 6th Asia-Pacific Regional Conference, Manila, 2002.
38 7th European Regional Conference of the International Federation of Red Cross and Red Crescent Societies, Istanbul, 20–24 May 2007.
39 18th Inter-American Conference of the Red Cross, Guayaquil, 4–7 June 2007.
40 T. Linde, above note 7, p. 571.

Responding to the needs of migrants "irrespective of their status"

The year 2007 arguably marked a new landmark towards the inclusion of migration amongst the priorities of the IFRC (which in that year appointed a Special Envoy for Migration and Displacement, Mr Trygve G. Nordby) and the National Societies, with the issue of "international migration" being included for the first time in the agenda of the 30th International Conference.

While the resolutions adopted until 2007 covered refugees and asylum-seekers, IDPs, returnees and to a lesser extent people moving due to reasons other than persecution or armed conflict, more could have been done to respond to the needs of vulnerable migrants, many of whom found themselves in situations where they were in urgent need of humanitarian assistance and protection. There was a need, in particular, to provide National Societies with a strong mandate to work in favour of all migrants, including those in an irregular situation. Indeed, as noted in the report prepared for the 30th International Conference, "a number of National Societies [found] themselves in delicate political situations when assisting groups of people who face discrimination or who are in their countries illegally".[41] In particular, the status of National Societies as auxiliaries to the public authorities raised some "ethically challenging questions" with regard to their role in the context of irregular migration.[42] For instance, while in some cases National Societies might be prevented from working with irregular migrants, in other countries they might be asked to act in support of government decisions, including when it comes to detaining or deporting migrants. Considering that assisting irregular migrants in some countries could constitute a crime, it was also deemed necessary to send a strong signal in order to facilitate access by National Societies to all migrants, regardless of their status.

The scope of the debate during the 30th International Conference was explicitly limited to cross-border migration.[43] In the absence of an internationally accepted formal definition of an "international migrant", the Conference built on the description of the phenomenon formulated in 1991 by the Council of Delegates in its Resolution 9 – that is, "new forms of movements of persons, due principally to economic and social hardship, frequently leading to severe malnutrition and famine conditions, and often associated with political instability".[44] From a Movement perspective, the purpose of the debate was to facilitate the development of concerted strategies or partnerships in order to "ensure that migrants who are left without any suitable form of protection and assistance receive the help they need, regardless of their status, thus preserving their lives, health and dignity".[45]

41 30th International Conference, "The Need for Collaborative Action and Partnerships between States, the Components of the International Red Cross and Red Crescent Movement and other Stakeholders in Addressing Humanitarian Challenges of Common Concern", Background Document, 30IC/07/5.1, Geneva, October 2007, p. 20.
42 *Ibid.*
43 *Ibid.*, p. 16.
44 See CoD Resolution 9, above note 11.
45 30th International Conference, above note 41, p. 4.

While refugees were in principle excluded from the discussion, it was noted that it was often difficult to distinguish between the different categories of "uprooted persons", and that some people who were not considered as refugees under the 1951 Refugee Convention[46] were potentially in need of international protection (which somewhat echoed the idea of a complementarity with the mandate of UNHCR already expressed in previous resolutions). The difficulty in distinguishing between refugees and migrants had also become more complicated in the context of mixed migratory movements, with refugees and migrants often using the same routes.[47] The Movement was particularly concerned by the fact that many destitute migrants were travelling under high-risk conditions and in need of basic humanitarian assistance to survive; that they were vulnerable to abuse and exploitation by smugglers and traffickers; that they were often subject to detention upon arrival in host or transit countries; and that they were increasingly the object of xenophobia and discrimination in countries of arrival.

Adopted in November 2007, the Declaration "Together for Humanity" stated that it

> focused on the humanitarian consequences of four great challenges facing the world today which affect the individual and specifically the most vulnerable people: environmental degradation and climate change; humanitarian concerns generated by international migration; violence, in particular in urban settings; [and] emergent and recurrent diseases and other public-health challenges, such as access to health care.[48]

With regard to migration, the Declaration provides that the Movement is "particularly concerned that migrants, irrespective of their status, may live outside conventional health, social and legal systems and for a variety of reasons may not have access to processes which guarantee respect for their fundamental rights".[49] As explained above, the expression "irrespective of their legal status" in this context was arguably included to prevent any difference of treatment between "regular" and "irregular" migrants and to ensure that National Societies would be able to provide assistance to those in need in accordance with the principle of impartiality.[50] In the Declaration, participants also resolved to intensify efforts to "mobilize community respect for diversity and action against racism,

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46 Convention relating to the Status of Refugees, 150 UNTS 189, 28 July 1951 (entered into force 22 April 1954).
47 30th International Conference, above note 41, p. 16.
48 30th International Conference, Resolution 1, "Declaration: Together for Humanity", Geneva, November 2007 (Together for Humanity Declaration).
49 *Ibid.*
50 The components of the Red Cross and Red Crescent are all guided by the same seven Fundamental Principles: humanity, impartiality, neutrality, independence, voluntary service, unity and universality. According to the principle of impartiality, the Movement "makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress". See IFRC, "The Seven Fundamental Principles", available at: www.ifrc.org/who-we-are/vision-and-mission/the-seven-fundamental-principles/.

discrimination, xenophobia, marginalization and other forms of exclusion faced by all vulnerable groups".[51]

These orientations were confirmed by Resolution 5 adopted that same year by the Council of Delegates.[52] This resolution requested that both the ICRC and IFRC, in accordance with their respective mandates, "support the efforts of National Societies to gain access and provide impartial humanitarian services to migrants in need, regardless of their status, and to do so without being penalized for such action".[53] It also invited National Societies "to utilize their capacity as auxiliaries to the public authorities in the humanitarian field to engage in a dialogue with their public authorities to clarify their respective roles relating to the humanitarian consequences of migration", and noted "that while acting in an auxiliary capacity National Societies will be in a position to base their services strictly on vulnerabilities and humanitarian needs and maintain their independence and impartiality at all times".[54] Finally, Resolution 5 welcomed the decision by the General Assembly of the IFRC to develop a policy on migration for National Societies, noting that the IFRC's 2003 Policy "[did] not provide them with sufficient guidance in their work to address the plight of persons made vulnerable as a consequence of migration".[55] The IFRC was then requested by its governing board to establish a reference group to develop the Federation Policy on Migration, with the ICRC's support. However, the precise scope of the document to be elaborated was left undetermined. While some National Societies were in favour of a policy that would encompass refugees and other displaced persons alongside migrants, others argued that it was important to maintain the distinction between these categories.[56]

The 2009 IFRC Policy on Migration

Adopted by the IFRC General Assembly and endorsed through a Council of Delegates resolution in November 2009,[57] the IFRC Policy on Migration contains ten general principles for action that should guide the work of the IFRC and its 191 member National Societies in the field of migration.[58]

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51 Together for Humanity Declaration, above note 48.
52 Council of Delegates, Resolution 5, "International Migration", Geneva, 23–24 November 2007 (CoD Resolution 5).
53 *Ibid.*
54 *Ibid.*
55 *Ibid.*
56 30th International Conference, *Report of the 30th International Conference of the Red Cross and Red Crescent, including the Summary Report of the 2007 Council of Delegates*, Geneva, 2007, pp. 147–151.
57 IFRC Migration Policy, above note 5. The IFRC Migration Policy benefited from the specific role, experience and expertise of the ICRC in restoring family links (RFL) and other protection issues, in particular regarding persons deprived of their liberty.
58 The ten general principles are: focus on the needs and vulnerabilities of migrants; include migrants in humanitarian programming; support the aspirations of migrants; recognize the rights of migrants; link assistance, protection and humanitarian advocacy for migrants; build partnerships for migrants; work along the migratory routes; assist migrants in return; respond to the displacement of populations; and alleviate migratory pressures on communities of origin. *Ibid.*, pp. 3–4.

In the absence of a universally agreed definition of a "migrant", and in order to capture "the full extent of humanitarian concerns related to migration", the IFRC Migration Policy provides a deliberately broad *description* of migrants:

> Migrants are persons who leave or flee their habitual residence to go to new places – usually abroad – to seek opportunities or safer and better prospects. Migration can be voluntary or involuntary, but most of the time a combination of choices and constraints are involved.

The Migration Policy further states that

> this policy includes, among others, labour migrants, stateless migrants, and migrants deemed irregular by public authorities. It also concerns refugees and asylum seekers, notwithstanding the fact that they constitute a special category under international law.[59]

This description recognizes that migration does not only cover so-called "voluntary movements" but that it is in fact often a combination of push and pull factors that spur people to leave their place of origin. Migration in this context may be understood as covering all forms of movement, including displacement, in which case the word "migrant" is used as a generic term to refer to all people who move from their own country to another, regardless of the reasons. It is indeed quite common amongst scholars, practitioners or journalists to use the terms "migrant" and "migration" in this broad sense.

Since the IFRC is a membership organization, which at the time of the adoption of the Migration Policy included some 186 National Societies, with the ICRC contributing to the discussions, the language used was necessarily the result of a compromise between different, and sometimes divergent, views. The rationale behind this broad description was to avoid being dragged into endless debates around terminology and concepts so as to focus on the humanitarian needs of migrants. Moreover, the Policy was "clearly addressed to community-based staff as the primary actors that translate the humanitarian imperative into action", rather than to other audiences,[60] and thus it is necessarily a simplification of the IFRC's approach without much elaboration on certain legal distinctions that are nevertheless important.

In practice, however, the exact scope of the IFRC Migration Policy has been largely open to discussion amongst the components of the Movement. For instance, while some would argue that it also covers IDPs, others consider that internal displacement is a separate issue based on the fact that the Movement Policy on Internal Displacement[61] was adopted by the Council of Delegates also in 2009, in parallel to the Migration Policy. There have also been discussions regarding the extent to which the Migration Policy covers movements driven by economic factors within countries; this is considered to be a significant aspect of National

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59   *Ibid.* (emphasis added).
60   T. Linde, above note 7, p. 568.
61   Council of Delegates, Resolution 5: "Movement Policy on Internal Displacement", Nairobi, 23–25 November 2009 (CoD Resolution 5).

Societies' work in some contexts, most notably in the Asia-Pacific region. These discussions illustrate the relevance of the IFRC Migration Policy as a "living instrument" that can be interpreted in the light of evolving conditions and in different contexts so as to be practical and effective. As Thomas Linde noted in 2009 when the Policy was adopted, "there are no easy answers, of course, as to how a new approach should be articulated – the debate must go on".[62]

The most vivid debates within the Movement, however, took place in the context of the so-called "migration crisis" in Europe in 2015 and 2016. This reflected a broader discussion in the media and amongst practitioners and academic circles regarding the use of the terms "migrant" and "refugee",[63] raising the question of whether refugees are subsumed under the term "migrant" in the IFRC Migration Policy. There are different views on what should be the right approach in this regard, but what is clear is that this was not an issue some ten years ago when the document was being drafted. The context was different, and the priority then was to find a way to ensure that National Societies would have a clear mandate to offer protection and assistance to all those who need it, including irregular migrants, considering their specific vulnerabilities and the sensitivities related to this issue in many contexts. What is clearly stated, however, is the fact that the 2009 Migration Policy "also *concerns* refugees and asylum seekers, notwithstanding the fact that they constitute a special category under international law".[64] The policy thus rightly recognizes that there are situations where the distinction has no relevance and where migrants and refugees altogether can benefit from the activities of the Movement. This would be the case, for instance, in the context of advocacy for the rights of individuals; when refugees are also migrant workers; in the context of urban settings where refugees and migrants face the same difficulties in accessing services; when both groups are confronted by discrimination, marginalization and xenophobia within the host societies; when refugees move onward to other countries for reasons not related to what prompted their displacement in the first place; or in situations where they are using the same routes and the same means of transport, and thus being exposed to the same risks. However, the question on whether or not the IFRC Migration Policy adequately addresses other issues, such as large-scale movement of refugees, remains open.

While it represents the main framework for the engagement of the IFRC and its member National Societies in the field of migration, the Migration Policy is not a standalone document, nor was it intended to replace all the resolutions adopted by the Movement on refugees, asylum-seekers, returnees and IDPs. The policy "expands the scope of, and replaces", the IFRC's 2003 Policy, which was deemed to be of little practical value; but it also "built on" and aimed to

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62　T. Linde, above note 7, p. 573.
63　See, for instance, Barry Malone, "Why Al Jazeera Will Not Say Mediterranean 'Migrants'", *Al Jazeera*, 20 August 2015, available at: www.aljazeera.com/blogs/editors-blog/2015/08/al-jazeera-mediterranean-migrants-150820082226309.html; UNHCR, "UNHCR Viewpoint: 'Refugee' or 'Migrant' – Which Is Right?", 11 July 2016, available at: www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html.
64　IFRC Migration Policy, above note 5 (emphasis added).

"complement"[65] the existing framework of the Movement by providing an additional and complementary set of guidelines to support the work of National Societies in the context of increasing humanitarian needs generated by migration. Many of the principles contained in the Migration Policy also find their origins in previous resolutions adopted by the Movement. For instance, the strictly humanitarian and inclusive approach focusing on the "needs" and "vulnerabilities" of migrants rather than on their legal status, types or categories,[66] which has often been praised as one of the major characteristics of the Migration Policy,[67] has been a constant in the approach of the Movement. The resolutions adopted until then by the Council of Delegates or the International Conference with regard to refugees, asylum-seekers, IDPs and returnees had indeed repeatedly emphasized the importance of a "need-based approach" focusing first and foremost on humanitarian needs.[68]

At the same time, the IFRC Migration Policy invites us to move beyond the traditional debate regarding the pre-eminence of a "need-based" versus a "category-based" or a "right-based" approach. On the one hand, the mere existence of the Migration Policy is in itself a recognition of the importance of "breaking down" the complexity of the humanitarian reality into categories. Indeed, a purely abstract need-based approach would not make any distinction between migrants and other human beings; the only criteria would be the needs and the vulnerabilities of people. Instead of this, the Migration Policy explicitly refers to various specific categories of "migrants". Furthermore, Principle 4 of the policy ("Recognizing the Rights of Migrants") clearly states, in what was certainly one of the most innovative aspects of the document, that "legal considerations are an essential element in determining the vulnerability of migrants, and in securing adequate access for them to assistance and services",[69] thus emphasizing the importance of an approach that takes into due consideration the legal framework and the rights attached to specific categories of people. While the IFRC has always promoted an approach based on needs first, its approach remains informed by rights and thus it does acknowledge the specific vulnerabilities and needs of some categories of persons as identified under international law.[70]

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65 *Ibid.*, Preamble.
66 *Ibid.*
67 T. Linde, above note 7, p. 569.
68 For instance, Resolution 7 adopted by the Council of Delegates in 1993 urged National Societies, in accordance with the principles of impartiality and independence, "to orient their assistance programmes towards the needs of the most vulnerable groups", establishing its priorities for action strictly on the basis of the most pressing needs". See COD Resolution 7, above note 13. The Plan of Action adopted in 1999 by the 27th International Conference, which dealt with the issue of refugees, asylum-seekers and IDPs under the heading of Final Goal 2.3, also recognized the rights and acute needs of the most vulnerable people as the first priority for humanitarian action. See 27th International Conference, Final Goal 2.3, "Provision for the Rights and Acute Needs of the Most Vulnerable People as the First Priority for Humanitarian Action", Geneva, 31 October–6 November 2011. The Council of Delegates' Resolution 4 of 2001 and Resolution 5 of 2007 both reaffirmed the approach of the Movement as being based on a response to vulnerabilities and humanitarian needs rather than on categories of persons. See CoD Resolution 4, above note 20; CoD Resolution 5, above note 52.
69 IFRC Migration Policy, above note 5, Principle 4.
70 See, for instance, IFRC, *The Legal Framework for Migrants and Refugees: An Introduction for Red Cross and Red Crescent Staff and Volunteers*, 2018.

Migration as a priority for the IFRC and its member National Societies

The number of international migrants has considerably increased over the past decades. In 2016, there were an estimated 258 million international migrants worldwide, up from 220 million in 2010 and 173 million in 2000.[71] This includes an estimated 50 million irregular migrants,[72] although this figure should be taken with caution given the clandestine nature of the phenomenon and the difficulties inherent in collecting precise data in that respect.

The IFRC Migration Policy has provided the IFRC and National Societies with a strong mandate to approach governments in order to gain access and to work with all migrants, irrespective of their status. A broad range of programmes have since then been developed around the world in many countries of origin, transit and destination to support migrants, including irregular migrants. Significant challenges remain, however, particularly regarding access to migrants for National Societies as well as access to basic services for migrants in what has become an increasingly politicized global environment. On the one hand, many countries of destination have put in place restrictive policies in an effort to stem the movements of people, leading to severe humanitarian consequences for migrants while at the same time hindering the capacity of National Societies to fulfil their mandate. On the other hand, and largely as a consequence of the increase in irregular migration, migrants have been increasingly facing suspicion, hostility and xenophobia.

There is a clear need for the IFRC in these circumstances to increase its support to National Societies that are interested in working with migrants. For years following the adoption of the Migration Policy, it was largely left to individual National Societies to engage in the field of migration, with the result that some of them have been very much involved in migration while others have not included specific activities in favour of migrants in their priorities. However, this approach changed with the crisis in Europe in 2015, which contributed to anchoring further the issue of migration as one of the main priorities of the IFRC.[73]

Some progress despite significant challenges

In 2011, four years after the adoption of the Declaration "Together for Humanity" and two years after the development of the Migration Policy, the IFRC carried out a survey to collect information about the activities of National Societies in favour of migrants and get a better understanding of the challenges and obstacles involved.[74]

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71 United Nations Department of Economic and Social Affairs, *International Migration Report 2017: Highlights*, UN Doc. ST/ESA/SER.A/404, 2017.
72 The most recent global estimates of the number of irregular migrants date from 2010. See IOM, *Global Migration Trends 2015*, 2016, p. 7.
73 See, in particular, IFRC, *Plan and Budget 2016–2020*, 2015.
74 IFRC, *Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion*, Reference Document, 2011.

The survey found that a large majority of National Societies were providing some form of humanitarian services to migrants. However, not all had developed programmes specifically targeting migrants; in many cases migrants were just included in general humanitarian support. Activities were implemented in a broad range of contexts and at all stages of the migration process, e.g. with regard to asylum-seekers and boat arrivals in reception centres, returnees before and after return, resettled refugees, unaccompanied and separated children, and victims of trafficking. Services ranged from emergency basic needs assistance (food, shelter, non-food items) to health care, psychosocial support, provision of information, legal counselling and referrals, to restoring family links (RFL), which aims at preventing family separation and assisting individuals in reconnecting with separated family members.

Despite these advances, the report published ahead of the 2011 International Conference identified several challenges to be addressed by the Movement. In particular, significant barriers continued to prevent National Societies from accessing people at all stages of the migratory experience. Irregular migrants were of particular concern, as many of them were lacking access to even the most basic services, partly due to their irregular status. It was noted that the increasing use of deterring and *non-entrée* policies to avert the arrival of persons on the territory of a State (e.g. visa requirements, carrier sanctions, interception, offshore processing, detention, deportation or readmission agreements) significantly compounded the vulnerability of migrants and affected the ability of National Societies to provide humanitarian and protection services. Discrimination, xenophobia and stigmatization of migrants may also make it more difficult for those in need to access assistance.

Adopted in December 2011 at the 31st International Conference in Geneva, Resolution 3[75] emphasized in particular the need to ensure that relevant laws and procedures are in place to ensure that National Societies enjoy effective and safe access to migrants without discrimination and irrespective of their legal status, as well as the need to ensure that national procedures at international borders include adequate safeguards to protect the dignity and ensure the safety of migrants. Resolution 3 also stressed the importance of activities aimed at promoting respect for diversity and social inclusion of migrants. The elements identified in Resolution 3 have become priorities for the IFRC and National Societies in the field of migration, as illustrated by the broad variety of activities implemented worldwide in recent years.

Ensuring that migrants, particularly those in an irregular situation, have access to basic services is a key aspect of the work of National Societies. For instance, building on the presence of National Societies along the migratory trails as well as on the global network of Red Cross and Red Crescent volunteers, innovative and proactive initiatives have been taken in many countries to address what remains one of the main challenges in this field – that is, the fact that a large proportion of those concerned are on the move, and most often in

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75 31st International Conference, Resolution 3, "Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion", Geneva, 2011.

surreptitious and clandestine ways, which makes it difficult for humanitarian organizations to have access to them. Such innovative initiatives include the establishment of "safe spaces" – centres run by National Societies and aimed at offering essential services to irregular migrants in a safe environment – and the deployment of mobile units in some countries of transit and destination to reach out to irregular migrants. It is especially in these kinds of cases that National Societies, supported by the IFRC, can exploit their comparative advantages to benefit those in need.[76] The range of services offered varies according to contexts and needs, from the mere provision of information to more comprehensive programmes covering food, shelter, information, RFL and legal aid.

Humanitarian diplomacy has also become an integral part of the IFRC's approach in the field of migration, with the organization representing National Societies at the international level in various forums where migration-related issues are discussed. Some of the priorities in this regard are to ensure that adequate standards to protect the dignity and safety of migrants are included in States' policies and to remind States of their obligations under international law, including when it comes to access to basic humanitarian services for migrants, including irregular migrants.

Moreover, National Societies have considerably expanded and adjusted their programmes related to the promotion of social inclusion in countries of destination and transit, but also in countries of origin in the context of reintegration. With their local anchorage, many National Societies have developed programmes to combat xenophobia and racism, sensitize local communities to the humanitarian needs of vulnerable migrants and displaced persons, assist people in their integration into the host community and promote opportunities for positive interactions between communities. In other words, National Societies not only support the integration of people by helping them to secure their basic needs, but in some contexts also contribute to their full integration – socially, culturally and economically – into receiving societies.

In 2015, the progress report on the implementation of Resolution 3 for the period 2011–15 noted some improvements in these areas, while recognizing that much remained to be done to secure unhindered access to migrants and to address the increase in xenophobia and racism in some communities.[77] The 2015 Council of Delegates Resolution 7[78] as well as the 2017 Council of Delegates

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76 Such comparative advantages include a local presence through its numerous branches and 14 million volunteers supported by an international network; privileged access to vulnerable populations based on trust in the Red Cross and Red Crescent emblem; privileged status with national authorities who may permit National Societies to work with populations that other humanitarian actors may not be permitted to work with; opportunities for direct advocacy by National Societies with their governments and with local authorities; an approach based on universally recognized Fundamental Principles; and the richness and diversity of experiences within the 191 National Societies that can inspire and strengthen further migration-related programmes.

77 32nd International Conference, *Implementation of Resolution 3 of the 31st International Conference, "Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion": Progress Report (2011–2015)*, 32IC/15/15, October 2015.

78 Council of Delegates, Resolution 7, "Movement Statement on Migration: Ensuring Collective Action to Protect and Respond to the Needs and Vulnerabilities of Migrants", Geneva, 2015.

Resolution 3, adopted in Antalya, Turkey, reaffirmed the commitments made in 2011 while calling on the Movement to scale up its efforts to assist and protect migrants without discrimination and irrespective of their legal status.[79]

The IFRC's increasing support to National Societies in the field of migration

Despite numerous resolutions adopted over the past decade, migration (as opposed to displacement) has long been considered by many, including within the Movement, as a separate issue compared to the Movement's work in the context of emergency, be it in situations of conflict or in situations of natural disasters. However, this perception changed with the upsurge in arrivals of migrants and refugees to Europe, with National Societies called upon to play a significant role in the humanitarian response in many countries across the continent.

In order to support the response in Europe while extending the work further upstream along the migratory routes and providing a clear strategic framework for National Societies – notably in North and Sub-Saharan Africa – the IFRC mobilized a Migration Coordination Cell, including twenty-five National Societies from Europe, Africa, Middle East and North Africa, to develop a response plan, in close collaboration with the ICRC, that would provide a clear strategic framework for National Societies.[80] The so-called "Mediterranean Response Plan" was presented in September 2015 at a partnership meeting held in Tunis with an initial focus on the situation in the Mediterranean and neighbouring regions. At the meeting, the IFRC also released the "Tunis Commitment to Our Shared Humanity",[81] which calls on the public and decision-makers to strengthen collective efforts to save lives and ensure the safety and well-being of migrants. The Mediterranean Response Plan identified specific humanitarian strategies, activities and partnerships that were being developed across the Movement and which formed the basis of a coordinated approach to the protection and assistance of vulnerable migrants, taking into account the roles and mandates of other organizations such as UNHCR and the International Organization for Migration (IOM). As part of this plan, the IFRC committed to enhancing support to National Societies along the migratory routes in their efforts to respond to the vulnerabilities of those concerned through three main areas of response: assistance, protection, and public awareness and promotion of respect for diversity, non-violence and social cohesion.

In addition, the IFRC has been able to support the development of regional migration frameworks and strategies inspired by the Mediterranean Response Plan in several other regions. The Red Cross and Red Crescent European Migration

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79 Council of Delegates, Resolution 3, "Movement Call for Action on the Humanitarian Needs of Vulnerable Migrants", Antalya, 10–11 November 2017.

80 IFRC, *A Response Plan to Meet the Humanitarian Needs of Vulnerable Migrants: A Movement Coordinated Approach Focusing on the Mediterranean and Neighbouring Regions*, 2016.

81 IFRC, *Tunis Commitment to Our Shared Humanity: Responding to the Needs of Migrants and Building Their Resilience: A Pressing Humanitarian Imperative*, 2015.

Conference held in London in February 2016 led to the development of the European Framework for Migration,[82] which guided the collective action of National Societies in Europe in assisting vulnerable migrants from their entry into Europe to their final destination countries. A regional meeting on the theme "Mobilising the Movement: Humanitarian Responses to Migration", organized in Kuala Lumpur in April 2016, led to the development of a Migration and Displacement Plan 2017–2020 with the support of National Societies from the region. In the Americas, the IFRC and ICRC, together with twenty-five National Societies from the Americas region, adopted in November 2016 a Movement declaration outlining ten key deliverables that participants to the meeting committed to turn into action.[83] Based on the experiences and priorities of the National Societies concerned, these regional initiatives reflect the specificities of each region, e.g. social inclusion and family reunification in Europe, climate-related displacement and labour migration in Asia-Pacific, and people fleeing violence and poverty in Latin America.

With migration now being included as one of its main priorities, or "areas of focus",[84] the IFRC developed its first Global Migration Strategy[85] in early 2017, which was endorsed by the IFRC General Assembly in November 2017. Building on the regional frameworks, the Strategy reflects a coordinated approach and articulates the IFRC's and its National Societies' core strengths and common purpose on migration, setting out aims and objectives to be achieved over a five-year timeframe from 2018 to 2022. Five priorities were identified to form the basis of the Strategy over the coming years: greater and more consistent IFRC action on migration through strategic attention, understanding of vulnerabilities and response to needs; stronger IFRC action along migratory trails to reduce risks and address needs; greater focus on the most vulnerable and marginalized, ensuring that services are accessible and acceptable and establishing dedicated programming where necessary; increased impact of advocacy and humanitarian diplomacy with governments, in particular through strategic use of the National Societies' role as auxiliaries to public authorities; and strengthened partnerships both within and outside the Movement.[86]

While the Global Migration Strategy captures more specifically the priorities and activities of the IFRC in the field of migration, it is envisaged as a "stepping stone" towards a future Movement migration strategy that would incorporate the work of the ICRC in the fields of RFL, detention and, more broadly, protection.[87] In the meantime, the IFRC will work closely with National Societies to ensure the operationalization of the Strategy by ensuring that they

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82 IFRC, *European Migration Framework*, 2016.
83 Regional Meeting on the Role of the Red Cross Movement and Migration in the Americas (Toluca Declaration), Toluca, Mexico, 7–8 November 2016.
84 See, in particular, IFRC, above note 73.
85 IFRC, *IFRC Global Strategy on Migration 2018–2022: Reducing Vulnerability, Enhancing Resilience*, 2017, available at: media.ifrc.org/ifrc/wp-content/uploads/sites/5/2017/12/IFRC_StrategyOnMigration_EN_20171215.pdf.
86 For more details on the priorities and aims set out in the Strategy, see *ibid.*
87 *Ibid.*, pp. 14, 15.

integrate migration into their strategic planning, by building their capacities to provide relevant services to migrants in need, by supporting the development of regional and trans-regional networks, and through the development of timely evidence- and rights-based advocacy to support migrants.

The case for a differentiated approach to migration and displacement issues

According to UNHCR, the current number of forcibly displaced persons globally is the highest since the aftermath of the Second World War, with 25 million refugees and asylum-seekers and more than 40 million IDPs who have fled conflicts, violence and persecution.[88] Moreover, it is estimated there were 24.2 million new displacements caused by disasters, including drought, floods and earthquakes, during 2016.[89] It is expected that climate change will increase displacement of people in the future.

In spite of the many resolutions adopted by the Council of Delegates and the International Conference on this issue, there is little technical and policy guidance available regarding the work of National Societies in the field of displacement, apart from the existing Movement Policy on Internal Displacement. Given the fact that displacement is likely to remain one of the main humanitarian challenges in the future, and given also the increasing protracted nature of displacement,[90] the IFRC has committed to increasing its support to National Societies in this area.

The limits of the IFRC Migration Policy when it comes to displacement

Considering its deliberately "broad" approach, the IFRC Migration Policy is often considered to be the main guidance for National Societies when it comes to their work with people on the move in general. However, the precise scope of the Migration Policy when it comes to refugees, IDPs and other types of displaced persons (e.g. people displaced across borders as a consequence of a natural disaster or climate change) gives room to interpretation – more so if one takes a closer look at the document while taking into consideration the discussions within the Movement over the past three decades. As mentioned above, the IFRC Migration Policy was adopted in a specific context when it was felt that National Societies needed a strong mandate to work in favour of all migrants, including irregular migrants; it was not intended to provide comprehensive guidance in the context of displacement.

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88 UNHCR, *Global Trends: Forced Displacement in 2016*, Geneva, 2017.
89 Internal Displacement Monitoring Centre, *Global Report on Internal Displacement*, Geneva, May 2017, p. 31.
90 See World Bank, *Addressing Protracted Displacement: A Framework for Development–Humanitarian Cooperation*, December 2015.

The interpretation proposed above is supported in particular by the Principle 9 of the Migration Policy ("Respond to the Displacement of Populations"), which explicitly "keeps migration distinct from displacement, as two separate, if interrelated, 'families of concern'".[91] Principle 9 reads as follows:

> Armed conflicts and violence, natural or man-made disasters, but also development or relocation schemes can force populations to leave their homes, leading to accelerated and collective, even massive movements. The displaced populations might seek assistance and protection within their own country, or might find refuge across international borders. Displacement of populations and migration of individuals and groups are distinct but often interrelated phenomena; where they are interrelated, National Societies will strive for a coordinated action that covers both the displaced and the migrants.[92]

This principle makes the link between numerous resolutions that had been adopted by the Movement on refugees, IDPs and other displaced persons prior to the adoption of this policy, while recognizing the distinct character and vulnerabilities of "the displaced", including refugees and IDPs, compared to "the migrants".

While the difference between migration and displacement is not clearly articulated in the document, displacement is typically triggered by a set of "objective" and more or less sudden phenomena, such as conflict and natural disasters, that would force large groups of people to leave their homes in a precipitated way. Although they lack suddenness, the movements of people triggered by situations of protracted conflicts or slow-onset natural disasters can also be categorized as forms of displacement.

The difference between migration and displacement is particularly significant with regard to possible actions on the so-called "root causes" in the countries of origin. Principle 10 of the Migration Policy ("Alleviating the Migratory Pressures on Communities of Origin") makes a distinction between the "displacement of population" triggered by armed conflict on the one hand, and migration induced by "social and economic distress", by "the lack of services and prospects for development" or by "environmental degradation" on the other.[93] In the latter case, National Societies and the IFRC could play a role through programmes that have more to do with development than humanitarian relief, such as the creation of income-generating activities, programmes for food activities, or programmes for health and education. The Migration Policy makes clear, however, that in doing so National Societies must not seek to encourage, prevent or dissuade migration, although they may carry out activities aimed at sensitizing potential migrants about the risks of migration. Principle 7 of the Migration Policy states that "as a matter of principle, National Societies must not seek to *prevent* migration: Whether to migrate or not is a personal decision".[94]

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91 T. Linde, above note 7, p. 575.
92 IFRC Migration Policy, above note 5, Principle 9.
93 *Ibid.*, Principle 10.
94 *Ibid.*, Principle 7 (emphasis added).

The approach of the Movement is completely different in the case of displacement, and it can hardly be said that people displaced because of an armed conflict or a sudden-onset natural disaster leave of their own free will. The prevention of displacement, e.g. through measures aimed at addressing the root causes, has indeed been a key aspect of the work of the Movement. This was recognized by several International Conference resolutions regarding the role of the Movement, especially that of the ICRC when it comes to ensuring respect for international humanitarian law as a means of preventing displacement.[95] It is also a crucial aspect for the IFRC and National Societies in the context of disaster risk reduction and disaster preparedness. For instance, the Movement Policy on Internal Displacement emphasizes the importance of "prevention" and states that the Movement must "seek to prevent displacement while recognizing people's right to leave of their own accord".[96] Developing the capacities of the Movement to prevent all forms of displacement, including cross-border displacement, in a more systematic and effective way is of primary importance.

The need for more guidance to National Societies on how to address the specific vulnerabilities and needs of displaced persons

The Movement Policy on Internal Displacement, with its ten principles,[97] provides some guidance on the Movement's work in the field of displacement, although its scope is specifically limited to internal displacement. It is a particularly important document for the Movement, but it has not achieved the same prominence as the Policy on Migration for the IFRC and its National

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95 See, for instance, COD Resolution 9, above note 11; COD Resolution 7, above note 13; Resolution IV, above note 17; COD Resolution 4, above note 20.

96 CoD Resolution 5, above note 61, Principle 3.

97 The Movement Policy on Internal Displacement notes the following ten principles: "We in the International Red Cross and Red Crescent Movement, (i) serve all those affected by internal displacement – the people actually displaced, host communities and others – and make decisions according to the most pressing needs for humanitarian services; (ii) make full use of our privileged access to communities at risk as well as to decision-makers; (iii) seek to prevent displacement while recognizing people's right to leave of their own accord; (iv) support the safe, voluntary and dignified return, relocation or local integration of IDPs, on the basis of our independent assessment of their situation; (v) seek to empower individuals and communities. We do this by ensuring their participation in the design and implementation of our programmes, by helping them to exercise their rights and by providing access to available services; (vi) coordinate with the authorities and all others concerned. Whenever necessary, we remind them of their obligations, as set out in the applicable normative framework; (vii) as National Societies and auxiliaries to our authorities, support those authorities in meeting their responsibilities in the humanitarian field as far as our resources and capacities allow and provided we can do so in full compliance with the Fundamental Principles and in keeping with the mission and Statutes of the Movement; (viii) seek to limit the extent to which we substitute for the authorities, in discharging their responsibility to meet the needs and ensure the well-being of the population within the territory under their control; (ix) give priority to operational partnerships within the Movement and strive to play our complementary roles, shoulder our responsibilities and marshal our expertise, to the full; (x) coordinate with other entities on the basis of their presence and abilities on the ground, the needs to be met, the capacities available, and the possibilities for access, while ensuring that we remain (and are perceived as remaining) true to our Fundamental Principles."

Societies, mostly due to the fact that within the Movement the work in favour of IDPs in the context of conflicts has been led by the ICRC. As a result, while it is clear that people displaced within their country because of natural disasters have always been amongst the main beneficiaries of the activities undertaken by the IFRC and National Societies, they have only rarely been labelled as "IDPs" and their specific vulnerabilities have not always been fully taken into consideration in the response.

The Movement Policy on Internal Displacement includes some elements specific to the approach in the field of displacement, in particular when it comes to the prevention of displacement. However, there are many other differences in the respective approaches to migration and displacement – both within a country and across borders – that need to be highlighted. For instance, in many cases it is clear from the outset that displaced persons will not have the possibility of going back to their country or place of origin. This has significant programmatic implications for humanitarian organizations, in particular in terms of shelter or in terms of housing, land and property programmes, but also in terms of humanitarian diplomacy. Indeed, displaced persons may need protection from the circumstances they have fled in the first place, including a guarantee that they will not be returned to a place where their lives or security may be at risk (the so-called principle of *non-refoulement* when referring to cross-border movements).

People forced to flee their homes are most likely to be in dire need since they have often been brutally pushed out of their usual environment, which directly threatens their ability to meet their most basic needs. They may also be displaced for a long period of time, in which case they may need support and assistance over the longer term in the form of shelter, food and medical aid, amongst other services, coupled with measures aimed at ensuring their self-sufficiency. While cash transfer programming is an increasingly important tool for addressing some of the needs of displaced persons (with many programmes carried out in favour of refugees, for instance), it remains much more sensitive in the context of migration. Moreover, those who have been displaced will most likely need assistance in locating members of their families from whom they have been separated, while migrants may not wish to have their families informed of their whereabouts – e.g. in the case of irregular migrants who may fear that re-establishing contact with family members might put them at risk.

Displaced persons also need assistance in bringing their displacement to an end. It can be assumed that in most cases, displaced persons wish to go back to their place of origin, as they have been compelled to leave their home, and thus one of the objectives of the response should be to avoid long-term dependence and facilitate a return to their normal life as soon as conditions permit. This is not always the case, however, and other solutions must be explored, such as settling in a new place or, for some refugees, resettlement in a third country. National Societies are potentially in a position to provide the support needed in these kinds of situations, including in the context of voluntary repatriation for refugees, which in some circumstances

may be the most appropriate durable solution provided that certain conditions are met.[98]

When it comes to migration, however, the approach is different. While migrants may need support in terms of integration and social inclusion, for a large majority of them the issue is not about finding a "durable solution" as in theory they have the possibility of returning to their countries. The IFRC Migration Policy also makes it clear that National Societies must not seek to promote or encourage the return of migrants. Assisting migrants in returning is possible, but under strict conditions in line with the Fundamental Principles of the Movement.[99] In particular, National Societies should only be concerned with the returnees' own needs and interests; they should not be part of government schemes to promote or encourage the return of migrants, nor should they be associated with the enforcement of a State's decision to remove a migrant.[100]

National Societies are often at the forefront of the response to situations of displacement, with refugees and displaced persons making up a large proportion of the people assisted. Through its presence in every country, the Movement is able to provide support to a significant proportion of displaced persons at all stages of displacement: from preventing displacement in the first place, to providing protection and assistance when displacement does occur, to helping people to return to their homes and reintegrate there or integrate in any other place. Considering the importance of displacement, and that the phenomenon is likely to increase in the near future, there is a need to get a better understanding of specific programmatic aspects related to different forms and stages of displacement; this is so for both IDPs and those who cross borders, as both groups often face similar risks and deprivations. This is a necessary condition in order to ensure that the IFRC and its National Societies are better equipped to respond to such situations in a more effective manner. In particular, much more needs to be done to provide guidance to National Societies in the context of climate-change-induced displacement, disaster-induced cross-border displacement, displacement in urban areas, or in protracted situations. The role of families and communities must also be considered, as they often share their own resources with displaced persons and are therefore also affected by displacement. It is important that National Societies not only support families and local communities but also help them play their key role in mitigating the effects of displacement.

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98 See UNHCR, *Handbook on Voluntary Repatriation: International Protection*, Geneva, 1996.

99 30th International Conference, Resolution 2, "Specific Nature of the International Red Cross and Red Crescent Movement in Action and Partnerships and the Role of National Societies as Auxiliaries to the Public Authorities in the Humanitarian Field", Geneva, 26–30 November 2011. This concerns in particular the principle of impartiality (see above note 50) and the principle of independence. The principle of independence states that "National Societies, while auxiliaries in the humanitarian services of their governments and subjects to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement". See IFRC, above note 50.

100 IFRC, "Advisory Note: Action to Assist Migrants in Return", Supplementary Guidance on the Policy on Migration, available at: www.ifrc.org/PageFiles/89397/new-docs/Advisory%20Note%20Return_EN.pdf.

Conclusion

The importance of migration and displacement for the IFRC and National Societies is reflected in the increasing number of emergency appeals covering "population movements"[101] as well in the growing number of people who benefit from IFRC-backed National Society support. While it remains difficult to get precise figures regarding the number of IDPs that have been assisted, more than 9 million migrants, refugees and members of host communities were supported in 2017,[102] a substantial increase compared with 7.4 million people in 2016.[103] Moreover, National Societies – with or without the support of the IFRC – are by far the main implementing partners of international organizations such as UNHCR, the IOM and the World Food Programme, with approximately thirty-five to forty partnerships with each of these organizations at the country level.

      The IFRC has always promoted an approach based on humanitarian needs first, but its approach remains informed by rights and acknowledges the specific vulnerabilities and needs of certain categories of persons. In particular, as the analysis above suggests, the distinction between so-called displaced persons (be it within or across borders) and migrants has long structured the approach of the Movement. In practice, indeed, National Societies have mostly responded – and continue to do so – to situations where people have been forced to flee their homes due to natural or man-made disasters. While it may be true that the distinction between migration and displacement is increasingly blurred in contemporary migratory flows, it is the view of the present authors that this distinction remains fundamental and must be taken into consideration by humanitarian actors in programming. This is what prompted the IFRC to redefine the role and scope of its Migration Unit, which has recently become the Migration and Displacement Unit. Discussions are also ongoing within the IFRC, involving different sectors and operations, aimed at acquiring a better evidence-based understanding of the specific programmatic aspects related to displacement and at finding the best ways to include a migration and displacement perspective into the work of National Societies.

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101 The IFRC defines population movements in this context as large movements of people, including migrants, refugees or IDPs, who have been forced or obliged to flee or to leave their county or places of habitual residence, or who find themselves in an extremely precarious situation at any stage of their journey, in particular – but not limited to – as a result of or in order to avoid the effects of armed conflicts, situations of generalized violence, violations of human rights or natural or human-made disasters. Such movements may involve mixed flows of people, where different categories of people with varying needs move for different reasons while using similar routes.

102 Figures taken from active and new emergency appeals and Disaster Relief Emergency Fund operations in 2017.

103 Figures from 2016 present limitations and may not reflect the entire amount of people reached during the period.

Migration and data protection: Doing no harm in an age of mass displacement, mass surveillance and "big data"

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Abstract

This article considers the key data protection challenges facing humanitarian organizations providing assistance to refugees, internally displaced persons and migrants. These challenges are particularly significant for several reasons: because data protection has come relatively late to the humanitarian sector; because humanitarian organizations are under pressure to innovate rapidly; because the global communications architecture on which many of these innovations depend is inherently vulnerable to State surveillance; and because States are deploying

increasingly sophisticated and coercive means to prevent irregular forms of migration and/or subjecting humanitarian organizations to surveillance and disruption. The first part of the article outlines the fundamental rights challenges presented by contemporary data-driven migration control paradigms. The second outlines concerns about "data-driven humanitarianism" and "mass surveillance" to show how humanitarian organizations risk inadvertently exacerbating these problems. The third assesses specific data protection challenges that humanitarian organizations face and the policies and practices they have developed in response. The article concludes with some brief observations on the technical and political dynamics shaping their efforts to comply with their legal and ethical obligations, and calls for the sector to work together to extend data protection norms and outlaw cyber-attacks by State actors.

Keywords: migration, border control, immigration, asylum, refugees, surveillance, vetting, big data, humanitarian action, data protection, privacy, human rights.

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You arrive at a refugee camp, hungry and desperate. To access food and basic necessities, you have to agree to provide biometric data – iris and fingerprint scans. Several years hence, you are living in a country which passes a new law asserting jurisdiction over data stored in the cloud by the organization that helped you. By taking your fingerprint, the security services can now find out not only your ethnicity or immigration status but your movements, consumer patterns and financial situation. In some instances the pressure is happening real-time, as data is collected. The fact that "humanitarian data" is picked up and used for purposes other than humanitarian, such as counter-terrorism or migration flow management (while understandable and important from one point of view), puts the individuals at risk of adverse, albeit potentially legitimate, consequences (such as arrest, denial of entry, etc).[1]

Introduction

This article considers the key data protection challenges faced by humanitarian organizations (HOs) providing assistance to refugees, internally displaced persons and migrants in need of support. These challenges are significant for many reasons, but four are particularly important in terms of framing this discussion. The first is the simple fact that concern for data protection has come relatively

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1   Anja Kaspersen and Charlotte Lindsey-Curtet, "The Digital Transformation of the Humanitarian Sector", *Humanitarian Law & Policy Blog*, 5 December 2016, available at: blogs.icrc.org/law-and-policy/2016/12/05/digital-transformation-humanitarian-sector/ (all internet references were accessed in August 2017).

late to the humanitarian sector. This is not to say that HOs have not taken data protection-related issues such as beneficiary consent, data accuracy and confidentiality seriously in the past – clearly these practices have long been integral, if not always universally implemented – but rather that the adoption and compliance with international data protection norms is something that the sector as a whole is only just beginning to address. Though HOs were rightly singled out by privacy advocates as having failed to keep pace with developments in privacy and data protection law,[2] galvanizing some into remedial action, it is also the case that data protection (in the sense of both a set of legal standards and a community of change) has traditionally had very little to say about humanitarian action, at least relative to other sectors.[3]

This omission is critical because the features of the emergencies or conflicts to which humanitarian actors routinely respond present formidable challenges to the practical application of key tenets of data protection. Although humanitarian action often occurs in ungoverned or ill-governed spaces, where data protection may appear the lowest of priorities, these challenges are not devoid of wider social, political or legal context. On the contrary, the backdrop to humanitarian support for migrants and refugees is a global order now characterized by as yet relentless demands for ever tighter immigration and border controls – demands which have in practice resulted in ever more sophisticated techniques of data-driven "migration management", and which have in turn presented their own range of human rights and data protection challenges. This is the second overarching issue that frames this article.

HOs must contend with the consequences of these developments, primarily as defenders of the rights and best interests of their beneficiaries, but also, and increasingly, as users of the same ("interoperable") technologies and as partners of governments with multiple interests in the data. Those that are innovating and availing themselves of the opportunities presented by "data-driven humanitarianism"[4] must also contend with a global communications infrastructure that is vulnerable to surveillance and infiltration by State and non-State actors alike. With HOs as the potential targets of the intelligence agencies of friendly as well as hostile States, the risk of "aiding surveillance" is the third key challenge considered below.

This challenge is linked to a fourth: the intrinsic "double character", to borrow an expression from Marx,[5] of the applications that are shaping

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2   Anna Crowe, "A Paucity of Privacy: Humanitarian, Development Organisations Need Beneficiary Data Protection Policies", *Privacy International*, 28 November 2013, available at: www.privacyinternational.org/node/240.

3   The 1990 UN General Assembly's Guidelines for the Regulation of Computerized Personal Data Files represent the most significant exception, but these were designed to apply early data protection principles to UN computer systems rather than human action *per se*. See UNGA Res. 45/95, 14 December 1990.

4   See, for example, Patrick Meier, "New Information Technologies and Their Impact on the Humanitarian Sector", *International Review of the Red Cross*, Vol. 93, No. 884, 2011.

5   This analogy is itself borrowed from Thomas Mathiesen, *On Globalisation of Control: Towards an Integrated Surveillance System in Europe*, Statewatch, London, November 1999, p. 1.

international mobility and aid delivery in the twenty-first century. Big data promises everything from secure borders to crime prediction to efficient targeting of aid. Access to territory and humanitarian assistance is already and increasingly shaped by policies of surveillance and social sorting, and practices of inclusion, exclusion and social control.

For HOs committed to the principle of "do no harm", all of this has critical real-world consequences: for their operations and reputations, and for the fundamental rights and safety of their beneficiaries. Data breaches in developed countries can be inconvenient or costly for those affected; for refugees and their families back home, they can be life-threatening.[6] And although data protection can appear a rather toothless counterweight to the "mass surveillance" revealed by Edward Snowden[7] or the "extreme vetting" demanded by US president Donald Trump,[8] robust data protection policies and practices are among the only tangible means that HOs have to innovate responsibly, guard against the reputational damage threatened by data loss or cyber-attack, and mitigate the formidable challenges thrown up by big data and coercive government policies.[9]

This article is divided into three main parts. The first builds on this introduction by outlining some key features of contemporary international migration control and the fundamental rights challenges they present. The second part outlines concerns about "data-driven humanitarianism" and draws on the documents released by Edward Snowden to show how HOs risk inadvertently exacerbating these problems by "aiding surveillance". Finally, in the face of too many over-simplistic and sensationalist critiques of humanitarian innovation, the third part attempts to provide a more nuanced and necessarily technical assessment of the unique data protection challenges that HOs working with migrants and refugees face, and some of the policies and practices they have developed to meet those challenges. The article concludes with some brief observations on the technical and political dynamics shaping their efforts to comply with their legal and ethical obligations, and the need for HOs to work together to extend data protection norms in the sector and outlaw cyber-attacks by State actors.

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6   A. Kaspersen and C. Lindsey-Curtet, above note 1.
7   Edward Snowden is a whistleblower who passed a tranche of intelligence documents to journalists at the *Guardian* and *Washington Post*. The documents revealed operational details about the global surveillance programmes of the United States and its Australian, British and Canadian partners, and the two newspapers won a Pulitzer Prize for their reporting.
8   Sabrina Siddiqui, "Trump Signs 'Extreme Vetting' Executive Order for People Entering the US", *The Guardian*, 27 January 2017, available at: www.theguardian.com/us-news/2017/jan/27/donald-trump-muslim-refugee-ban-executive-action.
9   On the challenges thrown up by big data, see Frank Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information*, Harvard University Press, Cambridge, MA, 2015; Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*, Penguin, London, 2016; Gry Hasselbalch and Pernille Tranberg, *Data Ethics – The New Competitive Advantage*, Publishare, Copenhagen, 2016. On the challenges of mass surveillance and coercive State policies, see Bruce Schneier, *Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World*, W. W. Norton, New York, 2015.

The securitization of international migration

In international relations theory, critical security studies and other social science disciplines, "securitization" describes the process of transforming a subject into an issue of "security".[10] Once politicized in this way, measures that were hitherto deemed excessive or otherwise unacceptable to policy-makers may be adopted and normalized in ways that would not have been possible without the recourse to insecurity, real or imagined. Though the merits and utility of "securitization" theory are much debated,[11] it is certainly difficult to conceive of more "securitized" areas of public policy than those relating to international migration, asylum and border control. Indeed, even the most seasoned of frequent travellers may be hard-pressed to recall an actually quite recent past when immigration formalities were largely administrative in nature and the body scanners that now pervade airport checkpoints were still confined to science fiction.

While migration has long been linked to survival, legal migration has always been tied to privilege and shaped by prevailing ideologies and power structures, with visa regimes and admission policies inextricable from colonialism, racism and fascism.[12] Today, the "migrant", the "refugee" and the "illegal" are collectively objectified in the political discourse and praxis of "national security" as never before. With the obvious caveat that the brief outline which follows cannot possibly hope to do justice to such a complex and highly politicized arena,[13] this section highlights the key features of an overall policy framework in which "data" is central, yet where the key tenets of data protection have been marginalized or circumvented. These features are: the conflation of border control and counterterrorism; new technologies for identity management; the worldwide proliferation of immigration controls; outsourcing and authoritarianism; enhanced security vetting; and the limited application of relevant human rights instruments.

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10 On the origins of this kind of "securitization" theory, see Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis*, Lynne Rienner, Boulder, CO, 1998.

11 See Columba Peoples and Nick Vaughan-Williams, *Critical Security Studies: An Introduction*, Routledge, New York, 2010.

12 See Liz Fekete, "The Emergence of Xeno-Racism", *Race & Class*, Vol. 43, No. 2, 2001; Steve Cohen, *Standing on the Shoulders of Fascism: From Immigration Control to the Strong State*, Trentham Books, London, 2002; Liz Fekete, *A Suitable Enemy: Racism, Migration and Islamophobia in Europe*, Pluto Press, London, 2009; Marjory Harper and Stephen Constantine, *Migration and Empire*, Oxford University Press, 2010; Lili Eskinazi, "European Immigration: A Colonial Legacy?", *Alternatives International Journal*, 31 October 2011, available at: www.alterinter.org/spip.php?article3694.

13 This article does not seek or claim to provide a theory of either surveillance or migration control. It should also be stressed that surveillance may be a byproduct of as well as a motivation within the myriad national and international policies that have been introduced in this area. Similarly, the lack of attention in this article to other factors driving developments in this area – such as migration patterns, domestic politics, technological advances and the bureaucratic impulse to enhance efficiency – does not signify any belief that they are unimportant. Lastly, immigration controls are not the same everywhere; there may be a clear direction of travel but the path is characterized by "disjointed incrementalism", a term that is credited to political scientist Charles E. Lindblom's 1959 essay "The Science of 'Muddling Through'", *Public Administration Review*, Vol. 19, No. 2, 1959.

The migration–terror nexus

The first of these features is the conflation of immigration control with counterterrorism after the terrorist attacks in the United States on 11 September 2001. Regardless of any statistics demonstrating the "home-grown" terror threat to be more significant than that posed by migrants,[14] or the probability that in the United States one is more likely to be killed by a policeman or a toddler than a terrorist,[15] the border is now widely perceived as the first and most important line of defence against terrorism. As George W. Bush, then president of the United States, put it in 2002: "We need to know who is coming into our country, why they're coming into our country, and whether or not they're leaving our country when they say they're going to be leaving our country."[16] This assertion characterized a new orthodoxy to which all policy debates about border control could be, and inevitably were, effectively reduced.

Such discourse was by no means limited to the United States. Among the first legislative responses of the European Union (EU) to the attacks of 9/11 was a common position on combating terrorism requiring member States to vet all asylum-seekers for connections to terrorist groups before granting refugee status,[17] itself modelled on the non-binding provisions of a United Nations (UN) Security Council resolution on the same topic.[18] In the fifteen years that have followed, travellers of every stripe have been subject to ever more sophisticated attempts to vet and profile them in order to assess and mitigate the risks they are perceived to present. This has paved the way for the "extreme vetting" now demanded by the current US government (see further below).

Identity management

The second feature is a corollary to the first. Attempts to control migration through the plethora of measures that have been adopted since 9/11 have coalesced around techniques of identity management centred on the deployment of biometric identification systems. From an initial emphasis on ensuring – via a unique biometric identifier[19] – that the holder of a travel document was the person to

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14 Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, Cato Institute, Policy Analysis No. 798, Washington, DC, 13 September 2016.

15 Gary Younge, "Trump Fears Terrorists, but more Americans are Shot Dead by Toddlers", *The Guardian*, 8 February 2017, available at: www.theguardian.com/commentisfree/2017/feb/08/trump-muslim-terrorists-gun-violence-america-deaths.

16 Adam Entous, "Bush to Seek New Powers in Homeland Security Plan", *Reuters*, 15 July 2002.

17 Council Common Position of 27 December 2001 on Combating Terrorism, *Official Journal of the European Communities*, 2001/930/CFSP, 27 December 2001 (OJ 2001 L 344/90), Art. 16.

18 UNSC Res. 1373, 28 September 2001, Art. 3(f).

19 Most biometric systems used for border and immigration controls use digitized photographs, fingerprints or iris scans, or a combination of two of these identifiers. Biometric profiles are entered into population databases and/or stored in radio-frequency identification chips attached to travel documents issued by States. Once enrolled, the identity of individuals can be checked against the database or the travel document. The only biometric mandated by the International Civil Aviation Organization, which sets global standards for air travel, is the digitized photograph.

whom it was issued, these identity management systems are now being integrated into wider law enforcement and surveillance apparatuses. And although the mandatory fingerprinting of citizens remains a (fading) redline in some countries with a civil liberties tradition, such as the United Kingdom and United States, biometric profiling is being widely deployed across the world and has fast become the norm for "non-citizens" and "aliens", regardless of those traditions.[20]

Today, biometric profiling is part and parcel of border control worldwide, but as these systems have developed, so too have their capabilities. So-called "smart border systems" can be used to track individuals across territories,[21] while the databases that house the biometrics have been opened up to national security and law enforcement agencies.[22] Whereas authorized travellers appear to have accepted biometric profiling as a condition of their passage (of course, it is not as if they have a choice), the use of biometrics in more coercive situations – for example in respect to the determination of State responsibility for asylum and expulsion policy in the EU – has led to horrific stories of refugees and migrants mutilating their fingertips to avoid immigration enforcement measures.[23] In response, States have begun to criminalize failure to provide fingerprints to immigration officers.[24] Though the symbolism is striking, the reality is that ever tighter attempts to prevent irregular migration have long developed in symbiosis with ever more "extreme" attempts to evade them.

The global proliferation of immigration controls

This phenomenon is also reflected in the transfer of migration control techniques from destination countries to countries of origin and transit, which occurs through technical assistance, migration management deals and aid-and-trade packages. These measures take various forms, from the imposition of so-called

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20 The decision to biometrically profile all asylum-seekers and irregular migrants in the EU in fact long pre-dates 9/11, with legislation proposed in 1995 and finally adopted in 2000. After 9/11, the EU decided that mandatory fingerprinting should also be introduced for all visa applicants, all visa-exempt third-country nationals entering the EU, all legally resident third-country nationals, and all EU passport holders (the UK opted out of this decision). See Kjetil Rommetveit, "Introducing Biometrics in the European Union: Practice and Imagination", in Ana Delgado (ed.), *Technoscience and Citizenship: Ethics and Governance in the Digital Society*, Springer, Cham, 2016.

21 See Ben Hayes and Mathias Vermeulen, *Borderline: The EU's New Border Surveillance Initiatives – Assessing the Costs and Fundamental Rights Implications of EUROSUR and the "Smart Borders" Proposals*, research study, Heinrich Böll Foundation, Berlin, 2012.

22 In the EU, for example, every major immigration and asylum database (including the Schengen Information System, Eurodac System, Visa Information System and proposed "smart borders" system) has seen the primary legislation later amended to provide access for security and intelligence services. See Costica Dumbrava, "European Information Systems in the Area of Justice and Home Affairs: An Overview", *European Parliamentary Research Service*, May 2017, available at: www.europarl.europa.eu/RegData/etudes/IDAN/2017/603923/EPRS_IDA(2017)603923_EN.pdf.

23 See, for example, Graeme Culliford, "I've Burned off Tips of My Fingers to Get to UK", *The Sun*, 14 June 2014, available at: www.thesun.co.uk/archives/news/900339/ive-burned-off-tips-of-my-fingers-to-get-to-uk/.

24 See EU Fundamental Rights Agency, *Fundamental Rights Implications of the Obligation to Provide Fingerprints for Eurodac*, Vienna, May 2015.

"pre-frontier checks" and readmission obligations to policy and technology transfers, often facilitated by intergovernmental organizations.

While it might be assumed that stronger immigration controls have simply gone hand-in-hand with development and modernity, as richer countries have gradually sought to prevent or control migration from poor ones, the world's richest countries have also very deliberately exported them. Their motivation is twofold: firstly, to enlist support and build capacity in countries of origin and transit of migrants and refugees in order to prevent undocumented migrants from reaching the territories of those wealthier States which do not want them to arrive – and expeditiously returning those that do manage this feat (the EU– Turkey refugee deal being the starkest example of the pursuit of this policy[25]); and secondly, to facilitate the collection of data on inbound travellers and to gather intelligence on other persons of interest. The EU and its member States have been most active in this area, providing technical assistance to a range of countries in central and eastern Europe, North and West Africa, the Middle East and, at the height of the refugee "crises" that armed conflict always produces, countries as far afield as Sri Lanka.[26] This assistance has covered everything from immigration and asylum systems to border control infrastructure, the training of immigration officers and border guards, detention centres and information campaigns advising against unauthorized emigration. It has even – contrary to the free-movement provisions in the UN Declaration on Human Rights – encompassed the most coercive of measures to prevent "unauthorized exit".[27]

The United States has also provided a great deal of technical assistance in this area, including the technology and funding for immigration control systems in countries such as Afghanistan, Cambodia, Ethiopia, Ghana, Kenya, the Maldives, Pakistan, Tanzania and Yemen.[28] According to one government minister on the receiving end of this largesse, the rationale is to provide "a door for American influence" by allowing the United States to locate foreign nationals whenever it wishes.[29] Regardless of motivation, and as will be discussed further below, the intrinsic relationship between border control, identity management and national

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25 Council of the European Union, "EU-Turkey Statement", Press Release No. 144/16, 18 March 2016.

26 See Ben Hayes, Steve Wright and April Humble, "From Refugee Protection to Militarised Exclusion: What Future for 'Climate Refugees'?", in Nick Buxton and Ben Hayes (eds), *The Secure and the Dispossessed: How the Military and Corporations Are Shaping a Climate-Changed World*, Pluto Press, London, 2015.

27 European States have, for example, supplied armed vessels to the Libyan Coastguard. See Maurizio Albahari, *Crimes of Peace: Mediterranean Migrations at the World's Deadliest Border*, University of Pennsylvania Press, Philadelphia, 2015, p. 88. See also Maggie Michael, "Backed by Italy, Libya Enlists Militias to Stop Migrants", *Associated Press*, 29 August 2017, available at: www.apnews.com/ 9e808574a4d04eb38fa8c688d110a23d. The Universal Declaration of Human Rights states that "[e] veryone has the right to leave any country, including his own"; see Universal Declaration of Human Rights, 217 A (III), 10 December 1948, Art. 13(2).

28 See Ben Hayes and Roch Tassé, "Control Freaks: 'Homeland Security' and 'Interoperability'", *DifferenTakes: A Publication of the Population and Development Programme at Hampshire College*, No. 45, Spring 2007.

29 Former Maldives Minister of State for Defence and National Security Ilyas Hussain Ibrahim, cited in Gus Hosein and Carly Nyst, *Aiding Surveillance*, Privacy International, London, 2013, p. 55, available at: www. privacyinternational.org/node/310.

security means that this kind of technical assistance frequently raises human rights concerns that are rarely discussed by donors or recipients.

Responsibilization, privatization and authoritarianism

In addition to the thinly veiled attempts by rich countries to outsource their responsibility for refugees and asylum-seekers to poorer ones, contemporary immigration controls are characterized by the growing involvement of the private sector in their domestic and international enforcement.[30] EU States, for example, have imposed legal obligations on transport companies that make them responsible for preventing the arrival of undocumented or inadequately documented passengers. From airlines to lorry drivers, the failure to prevent the passage of unauthorized travellers frequently results in hefty fines known as "carrier sanctions".[31] Scandalously, the predilection for private actors to go to the aid of migrant boats in distress has been similarly restricted by threats and prosecutions for those electing to rescue anyone other than those at an immediate risk of drowning.[32]

More generally, as States have come to depend more heavily on large-scale computer systems and surveillance technology, the private sector has become more invested in the development and implementation of immigration and border control policy. The defence and technology sectors have profited most from these arrangements, with the major defence contractors now earning significant parts of their revenue from their diversification into all things "homeland security".[33] In addition to the massive contracts on offer for border fortification and wide-area surveillance, privatization in the field of criminal justice has seen the private sector gain an increasing foothold in areas such as immigration detention and the enforcement of expulsion policy.[34] Inevitably, the corporatization of border control and immigration enforcement puts efficiency and profit ahead of other values and interests, such as accountability and human rights protection.

Finally, the obligations that have been imposed on the transport sector have been steadily expanded into other areas of public and private life, with landlords, employers, banks, universities, schools and health service workers increasingly subject to statutory obligations to police their clientele by checking their immigration status – again with heavy penalties for dereliction of duty. The growing instrumentalization of public and private actors in the "fight" against illegal

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30 See Thomas Gammeltoft, "The Migration Control Industry", in Rita Abrahamsen and Anna Leander (eds), *Routledge Handbook of Private Security Studies*, Routledge, London, 2016.
31 See Sophie Scholten, *The Privatisation of Immigration Control through Carrier Sanctions*, Brill, Leiden, 2015.
32 See Maarten den Heijer, "Frontex and the Shifting Approaches to Boat Migration in the European Union: A Legal Analysis", in Ruben Zaiotti (ed.), *Externalizing Migration Management: Europe, North America and the Spread of "Remote Control" Practices*, Routledge, London, 2016. See also Irini Papanicolopulu, "The Duty to Rescue at Sea, in Peacetime and in War: A General Overview", *International Review of the Red Cross*, Vol. 98, No. 902, 2016.
33 See Mark Akkerman, *Border Wars: The Arms Dealers Profiting from Europe's Refugee Tragedy*, Transnational Institute, Amsterdam, 2016, available at: www.tni.org/en/publication/border-wars.
34 See reports and website of the Global Detention Project, available at: www.globaldetentionproject.org/.

immigration, which has not been accepted uncritically,[35] has important implications for organizations committed to non-discrimination and universal human rights.

Extreme vetting

The four features outlined above all feed into an overarching fifth: the agglomeration of personal data in order to vet, profile and ultimately categorize travellers and migrants into the legitimate and the suspicious, the deserving and the undeserving, the entitled and the excluded, and so on. As noted above, 9/11 was very much the catalyst for this drive, as the rules were tightened first for refugees and asylum-seekers, then for visa applicants, then for visa-exempt travellers.

The means through which all of this has been achieved include the introduction of biometric visas, where applicants are enrolled and vetted at the time of their application;[36] the introduction of passenger name record (PNR) disclosure regimes and advance passenger information (API) systems, under which law enforcement and security agencies receive detailed information on travellers before their journeys have begun;[37] and Electronic Systems for Travel Authorization, developed to pre-screen travellers before they are allowed to board an inbound carrier.[38] The vetting that takes place occurs largely in secret but is known to include checks to ensure that travellers meet entry criteria and have not previously fallen foul of immigration laws, and screening against national security and counterterrorism databases such as "no-fly" lists, "watch lists", sanctions lists and foreign policy lists.[39] Data is also routinely shared with other States, for example through the Schengen, "Five Eyes" and other bilateral and multilateral security cooperation frameworks.[40]

While the European tabloid press has struggled to come to terms with the idea that one could both own a smartphone and be in need of refugee protection,[41]

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35 Medical professionals and university staff are among those who have resisted or refused to engage in such checks where they have been legislated for. See, for example, Miranda Wilson, "Academics Refuse to Police Immigration", *Institute of Race Relations News*, 13 May 2009, available at: www.irr.org.uk/news/academics-refuse-to-police-immigration/.

36 For instance, this is the case with the EU Visa Information System.

37 Australia pioneered the use of API systems, while under EU law the security and intelligence agencies have access to the passenger data (PNR) held in European airline reservations databases.

38 The United States operates a travel authorization system, while the EU plans to introduce one.

39 For an explanation of how these systems are supposed to work, see UK House of Commons, Committee of Public Accounts, "E-Borders and Successor Programmes", 27th Report of Session 2015–16, London, 2016. See also Julien Jeandesboz, Didier Bigo, Ben Hayes and Stephanie Simon, *The Commission's Legislative Proposals on Smart Borders: Their Feasibility and Costs*, PE 462.613, European Parliament, Brussels, 2013.

40 States party to the Schengen Convention pool data on persons to be refused entry or subject to surveillance checks via the Schengen information system, and exchange supplementary data through the "Sirene network". "Five Eyes" refers to a post-war intelligence alliance comprising Australia, Canada, New Zealand, the UK and the United States. In 2009, these countries adopted a "Five Country Conference Data-Sharing Protocol" for biometrics (unpublished). Interpol, the International Police Office, also facilitates the exchange of data used in border control.

41 See James O'Malley, "Surprised that Syrian Refugees Have Smartphones? Sorry to Break this to You, but You're an Idiot", *The Independent*, 7 September 2015, available at: www.independent.co.uk/voices/comment/surprised-that-syrian-refugees-have-smartphones-well-sorry-to-break-this-to-you-but-youre-an-idiot-10489719.html.

European governments have seized upon the opportunity to introduce some "extreme vetting" of their own by aping the seizures of such devices by US and Israeli border guards.[42] In early 2017, Denmark and Norway produced draft proposals to confiscate smartphones from refugees at the point of registration and to use the data they contain to assess both the security threat that the asylum-seeker poses and the credibility of their asylum claims.[43] The proposals, which raise substantial concerns about asylum procedures, represent an unparalleled intrusion into the private lives of persons seeking asylum.

Privacy and data protection: Dissolving at the border

What, then, of the rights to privacy and data protection that should temper States' predilection for untrammelled surveillance? The short answer is that the right to privacy has proved relatively ineffective due to overbroad interpretations of what constitutes a "necessary and proportionate" restriction.[44] This is due in no small part to a discriminatory approach on the part of States which views foreigners as being less entitled to privacy rights than citizens.[45] As for data protection, which regulates the processing of personal data by public and private bodies and gives rights to data subjects to assert control over data that concerns them and to seek redress if it is misused, security and public policy derogations are compounded by limited geographical reach.[46] Although more than 100 countries now have

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42 On the United States, see Olivia Solon, "US Border Agents are Doing 'Digital Strip Searches'. Here's How to Protect Yourself", *The Guardian*, 31 March 2017, available at: www.theguardian.com/us-news/2017/mar/31/us-border-phone-computer-searches-how-to-protect; on Israel, see "Israel Approves Email Checks at the Border", *Times of Israel*, 24 April 2013, available at: www.timesofisrael.com/israel-approves-email-checks-at-the-border/.

43 For Denmark, see unpublished proposal dated 10 February 2017 to amend the Danish Aliens Act, on file with author. For Norway, see proposal (in Norwegian) dated 11 January 2017, available at: www.regjeringen.no/contentassets/8c99986c9bd444b6a00d56fe8afca077/visitasjon-horingsnotat-januar-2017.pdf.

44 Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 4 November 1950 (entered into force 3 September 1953), on the right to private and family life, holds that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." On what makes communications surveillance "necessary and proportionate", see Necessary and Proportionate Coalition, "Necessary & Proportionate: International Principles on the Application of Human Rights to Communications Surveillance", May 2014, available at: www.necessaryandproportionate.org/principles. On the recent judgments of the Court of Justice of the European Union that are beginning to limit the broad scope of the permissible exceptions, see the judgments *Tele2* and *Watson*, Joined Cases Nos C-203/15, C-698/15; *Schrems v. DPC Irl*, Case No. C-362/14; and *Digital Rights Ireland* and *Seitlinger*, Joined Cases Nos C-293/12, C-594/12.

45 See Marko Milanovic, "Foreign Surveillance and Human Rights, Part 1: Do Foreigners Deserve Privacy?", *EJIL: Talk! Blog of the European Journal of International Law*, 2013, available at: www.ejiltalk.org/foreign-surveillance-and-human-rights-part-1-do-foreigners-deserve-privacy/.

46 Although data protection is often seen as corollary to the right to privacy related to the information that is held about individuals, it is increasingly recognized as a fundamental and constitutional right. See, for example, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012, Art. 8.

some form of data protection law or provision,[47] many of these do not yet amount to comprehensive data protection regimes and/or fall far short of the highest standards that have been developed in Europe (first by the Council of Europe (CoE), then the EU).[48]

Crucially, even where these high standards do prevail, if data is processed on a statutory basis, or for the purposes of national security, the key data protection principles of individual consent and choice either do not or cannot apply, while the right to assert control over one's data is restricted in fundamental ways (for example in respect to access, correction and deletion of data).[49] These substantial carve-outs are underscored by a now widely held perception that travel and immigration data is "fair game" for national security agencies. As the EU's data protection supervisor put it in 2008, in a critical response to a raft of EU border control proposals that fell largely on deaf ears, the "underlying assumption" is that "all travellers" should be "considered a priori as potential law breakers" and "put under surveillance".[50]

Aiding surveillance?

As suggested in the introduction, the coercive State practices described above have significant implications for HOs, whose activities and innovations – if not subject to robust data protection safeguards – risk exacerbating the fundamental rights problems posed by mass surveillance and data-driven migration management. These concerns were spelt out in a 2013 report by the advocacy group Privacy International entitled *Aiding Surveillance*, which examined the way in which "development and humanitarian aid initiatives are enabling surveillance in developing countries".[51] The report focused on four areas of innovation in the development and humanitarian sectors: (i) the information systems underlying cash transfer programmes; (ii) biometric identification and voter registration systems; (iii) the use of mobile phones and the data collected and generated by them for purposes such as mobile money, health services and crisis management; and (iv) border surveillance and security technologies.

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47 See DLA Piper, "Data Protection Laws of the World", available at: www.dlapiperdataprotection.com/.
48 See, for example, CoE, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS 108, 28 January 1981 (entered into force 1 October 1985); Regulation of the European Parliament on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC, 2016/679/EU, 27 April 2016 (GDPR).
49 For an overview of key principles of data protection see European Union Agency for Fundamental Rights and Council of Europe – European Court of Human Rights, *Handbook on European Data Protection Law,* 2014, available at: www.fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed_en.pdf.
50 European Data Protection Supervisor, *Preliminary Comments of the European Data Protection Supervisor*, Brussels, 3 March 2008, p. 5, available at: https://edps.europa.eu/sites/edp/files/publication/08-03-03_comments_border_package_en.pdf.
51 G. Hosein and C. Nyst, above note 29.

Supported by dozens of examples, the report observed that whereas the underlying technologies "have been the subject of extensive debate in advanced Western democracies in recent years",[52] there has been a "systematic failure to critically contemplate the potential ill effects of deploying technologies in development and humanitarian initiatives, and in turn, to consider the legal and technical safeguards required in order to uphold the rights of individuals living in the developing world".[53] Justified criticism was levelled at UN agencies, donors, international non-governmental organizations, development actors and HOs, while seminal strategy documents such as the UN Office for the Coordination of Humanitarian Affairs' (OCHA) *Humanitarianism in a Networked Age*[54] and the UN's Post-2015 High-Level Panel's *A New Global Partnership*[55] were chastised for having paid "scant attention to the potential impact of the adoption of new technologies or data analysis techniques on individuals' privacy".[56] In conclusion, the report warned that the "do no harm" approach beloved of the aid sector risked setting too low a bar for human rights protection. The aim, it suggested, should not be to simply avoid imperilling beneficiary human rights, but to actively promote and protect them.[57]

In addition to innovating responsibly, HOs face another challenge thrown up by disclosures about surveillance. The rapid growth first in mobile telephony and then in smartphones[58] has opened up tremendous possibilities not just for communication but for protection and assistance of migrants and refugees in need of support from HOs. However, as noted in the introduction to this article, it has also opened up tremendous possibilities for government surveillance, which has important consequences for how information and communications technologies (ICTs) are perceived and used by people whose situations render them vulnerable to detection or abuse. Oblivious to such concerns, some HOs appear to assume that persons in need of assistance are happy to hand over their personal data to whoever requests it, or that privacy is essentially a Western construct with little appeal in other cultures or contexts. However, in-depth research into the use of smartphones and social media networks by migrants and refugees *en route* to Europe conducted by The Open University and France

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52 *Ibid.*, p. 8.

53 *Ibid.*, p. 7.

54 OCHA, *Humanitarianism in the Network Age*, OCHA Policy and Study Series, Geneva, 2013.

55 UN, *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development: The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, 2013*, New York, 2013.

56 G. Hosein and C. Nyst, above note 29, p. 9.

57 *Ibid.*, pp. 56–58. Also see Kristin Bergtora Sandvik, Katja Lindskov Jacobsen and Sean Martin McDonald, "Do No Harm: A Taxonomy of the Challenges of Humanitarian Experimentation", in this issue of the *Review*.

58 According to research by the Open University and France Médias Monde, "98% of the population in the Middle East and North Africa use a mobile phone, 84% use a smartphone, 81% use internet connections, [and] 51% use a 'high-end' device (i.e. over $500)". See Marie Gillespie *et al.*, *Mapping Refugee Media Journeys: Smartphones and Social Media Networks: Research Report*, Open University and France Médias Monde, 13 May 2016, available at: www.open.ac.uk/ccig/research/projects/mapping-refugee-media-journeys.

Médias Monde suggests this position is wrong.[59] It found, *inter alia*, that "fear both of surveillance by traditional institutions such as governments and soussurveillance [sic] by other group members among refugees" resulted in them "shrouding their identities on social media and online via use of avatars and pseudonyms";[60] that "refugees will not share personal information online, preferring to remain anonymous for fear of reprisals, surveillance, detention and/or deportation";[61] and that communication with family and friends was conducted "mainly on Whatsapp as they trust that it is not under surveillance as are Twitter and Facebook accounts".[62] Their lack of trust in both governments and State-funded institutions and organizations drove them "towards unofficial, potentially dangerous and exploitative resources".[63] Beneficiary communities far from the militarized borders of "Fortress Europe" and unfamiliar with the concept of data protection have also demonstrated significant concern about the capacity for different actors to use information in ways that may not be in their best interests.[64]

The risks of "aiding surveillance" do not end there. Among the documents released to journalists in 2013 by the whistleblower Edward Snowden were some which showed that the National Security Agency and Government Communications Headquarters, the key US and UK surveillance and intelligence agencies, had targeted HOs for surveillance. Those whose communications were intercepted included the United Nations Children's Fund, the United Nations Development Programme and Médecins du Monde.[65] It is safe to assume that if the United Kingdom and United States are doing this, other capable domestic and foreign intelligence agencies are also targeting HOs. This too has significant implications for

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59 *Ibid.*

60 *Ibid.*, p. 13. The research stressed: "It is important to underline that, during the interviews with refugees, issues of trust and confidentiality were of paramount importance. Fear of being under surveillance and exposure – even by other refugees and not just the French authorities – was a key stumbling block when refugees were answering interview questions as well as in the more informal conversations that took place around the interviews." *Ibid.*, p. 43.

61 *Ibid.*, p. 17.

62 *Ibid.*, p. 48.

63 *Ibid.*, pp. 13–18. Consider also proposals by FRONTEX, the EU's Border Management agency, to develop a smartphone app to ensure the safety of people crossing the Mediterranean. Migrants' rights groups and privacy organizations pointed out that refugees were obviously unlikely to embrace an application that would make it easier for European governments to follow and intercept them. See Diane Taylor and Emma Graham-Harrison, "EU Asks Tech Firms to Pitch Refugee-Tracking Systems", *The Guardian*, 18 February 2016, available at: www.theguardian.com/world/2016/feb/18/eu-asks-tech-firms-to-pitch-refugee-tracking-systems.

64 Unpublished research conducted in Gaza by the author in 2015 (on file with author) found strong concerns about data protection in the form of frustration about international non-governmental organizations and international organizations conducting surveys and collecting personal information, including names and identity documents, never to return. This in turn led to suspicion on the part of local communities, who are increasingly distrusting of the motives of such organizations.

65 See James Ball and Nick Hopkins, "GCHQ and NSA Targeted Charities, Germans, Israeli PM and EU Chief", *The Guardian*, 20 December 2013, available at: www.theguardian.com/uk-news/2013/dec/20/gchq-targeted-aid-agencies-german-government-eu-commissioner. See also Joan Tilouine and Simon Piel, "British Tapped UN and NGO Phones and Emails in Nigeria and Congo", *Le Monde*, 8 December 2016, available at: www.lemonde.fr/afrique/article/2016/12/08/british-tapped-un-and-ngo-phones-and-emails-in-nigeria-and-congo_5045681_3212.html.

the operations and beneficiaries of those HOs. And although people who passively accept mass surveillance as "the way of the world" tend to comfort themselves with the naive assumption that it is largely passive – surveillance for surveillance's sake, as it were – it is also clear that various forces are quite prepared to disrupt the activities of HOs in pursuit of a political or military advantage. This could include locating or gathering intelligence on targets or adversaries, influencing civilian populations or undermining the distribution of aid, for example. Moreover, although people may be aware of the risks involved in sharing personal information, the risks involved in "metadata" collection and surveillance are much less well understood.[66] This in turn raises important questions as to the extent to which HOs must acknowledge the inherent risks in using new technologies to provide assistance and advise their beneficiaries accordingly as part of their protection mandate.

International Committee of the Red Cross (ICRC) staff members are among those now calling for concerted action to address these threats. Warning of the dangers of hacking by malevolent State and non-State actors, a 2016 post on the ICRC's blog cites the hypothetical yet by now familiar example of an online platform established by an HO to "crowdsource" real-time data about humanitarian needs and evidence of human rights abuses, and asks us to imagine such a platform being hacked or spoofed to create a false picture about who is attacking whom.[67] "A successful hack could rapidly reshape perceptions and change the course of conflict", the post observes.[68] The post also suggests that in the light of growing physical attacks on HOs, from medical convoys to facilities to staff, "norms are shifting, and agencies' reputation for neutrality is no longer guaranteed to offer protection".[69] As such, it may be "increasingly desirable to attack an agency's reputation directly" in order "to spread misinformation about the mandate, impact and purpose of its operations or the intentions of its staff".[70] Needless to say, this could have devastating consequences for the HO's staff, security, reputation and beneficiaries.

In February 2017, Brad Smith, the president of Microsoft, issued a call for a fifth "Digital Geneva Convention" to protect civilians on the internet and address the alarming growth of State-sponsored cyber-attacks, peacetime nation-State hacking, offensive "cyber-war" capabilities and the "weaponization" of software to achieve national security objectives.[71] While the idea has gained some traction in humanitarian circles, the failure to achieve anything but piecemeal reforms to the mass surveillance programmes revealed by Edward Snowden coupled with the

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66 "Metadata" means data about data. Telecommunications metadata includes data such as the time, duration, origin and destination of phone calls, electronic messages, instant messages and other modes of telecommunication. This information can be used to build up a detailed picture about an individual's location, movements and contacts.

67 A. Kaspersen and C. Lindsey-Curtet, above note 1.

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 Brad Smith, "The Need for a Digital Geneva Convention", *Microsoft Blog*, 14 February 2017, available at: blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention.

troubling role of many technology companies in actually facilitating those programmes suggests that there will be no "quick wins" in this area.[72]

Data protection in humanitarian action

Building on its earlier work on privacy, aid and development, Privacy International's *Aiding Surveillance* provided a sharp corrective to the technological evangelism that was, quite understandably, sweeping the aid and development sectors at the time,[73] and made a foundational contribution to a wider discourse about the importance of data protection in humanitarian action. Between 2013 and 2016, Médecins Sans Frontières, the Cash Assistance Learning Partnership, OCHA, Oxfam, the UN Office of the High Commissioner for Refugees (UNHCR), the UN World Food Programme, UN Global Pulse and the ICRC all adopted data protection policies, rules governing data sharing, or responsible data use statements.[74] In 2015, the International Conference of Data Protection and Privacy Commissioners (ICDPPC) adopted a Resolution on Privacy and International Humanitarian Action (ICDPPC Resolution) – another first – reiterating that while data processing is an integral part of the performance of the mission of humanitarian actors, the adoption of data protection frameworks "by the overall humanitarian community is still scarce".[75] The ICDPPC Resolution spelt out some of the key challenges facing HOs seeking to comply with data protection law and principle. This included the collection of "sensitive data" (defined recently in the EU General Data Protection Regulation (GDPR) as personal data that reveal "racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership; data concerning health or sex life and sexual orientation; genetic data or biometric data"), whose collection is prohibited unless strict conditions and requirements are fulfilled.[76] The ICDPPC also suggested that monitoring and information management systems, electronic data transfers, ID systems and biometrics, mobile phone apps and drones – essentially the entire spectrum of humanitarian innovation – posed "specific privacy and security risks".[77] The ICDPPC Resolution warned that "humanitarian organizations not benefiting from privileges and immunities may

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72 See Ian Brown, Mort Halperin, Ben Hayes, Ben Scott and Mathias Vermeulen, "Towards Multilateral Standards for Surveillance Reform", in Russell Miller (ed.), *Privacy and Power: A Transatlantic Dialogue in the Shadow of the NSA-Affair*, Cambridge University Press, Cambridge, 2017.

73 See, Kristin Bergtora Sandvik and Maria Gabrielsen Jumbert (eds), *The Good Drone*, Routledge, London, 2017.

74 See Jos Berens, Ulrich Mans and Stefaan Verhulst, *Mapping and Comparing Responsible Data Approaches*, GovLab and Leiden University Centre for Innovation, June 2016, pp. 5–6.

75 37th International Conference of Data Protection and Privacy Commissioners, "Resolution on Privacy and International Humanitarian Action", Amsterdam, 27 October 2015 (ICDPPC Resolution).

76 GDPR, above note 48, Art. 9. The ICDPPC Resolution, above note 75, also notes that "data that would normally not be considered as sensitive under data protection laws may be very sensitive in [a] humanitarian emergenc[y] context". The GDPR is a binding EU law, while the ICDPPC Resolution is an advisory, "soft-law" measure.

77 ICDPPC Resolution, above note 75.

come under pressure to provide data collected for humanitarian purposes to authorities wishing to use such data for other purposes (for example control of migration flows and the fight against terrorism)".[78] However, although the Resolution stressed numerous risks arising from data processing by HOs, and called for compliance with international data protection laws, it provided little in the way of guidance as to how specific challenges, including those unique to the sector, might be mitigated in practice. The same is true of many of the data protection provisions adopted by HOs. While the key principles of data protection have been transposed into formal policies, they often fail to provide clear guidance on how implementation can be achieved in the testing circumstances in which humanitarian action occurs. In July 2017, the ICRC and Brussels Privacy Hub made a huge leap in terms of filling this void with the publication of a *Handbook on Data Protection in Humanitarian Action* (ICRC Handbook).[79]

The remainder of this article considers some of the key data protection challenges facing the sector, drawing on the main topics raised in the ICRC Handbook. For illustrative and comparative purposes, the analysis draws on the data protection rules set out in the EU GDPR. Where the analysis refers more generally to "data protection laws", it is referring to common principles found in relevant national and international frameworks.[80]

There are several reasons for the focus on the GDPR. First, to compare data protection challenges with legal norms for data protection requires a baseline: in the absence of any wider and comparable international law or convention, EU law is chosen because it is widely regarded as the "gold standard". Moreover, as data protection laws continue to spread steadily across the world, it is highly likely that the EU will continue to set the standard. Second, the GDPR is the first data protection law to make any specific reference, albeit only in passing, to humanitarian action.[81] Third, even where HOs are working in countries with

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78 *Ibid.*

79 Christopher Kuner and Massimo Marelli (eds), *Handbook on Data Protection in Humanitarian Action*, ICRC, Geneva, 2017 (ICRC Handbook).

80 This includes frameworks developed by the UN (UNGA Res. A/Res/45/95, "Guidelines for the Regulation of Computerized Personal Data Files", 14 December 1990), the CoE (Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS 108, 28 January 1981 (entered into force 1 October 1985; Committee of Ministers, Recommendation No. R (99) 5 for the Protection of Privacy on the Internet: Guidelines for the Protection of Individuals with Regards to the Collection and Processing of Personal Data on Information Highways, 23 February 1999; Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data Regarding Supervisory Authorities and Transborder Data Flows, ETS 181, 28 November 2001; Consultative Committee of the Convention for the Protection of Individuals with Regards to Automatic Processing of Personal Data, *Guidelines on the Protection of Individuals with regard to the Processing of Personal Data in a World of Big Data*, 23 January 2017), the EU (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data), the Organisation for Economic Co-operation and Development (OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 23 September 1980), Asia-Pacific Economic Cooperation (APEC Privacy Framework, 2004), and the Economic Community of West African States (ECOWAS Supplementary Act on Personal Data Protection 2010).

81 See GDPR, above note 48, recitals 46, 73, 112.

weaker data protection laws, those that are headquartered in the EU, wishing to operate in the EU or transferring data into the EU will have to comply with the GDPR. Even organizations with privileges and immunities, which had hitherto considered their activities and records beyond the reach of these laws, can increasingly expect to have to demonstrate that they have adequate data protection policies if they wish to receive data from governments or HOs in EU member States.[82] Fourth, because data protection is so central to fundamental rights protection in the information age, it is suggested that as a community of actors committed to respect for human rights, HOs should aspire to the highest standards of human rights protection.

Legality of processing

Data protection laws set out "legitimate bases" or permissible "conditions for processing"; it is by definition illegal for HOs or any other data controller to process personal information in the absence of such a legal basis.[83] Top of the list of grounds is consent, which HOs have traditionally relied on as the basis for their own data collection activities. However, for many HOs, it is questionable whether the conditions under which that consent is obtained always meet the norm of "freely given", "unambiguous" and "informed consent".[84] This is because beneficiaries of humanitarian assistance programmes will often (though not always) have no real choice but to register and provide data should they wish to avail themselves of assistance. Moreover, data subjects should be informed as to how their data is being used, with whom it will be shared and for what purposes, and the consent should be recorded. But with multiple HOs frequently involved in aid distribution to displaced or besieged populations, and the tremendous practical challenges that may be posed by the novelty or scale of the emergency to which HOs are responding, providing this information to people in order to obtain their consent becomes quite a feat.

Therefore, HOs may wish to process data according to an alternative legal basis. Those international organizations with humanitarian mandates derived from international law may elect to process personal data in accordance with their

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82 The GDPR only permits the transfer of data outside of the EU if the recipient State is the subject of an "adequacy decision" (meaning that it has been deemed to offer comparison-standard data protection) or is subject to binding data protection rules in the form of either standard contractual clauses drawn up by the European Commission or binding corporate rules approved by a data protection supervisory authority. *Ibid.*, Arts 44–48.

83 Within the EU framework, for example, data processing is only lawful if it is based on the consent of the data subject, a contractual requirement or a legal obligation; is necessary to protect the vital interests of the data subject or of another natural person; is necessary for the performance of a task carried out in the public interest or in the exercise of official authority; or is within the scope of the legitimate interests of the controller or a third party, unless such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data. On the lawfulness of data processing, see *ibid.*, Art. 6.

84 The EU defines consent as a clear affirmative act establishing a "freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her". *Ibid.*, recital 32.

mandate functions, but for NGOs this is not an option. The EU GDPR tacitly advises HOs to use the "vital interests" of the data subject as a basis for processing,[85] but also states that this should only be done in cases "where the processing cannot be manifestly based on another legal basis".[86] Moreover, "sensitive data" – which may well be needed to provide vital services – may only be processed without consent where the data subject is physically or legally incapable of providing it, or in connection with public health laws or emergencies.[87] These inconsistencies leave HOs facing difficult decisions about when it is appropriate to seek consent and when it is not, and how to implement a sufficiently (and legally) robust process for obtaining and documenting such consent. HOs that do elect to process data in the "vital interests" of their beneficiaries – defined as things that are "essential for life" – will also have to ensure that such processing is necessary and proportionate (i.e., not excessive) to this purpose.[88] Those relying on consent will also have to implement enhanced procedures for children, with parental consent to data processing of children being the norm, while making practical provision for the withdrawal of consent, which should be as simple a process as giving it. And all HOs will have to facilitate the right of data subjects to object to the processing of their personal data and, where appropriate, to have their data corrected or deleted.

Transparency to beneficiaries

Transparency is fundamental to data protection and should be second nature to HOs committed to providing accountability to affected populations. Regardless of the legal basis for data processing, data protection laws require data controllers to render their data processing operations transparent to data subjects.[89] This is not only about informing consent; data protection laws grant data subjects the right to this information.[90] Under the GDPR, they "should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing", with "the specific purposes for which personal data are processed … explicit and legitimate and determined at the time of the collection".[91] The difficulties of providing such information to the beneficiaries of humanitarian action are obvious, and

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85   *Ibid.*, recital 46.
86   *Ibid.*
87   In a humanitarian context, circumstances in which the data subject may not be able to provide consent may include situations when it is not possible to provide the requisite information about data processing to the data subject, circumstances in which the complexity of the processing may not be compatible with a free determination by the data subject, and situations where there is a significant power imbalance between data controller and data subject, with the latter offered no meaningful choice as to whether to provide their data. See ICRC Handbook, above note 79, Ch. 3.
88   The EU defines "vital interests" as those that are "essential for the life of the data subject or that of another natural person": GDPR, above note 48, recital 46. The ICRC Handbook, above note 79, offers a broader interpretation in its subsection 3.3.
89   See, for example, GDPR, above note 48, Arts 12–22, 34.
90   *Ibid.*
91   *Ibid.*, recital 39.

compliance with even minimum standards may be difficult to achieve in practice.[92] While it is entirely legitimate for HOs to point to circumstances which make it difficult or impossible to provide beneficiaries with information about data processing at the point of collection, they cannot rely on the exigencies of a particular situation to disregard these obligations altogether. Instead, they will have to look to novel means to provide information to individual beneficiaries and beneficiary communities, including *post hoc* information campaigns, the revision and incorporation of data protection issues into individual counselling procedures and outreach programmes, and the use of helpdesks and ICTs to make information available to those who seek it.

These methodologies are particularly applicable to scenarios in which HOs collect data without knowing exactly how it will be used or shared, for example during population and vulnerability assessment surveys implemented at the outset of an emergency response. As noted above, and in order to guard against "function creep" (the gradual widening of the use of a technology or system beyond the purpose for which it was originally intended), data protection law generally requires data controllers to specify the purpose(s) for which data will be used at the point of collection.[93] The challenge for HOs is to be as specific as possible, while retaining the flexibility to use the data for purposes that may only be determined as humanitarian responses unfold and develop. Where the purposes and/or partners change significantly, it could be necessary for HOs to inform beneficiaries, and depending on their consent procedures, to seek fresh or additional consent from data subjects. HOs therefore face another difficult judgement call as to where to draw the line. A single consent giving HOs *carte blanche* to use beneficiary data however they see fit, with no further consultation of the data subject, clearly breaches fundamental data protection principles, but obtaining additional consent for new data processing operations will inevitably have significant logistical, operational and resource implications. The key legal test is whether the processing is "compatible with the purposes for which the personal data were initially collected",[94] but if the purpose is deemed to be providing "humanitarian assistance", HOs may have wider scope in this area than other data controllers.[95]

Information security

The multiple risks that refugees, asylum-seekers and internally displaced persons face come from countries of origin, host States, transit and destination States (where those States enforce repressive exclusion policies), and malevolent third parties such as non-State armed groups, criminals and even "hacktivists" (those

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92 According to the GDPR, "[i]t should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed".
93 See, for example, *ibid.*, Art. 13.
94 *Ibid.*, Art. 6(4).
95 See ICRC Handbook, above note 79, subsection 2.6.3.

who engage in the subversive use of ICTs to promote a political cause or social change), among others. All of these adversaries could potentially use their personal data in ways that prejudice their best interests, expose specific groups or individual data subjects and their families to serious harm, or severely undermine the capacity of HOs to implement their mandates. Once beneficiary data has been collected, robust information security policies and practices are effectively the only thing that stands between HOs and vulnerable people and their potential adversaries.

Security in the field is trying enough, but the transition from physical files to digitized records via ICTs has created a new set of challenges for the humanitarian sector. Typically, a lack of technical expertise in the field has meant that local databases, solutions and innovations – which have been invaluable in delivering protection and assistance – have not always been developed or managed with information security in mind (to put it mildly). While central databases should offer much stronger data security, the breadth of access that it may be necessary to provide creates other vulnerabilities. In this respect, like all large organizations, HO's ICT users are their weakest link. Many lack basic information security training and, like a majority of ICT users, routinely engage in practices which undermine both their personal and organizational security.[96] This matters because the vast majority of successful ICT hacks do not exploit technical, "back-end" vulnerabilities (breaching firewalls, breaking into databases, etc.) but rely instead on some form of "social engineering" or psychological manipulation, such as tricking users or employees into handing over confidential or sensitive data by getting them to click on a bogus link or open an email attachment containing "malware" (software which is specifically designed to disrupt, damage or gain authorized access to a computer system). With the frequency and sophistication of these attacks increasing,[97] HOs should be making information security an integral part of field security and training their staff accordingly. While information security is already second nature to businesses with assets and reputations to protect, a cultural shift is still required in the humanitarian sector.[98]

It is something of a cliché, but the simplest way to achieve data protection is not to collect the data in the first place, or at least to collect only what you need. The next best option is to make sure the data is accurate and relevant, and to delete it as soon as it is no longer necessary. These principles are embodied in the concepts of

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96   See Fran Howarth, "The Role of Human Error in Successful Security Attacks", *IBM SecurityIntelligence*, 2 September 2014, available at: securityintelligence.com/the-role-of-human-error-in-successful-security-attacks/.

97   Symantec, "Extraordinary Attacks, High-Dollar Heists, Electoral Disruption", *2017 Internet Security Threat Report*, ISTR 22, April 2017.

98   A recent report on how international humanitarian actors manage risk states: "In terms of staff time and attention, the management of safety/security risk receives the most emphasis, with fiduciary risk management (prevention of fraud and diversion) ranking a close second. … The study found less overall emphasis and understanding of risk management in the areas of information security and legal (e.g., counter-terror legislation) compliance." See Abby Stoddard, Katherine Haver and Monica Czwarno, *NGOs and Risk: How International Humanitarian Actors Manage Uncertainty*, Humanitarian Outcomes and InterAction, February 2016, available at: www.humanitarianoutcomes.org/sites/default/files/ngo-risk_report.pdf.

"purpose specification", "necessity and proportionality" and "data minimization",[99] yet various imperatives in the humanitarian sector are pushing in the opposite direction. Many HOs seem to be starting from the default position that personal data must be retained for long, indeterminate or even indefinite periods to satisfy auditing requirements.[100] Inflated claims about the power of big data (see further below) are also encouraging HOs to collect and retain more personal information than they should, and many have poor "digital hygiene" practices, leaving data trails that amplify risks to beneficiaries, instead of minimizing and restricting access to data that is legitimately needed for archiving purposes. Another cultural shift is needed to address these problems.

The maintenance of humanitarian archives poses a different set of data protection challenges. For certain HOs, there are numerous and compelling reasons, some set out in their mandates, to maintain detailed archives of their activities, not least that the information may be of critical importance to data subjects such as refugees, as well as their families, long into the future. The difficulty comes in balancing the importance of maintaining a "humanitarian memory" with the fundamental principles of data protection law. UNHCR, for example, has a long-standing Records and Archives Policy which states that individual case files should be kept indefinitely, and a new data protection policy which states that personal data should be deleted as soon as it is no longer needed.[101] To date, however, all personal data relating to UNHCR's beneficiaries has been considered part of their case files, so the working assumption is – contrary to the organization's data protection provisions – that everything should be kept forever. The public and private interest in keeping historical records about refugees is clear, but do the archives need to contain every last scrap of data about a person's time in a refugee camp, particularly when more and more data is collected? And what if someone later objects to the retention of particular records in their case file, and requests deletion in accordance with their fundamental rights? Autonomy is fundamental to data protection, but paternalism is endemic to humanitarianism; a suitable balance must be found.

Sharing and caring

Many HOs share personal data with third parties, including host governments, operational/implementing partners and commercial service providers, in order to facilitate or enhance the provision of protection and assistance. Though it is counter-intuitive for privacy and data protection advocates, it is important to stress that the pooling of data among HOs assisting displaced persons is not only

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99 These principles are found in many data protection laws. See, for example GDPR, above note 48, Art. 5(1)(b) on purpose specification and Art. 5(1)(c) on necessity, proportionality and data minimization.

100 With the prospect of internal and external audit by States and other donors facing their programmes, many HOs appear fearful of deleting data, while deciding what to keep, what to throw out and securely destroying data can be costly.

101 See retention provisions in UNHCR, Policy on the Protection of Personal Data of Persons of Concern to UNHCR, May 2015, Art. 4(6).

a vital part of emergency response but can actually lower data protection risks by significantly reducing the amount of data that is collected and stored – and with it the "survey fatigue" that is often reported by those in need of assistance as a result of unnecessarily repetitive vulnerability assessments. However, in the absence of commonly applied data protection standards across the sector, such cooperation brings with it a raft of practical problems, while competition among HOs for funding, overlapping mandates and the politics of data ownership add a substantial layer of complexity. HOs also need to take more responsibility in their role as "gatekeepers" of sensitive information in response to increasing interest from the media, research institutes and private companies. In their desire to put a positive spin on refugee stories, or facilitate research that promises better understanding of refugees and their needs, HOs may not always take into account their legal obligations or the ethical implications of their actions.[102]

Data protection laws require that data subjects should provide explicit consent to the transfer of their data to another organization.[103] Data controllers must also ensure that all third-party recipients will properly protect the data, will only use it for specified purposes and will only receive the data they need to meet those purposes. Transfers should be regulated by legal or contractual agreement, and executed using secure communications channels – all of which is a far cry from how HOs have typically exchanged data in the past.[104] Data subjects must also be able to exercise their rights, and to obtain and seek redress in the event that things go wrong. Although the formalization of data-sharing arrangements to meet basic data protection standards has required a sea change in practice on the ground, these problems are not insurmountable. UNHCR's cash assistance programmes, for example, were the subject of a detailed data protection impact assessment resulting in innovative procedures for mapping data-sharing arrangements, assessing the adequacy of third-party data protection regimes, minimizing the amount of data that is shared, and concluding data-sharing agreements with a wide range of partners.[105]

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102 See European Commission, "Guidance Note – Research on Refugees, Asylum Seekers & Migrants", Directorate-General for Research and Innovation, available at: ec.europa.eu/research/participants/data/ref/h2020/other/hi/guide_research-refugees-migrants_en.pdf.

103 Such provisions only generally apply if the recipient of the data will have control over how it is used. Organizations may transfer data to "sub-processors" to perform tasks on their behalf or under their direction, subject to appropriate safeguards. See, for example, GDPR, above note 48, Arts 6(1), 7, 28.

104 See, for example, the findings of a data protection impact assessment conducted for UNHCR which recommended that "[t]he transfer of refugees' personally identifiable data in unencrypted files and on media susceptible to loss or theft should be restricted to an absolute minimum. Where possible, the practice of e-mailing such files should be replaced with secure FTP channels or VPNs. If files are to be e-mailed, the practice of transmitting encrypted files and the passwords for those files in successive e-mails should also cease in favour of a more secure procedure. The medium-term objective should be the implementation of secure ICT solutions that allow partners to access and use UNHCR data (and correct or augment where necessary), but through which UNHCR retains much greater control". See UNHCR and Trilateral Research & Consulting, *Privacy Impact Assessment of UNHCR Cash Based Interventions*, Geneva, December 2015, p. 23, available at: www.globalprotectioncluster.org/_assets/files/tools_and_guidance/cash-based-interventions/erc-privacy-impact-assessment-of-unhcr-cbi_en.pdf.

105 *Ibid.* See also UNHCR, *Operational Guidelines on the Protection of Personal Data of Persons of Concern*, forthcoming 2018.

The nature and extent of data protection risks related to data sharing does of course very much depend upon the type of data being shared and who the recipient is. Thus, sharing data with operational partners or service providers that have established solid data protection policies of their own may appear relatively low-risk, whereas cooperation with governments – whose policies toward migrants and refugees (or specific religious or ethnic groups) may change over time – is often perceived as higher-risk.[106] To navigate this landscape, it is crucial for HOs to properly assess the legal framework to which they and their local partners and service providers are subject, and analyze those laws through the prism of whether they could harm their beneficiaries. Such assessment often reveals the kinds of "positive disclosure" obligations discussed above, which are now found the world over and routinely risk undermining or prejudicing the fundamental rights of beneficiaries of humanitarian programmes. Some of the risks are obvious, like States requiring health service providers to inform public authorities about "conditions" such as HIV, TB or even homosexuality. Although HOs can and often do adopt a principled stance with regard to compliance with such laws, their local partners may not be in a position to do so. Other risks are far from obvious, such as those posed by international counterterrorism and anti-money-laundering regimes, which oblige all financial service providers to conduct "due diligence" on financial transfers and account holders.[107] This includes checking individual customers against hundreds of national and international sanctions lists – an activity that is frequently outsourced to "compliance" service providers and subject to the scrutiny of State financial intelligence units and national security agencies. Despite a growing awareness of the importance of data protection in the cash sector, it is far from clear that HOs, which have turned to cash assistance programmes in increasing numbers, are cognisant of the need to address this issue head-on with their service providers.[108] Because many sanctions lists are established by States that are party to a conflict or otherwise concerned with a situation of violence, the use of banks to deliver cash payments could inadvertently compromise the neutrality of HOs by embroiling them in sanctions enforcement.

A similar problem is posed by telecommunications registration and data retention regimes, which frequently oblige service providers to retain information about users, their communications traffic and even their content data, and make it available to law enforcement and security agencies. Prior to the advent of mobile telephony, obtaining these kinds of records often required a judge to serve a warrant on a phone company; today, all that may be needed is a mobile phone

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106 UNHCR, for example, is often obliged to share basic biographical information about refugees registered in a host State, leaving little scope for data protection beyond seeking to minimize what is actually shared.

107 See Gavin Sullivan and Ben Hayes, *Blacklisted: Targeted Sanctions, Pre-emptive Security and Fundamental Rights*, European Centre for Constitutional and Human Rights, Berlin, 2011. Also see Ben Hayes *et al.*, *"De-risking": From Financial Surveillance to Financial Exclusion? Banking Problems and Solutions for the Non-Profit Sector*, Human Security Collective and Open Society Foundations, forthcoming 2018.

108 See Jessica Burniske, Naz Modirzadeh and Dustin Lewis, "Counter-Terrorism Laws: What Aid Agencies Need to Know", Overseas Development Institute, Humanitarian Practice Network Briefing Paper No. 79, November 2014.

number. That surveillance is widespread and increasingly difficult to avoid does not, however, absolve HOs of their data protection responsibilities. On the contrary, the imperative is for them to recognize that beneficiary communications tools like bulk SMS messaging are particularly vulnerable to interception by State and non-State actors alike, to seek more secure alternatives where possible, and to ensure that their use does not compromise the neutrality of humanitarian action or the safety or security of their beneficiaries.[109]

As noted above, governments may also request data directly from HOs, or even assert jurisdiction or seize it against their wishes. Organizations that benefit from privileges and immunities have well-established rules for dealing with requests from governments and can assert various legitimate interests, including the fundamental rights of their beneficiaries, as a reason to refuse unwarranted requests.[110] Those HOs that do not benefit from such protections, and which have not made provision to mitigate against such eventualities, risk compromising not just the privacy but also the safety and security of their beneficiaries. In August 2017, it emerged that the Combined Homelessness and Information Network database, used by UK charities and government agencies to pool data and target interventions to support people sleeping rough, had been accessed by the Home Office to target foreign nationals for deportation.[111] The database, which is run by a homelessness charity, includes the location, nationality, mental health status and gender of rough sleepers.[112] Examples such as this – and there are others[113] – should serve as a cautionary tale for other initiatives that map vulnerability or provide "open data" sets that could be used for purposes other than those for which they were designed.

109 "Data collection on refugees should balance security and public safety with the need to preserve human dignity and rights. Governments and refugee agencies need to establish trust when collecting data from refugees. Technology companies should acknowledge their platforms are used by refugees and smugglers alike and improve user safety measures, and we should ask what it means for companies to have such politically charged data". Mark Latonero, "For Refugees, a Digital Passage to Europe", *Responsible Data Forum*, 8 February 2016, available at: responsibledata.io/for-refugees-a-digital-passage-to-europe/.

110 See, for example, UNHCR, *Guidelines on the Sharing of Information on Individual Cases: "Confidentiality Guidelines"*, Geneva, August 2001. Also see Els Debuf, "Tools to Do the Job: The ICRC's Legal Status, Privileges and Immunities", *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016.

111 Mark Townsend, "Home Office Used Charity Data Map to Deport Rough Sleepers", *The Guardian*, 19 August 2017, available at: www.theguardian.com/uk-news/2017/aug/19/home-office-secret-emails-data-homeless-eu-nationals.

112 St Mungo's, "CHAIN – Combined Homelessness and Information Network", available at: www.mungos.org/work-with-us/chain/.

113 Further examples include publishing real-time data on the conditions, routes and profiles of asylum-seekers in the Horn of Africa region, which can inadvertently provide resources from which smugglers and human traffickers can benefit; mapping refugee movements during armed conflict, which may have been used to the advantage of parties to the conflict; failing to consider the risks involved in the publication of maps showing the geographical location of religious minorities or victims of sexual violence, which may render those groups or individuals vulnerable to further harm; and publishing statistics that demonstrate the provision of assistance to different ethnic, religious or national groups, which have given rise to accusations of preferential treatment. The first example cited here is described in Joseph Guay and Lisa Rudnick, "What the Digital Geneva Convention Means for the Future of Humanitarian Action", *UNHCR Innovation Service*, 25 June 2017, available at: www.unhcr.org/innovation/digital-geneva-convention-mean-future-humanitarian-action/. Subsequent examples are derived from the author's work experience and are not publicly documented.

Big data

In a landmark 2013 report, OCHA suggested that "[f]inding ways to make big data useful to humanitarian decision makers is one of the great challenges, and opportunities, of the network age".[114] The arguments martialled in support of big data-led innovation in the humanitarian sector are persuasive, particularly when underscored by the demonstrably poor information management that has hampered effective action and cost lives. But while there can be no doubt that this kind of innovation offers HOs the chance to remedy some basic failings and enhance effectiveness, OCHA's unfettered enthusiasm for correlating and analyzing "vast pools of information, generating surprising insights into the places [HOs] operate", was accompanied by a total blind spot when it came to data protection.[115]

Admittedly, data protection norms, with their relatively simple demands, are not easily accommodated by this brave new world, at least at first sight. Data protection demands purpose specification and limitation; big data wants to find new uses for data by turning it into "actionable intelligence". Data itself becomes the rationale for the collection and processing of personal data, and "function creep" is in-built as the *raison d'être* is to develop uses for data that were not foreseen at the point of collection. In turn, HOs are encouraged to use ever more complex targeting and eligibility assessments to identify and better serve the most vulnerable aid recipients, even though this inevitably increases the amount of data (including sensitive data) collected by HOs in order to profile individuals, families or households. Complexity makes it harder for beneficiaries to understand (and hence makes them unable to provide meaningful consent to) their involvement in big-data programmes, and specifically how their information is collected, used, stored, shared and analyzed. Crucially, layering and modelling dimensions of vulnerability to the nth degree may not be in their "vital interests" either. Using big-data analytics for eligibility decisions can also produce discriminatory effects that persons of concern may not be able to appeal. And it is not only individual rights that are at stake: big data can undermine their collective dimension by impacting whole groups of beneficiaries in negative or unforeseen ways.

These challenges are by no means limited to HOs: they are present wherever personal data is "mined" for insight and are particularly acute when accompanied by machine learning, profiling and automated decision-making. And though it appears that data protection legislation has been struggling to keep up, the GDPR introduces requirements with far-reaching implications for HOs developing these tools.[116] It states that "[e]very data subject should therefore have the right to know … the logic involved in any automatic personal data processing and, at least when based on profiling, the consequences of such processing"; each

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114 OCHA, above note 54, p. 26.
115 The phrase "data protection" did not appear anywhere in OCHA's 112-page document.
116 GDPR, above note 48, recitals 63, 71, Arts 4, 13, 14, 15, 22.

subject also has "the right to obtain human intervention [and] an explanation of the decision reached after such assessment and to challenge the decision".[117]

Moreover, "[w]here possible, the controller should be able to provide remote access to a secure system which would provide the data subject with direct access to his or her personal data".[118] This set the tone for the *Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data in a World of Big Data* (Big Data Guidelines) issued by the CoE in January 2017, which urge data controllers to look beyond straightforward data protection to "preventive policies and risk assessments" that "consider the legal, social and ethical impact of the use of Big Data, including with regard to the right to equal treatment and to non-discrimination".[119] Mechanisms for HOs to achieve these objectives are considered further below.

Biometrics

Biometric ID systems are increasingly popular with HOs working with migrants and refugees because these organizations' beneficiaries often lack identity documents. By obtaining a unique identifier such as a digitized photograph, iris scan or fingerprint, biometric systems provide for more efficient registration procedures and, by speeding up entitlement checks and reducing fraudulent claims, faster and more equitable distribution of assistance. But as noted above, the GDPR explicitly defines biometrics as "sensitive data", and privacy and civil liberty campaigners have repeatedly expressed concerns about the development and implementation of biometric ID systems. This is due to both the scale of the data protection and security challenges that arise once personal data is linked to a biometric profile, and because biometrics are increasingly used as a tool of policing and immigration enforcement. Nevertheless, the demonstrable efficiency and accuracy of biometric profiling has taken precedence. Providing legal identity to the estimated 2.4 billion people who lack recognized identity documents is now a UN Sustainable Development Goal, providing additional impetus for the adoption of biometrics by States.[120] Crucially, although critics of biometric ID systems tend to focus instinctively on the implications of including individuals in a database, in development and humanitarian contexts, biometric registration drives may also engender social exclusion and even statelessness, as those identified as not entitled to citizenship or protection may be disenfranchised.

HOs deploying biometrics cannot ignore these wider concerns. UNHCR, for example, is currently rolling out its global Biometric Information Management System (BIMS) across its operations, providing an enduring digital identity that offers recognition to the excluded. UNHCR has also used the profiles it has collected to

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117 *Ibid.*, recital 63.
118 *Ibid.*
119 CoE, *Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data in a World of Big Data*, T-PD (2017) 01, Strasbourg, 23 January 2017 (Big Data Guidelines), p. 5.
120 UN Sustainable Development Goals, "Goal 16: Promote Just, Peaceful and Inclusive Societies", adopted 25 September 2015, para. 9.

verify identity and entitlement in order to streamline food and cash assistance, and is rightly lauded for developing innovative and complex data-sharing arrangements with operational partners and the Jordanian banking sector. But as more and more of its stakeholders and partners implement or contemplate the introduction or use of biometrics, UNHCR has inevitably faced increased pressure to share or provide access to BIMS for more purposes than were initially foreseen – for example, for joint registration activities with host governments, or in the security vetting of successful resettlement candidates. Consequently, links between UNHCR's policies of inclusion and States' policies of exclusion are beginning to intersect, creating data protection and fundamental rights challenges that were not foreseen when BIMS was established. These challenges include the development of a biometrics policy that can reconcile the competing demands of different stakeholders, explaining the data flows and attendant risks to refugees and dealing with beneficiary and government claims over the data.[121]

Perception is crucial. Any suggestion that biometrics collected for humanitarian purposes could ultimately be used against the interest of their beneficiaries risks severely undermining the credibility, reputation and viability of entire programmes.[122] Even ostensibly "low-tech" biometric databases containing digitized photographs carry inherent risks due to the rapid development of facial recognition technology.[123]

Managing risk

Despite the myriad risks for HOs processing personal data and the evident difficulty that HOs have in terms of responsible innovation, it is by no means the case that these challenges are insurmountable. All data processing carries inherent data protection risks; the key thing is for data controllers to properly assess these risks from the outset and develop appropriate safeguards.[124] More than a means for

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121 In 2017, the *Economist* magazine was moved to ask: "Will a refugee, who does not enjoy the protections of citizenship, be granted privacy rights to data stored in a cloud service?" See "Phones are Now Indispensable for Refugees", *The Economist*, 11 February 2017, available at: www.economist.com/news/international/21716637-technology-has-made-migrating-europe-easier-over-time-it-will-also-make-migration.

122 In 2016, *TakePart* magazine reported that "[c]ity officials in Calais announced in January that they would be clearing the Jungle [refugee camp] that month …. As an alternative, the city unveiled a new, official refugee camp, located on the Jungle's edge. … But few took the city up on the offer. The palm scanners spooked some of the residents, who worried their biometrics would be given to police and used against them if they managed to get to England." See Marc Herman, "Unwelcome Refugees", *TakePart*, 5 February 2016, available at: www.takepart.com/feature/2016/02/05/jungle-calais-france-demolition/.

123 According to the EU Fundamental Rights Agency, "[d]uring the latest period of arrivals of high numbers of refugees, private initiatives started to offer tracing services – particularly in big train stations in Austria, Germany and Hungary – using photos without considering data protection risks". See EU Fundamental Rights Agency, "Thematic Focus: Family Tracing and Family Reunification", available at: fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-family.

124 As Kaspersen and Lindsey-Curtet, above note 1, explain, "[b]eneficiaries need the best of both worlds: for more nimble and efficient ways of meeting their needs to be embraced by agencies with a history that inspires trust. For those agencies, that implies a willingness to self-disrupt in partnership with willing innovators – to constantly question the value of their ways of working, and think hard about the potential opportunities presented by technology to connect people, things, processes and data in new ways. But in seeking to harness the immense opportunities of technology to improve humanitarian aid, they also need to be conscious of some very real risks".

HOs to "do no harm", such assessment is becoming a legal obligation. The GDPR requires data controllers to conduct an assessment of the impact of envisaged processing operations on the protection of personal data where "new technologies" are involved and are "likely to result in a high risk to the rights and freedoms of natural persons".[125] Data protection impact assessments (DPIAs) must comprise "measures, safeguards and mechanisms" for risk mitigation and compliance with data protection law, and data subjects should be consulted.[126] DPIAs will be mandatory where data controllers intend to process sensitive data "on a large scale" (e.g. biometrics or health data). They will also be mandatory where processing is "systematic, extensive and automated", involving profiling that could "significantly affect the natural person".[127] Furthermore, where a DPIA "indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk", data controllers are obliged to seek prior approval for the processing from their data protection supervisory authority.[128] The more recent CoE Big Data Guidelines place a similar onus on data controllers to "[i]dentify and evaluate the risks of each processing activity" and assess their "potential negative outcome on individuals' rights and fundamental freedoms",[129] further encouraging ethical impact assessment with a view to preventing discrimination and social exclusion.

By conducting such assessments, HOs can mitigate risks in the design of their ICTs and devise forward-facing policies that offer meaningful privacy and fundamental rights protection to their beneficiaries. It must be hoped that they will also learn that it is much easier to do this at the design stage than to retro-fit data protection safeguards to systems that are already operational.[130] This is why the most recent EU and CoE legislation mandates privacy and data protection by design. Fortunately, these obligations are being imposed at a time when extensive innovation and research and development (R&D) has transformed these once aspirational concepts into highly effective models for information security and data protection. Anonymization techniques,[131]

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125 GDPR, above note 48, Art. 35(1).

126 DPIAs must include a systematic description of the envisaged processing operations and their purposes of the processing; an assessment of the necessity and proportionality of the processing operations in relation to the purposes; an assessment of the risks to the rights and freedoms of data subjects; and the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with data protection law. *Ibid.*, Art. 35.

127 *Ibid.*, Art. 35.

128 *Ibid.*, Art. 36.

129 Big Data Guidelines, above note 119, p. 5.

130 DPIAs can still be very helpful in remedying data protection gaps in existing systems and programmes.

131 By stripping datasets of personally identifiable information (PII), or replacing PII with codes (pseudonymization), HOs can render their data much less vulnerable to misuse. While these techniques are by no means infallible – individuals can be "re-identified" from multiple anonymized datasets using data matching or similar techniques, posing a potential risk to individuals included in large aggregate datasets – used correctly they can significantly reduce risk. However, as noted above, anonymizing data in order to produce aggregate or statistical information that may be published, or at least shared more widely than personal data, may in certain circumstances entail acute protection risks for beneficiary populations: see above note 113.

applied cryptography,[132] "zero knowledge" architecture[133] and new possibilities to put data under the meaningful and effective control of data subjects[134] now offer HOs the chance to develop ICTs that that are both highly effective and highly secure.

Conclusion: What kind of disruption?

While significant strides have been taken by the humanitarian sector in the four years since Privacy International pointed out the "paucity of privacy" in the aid and development sectors,[135] many HOs still have a great deal of work to do to meet the minimum standards for beneficiary data protection, information security and responsible innovation that are now embodied in not just the spirit but the letter of data protection law. Even those organizations that have led by example and adopted strong data protection policies still have a long way to go to ensure that these commitments are properly implemented across their operations. Building on the new ICRC *Handbook on Data Protection in Humanitarian Action*, which remains the only detailed guidance available to HOs, it is also vitally important that proactive discussions on global standards for collecting, sharing and storing personal data in times of crisis continue, and that data protection authorities assume greater responsibility for the development and implementation of workable standards. And while HOs, like all organizations, are understandably reluctant to discuss attempts to penetrate their information systems by State and non-State actors alike, they will have to find a way of collectively addressing this problem if they are to garner support for the zero-tolerance approach that international humanitarian law demands and the neutrality and effectiveness of humanitarian action requires. It remains to be seen if a "Digital Geneva Convention" is a viable response to these problems; in the meantime it is imperative that HOs take responsibility for properly securing their information systems and ensuring that their data cannot be used to undermine their neutrality or the rights and interests of their beneficiaries.

This fundamental challenge is at the heart of innovation and the embrace of new technologies in the humanitarian sector. It is a challenge that is both highly technical – requiring resources to be allocated to serious risk assessment and genuinely responsible innovation in tandem with R&D – and highly political, with the discourse around technological disruption in humanitarian action still very much characterized by a technological determinism that too often portrays or perceives data protection as a hindrance. Humanitarians are now expected to be in the "lab" as well as the "field", are told to ignore the new digital

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132 Applied cryptography allows for the encryption of data at rest and in transit.
133 "Zero knowledge" architecture involves storage platforms which prevent the platform owner and unauthorized third parties from reading information stored in a database.
134 For example, personal information management systems and data autonomy and portability initiatives.
135 G. Hosein and C. Nyst, above note 29.

humanitarianism "at their peril",[136] and are threatened with a "drift into irrelevance" if they fail to "self-disrupt".[137] They are also cautioned that "[o]verly prescriptive and rigid frameworks derived from entirely different circumstances … have the potential to stifle discoveries" and advised to adopt "minimalistic" approaches in devising regulatory schemes.[138]

Of course, technology is nothing more than a solution looking for a problem, and it is clear that many tech providers are attracted to the humanitarian sector not simply because they want to do good, but because it provides a great opportunity to test their solutions in the real world. If responsible innovators within the humanitarian sector set the agenda, for example by seeking out highly secure communication and data storage solutions, this collaboration is invaluable. But when the agenda is set by other prevailing interests, there is a significant risk of policy incoherence, unintended consequences and negative externalities. The palpable desperation on the part of some tech companies to develop a blockchain-based identity management system for refugees,[139] for example, promises agencies like UNHCR more robust and versatile ID systems, but may also seriously risk exacerbating or entrenching the exclusion and disenfranchisement caused by the State policies described in the introduction to this article. Donors also play a fundamental role here: data protection is at last beginning to feature in financing agreements, but may be fundamentally compromised in practice by the over-prioritization of data-intensive initiatives such as cash transfer programming, biometrics and transparency and accountability mechanisms.

Until technological disruption and data protection in the humanitarian sector are framed as mutually reinforcing (rather than mutually exclusive), HOs will inevitably continue to be bounced into hasty procurement or deployment decisions that needlessly undermine or jeopardize the fundamental rights of their beneficiaries. Those who control the purse strings – both outside and inside HOs – could have the greatest impact by meaningfully prioritizing data protection and information security. If not, what is known in the trade as a "catastrophic data breach" may one day make them sit up and listen.

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136 See, for instance, the book endorsements for Patrick Meier, *Digital Humanitarians: How Big Data is Changing the Face of Humanitarian Response*, Routledge, 2015, available at: www.digital-humanitarians.com/.
137 A. Kaspersen and C. Lindsey-Curtet, above note 1.
138 J. Berens, U. Mans and S. Verhulst, above note 74, p. 8.
139 "Microsoft and Accenture's Blockchain ID System for Refugees Highlights Data Privacy Needs", *ITU News*, 20 June 2017, available at: news.itu.int/blockchain-refugees/.

Obligations of transit countries under refugee law: A Western Balkans case study

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Abstract

A significant increase in the number of arrivals of refugees and migrants in Europe along the Western Balkans route brought several Balkan countries into the spotlight of international refugee protection in 2015 and 2016. Out of hundreds of thousands of refugees and migrants recorded entering the former Yugoslav Republic of Macedonia and Serbia, only a handful remained to seek asylum from their authorities. Under the circumstances, the applicability of the 1951 Refugee Convention with respect to refugees refraining from seeking asylum was brought into question, as well as the extent of transit countries' legal obligations under refugee law. Based on the Western Balkans experience, the present article seeks to re-examine the relationship between the concept of asylum and the regime of the 1951 Refugee Convention, the Convention's scope of application in "transit countries", and minimal standards stemming from positive law regarding the treatment of refugees and migrants in a transit context.

Keywords: refugee law, transit countries, forced migration, asylum, Balkan route, Western Balkans.

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> There is no work here, no work for refugees. The Serbian people are very good to us, they give us things, help us. But we cannot live here… Austria, Austria will give us papers, and give us work, and we'll live as free…
>
> Anonymous migrant in Subotica, Serbia[1]

Introduction

The massive movement towards Europe of forced migrants[2] fleeing escalating conflict in the Middle East, particularly Syria, in 2015 and 2016 has been described as the world's worst refugee crisis of our time.[3] This forced migration wave has been provoked not merely by the continuing violations of international humanitarian law (IHL) and international human rights law (IHRL) within and beyond the region, but also by a deteriorating situation in neighbouring countries such as Turkey and Lebanon, where the majority of refugees continue to seek shelter.[4] Therefore, an increasing number of persons have been moving to those European countries perceived as safe countries of asylum and as offering the chance to start a new life in peace and security, because of a lack of effective protection[5] and durable solutions in the immediate region.[6]

Whereas the trend has been to see this flow of refugees primarily through the prism of receiving countries in Western and Central Europe,[7] the principal source of the movement – the armed conflicts in Syria[8] and Iraq[9] – has primarily

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1   Anonymous interview with a migrant, January 2017. Courtesy of the Belgrade Centre for Human Rights (BCHR).

2   The terminology employed in this article is further explained at the end of this section.

3   Office of the United Nations High Commissioner for Refugees (UNHCR), "UN Secretary General Says More Help Needed for Syrian Refugees", 30 March 2016, available at: www.unhcr.org/uk/news/latest/2016/3/56fb98dc3/un-secretary-general-says-help-needed-syrian-refugees.html (all internet references were accessed in August 2017).

4   See UNHCR, *Global Trends: Forced Displacement in 2015*, Geneva, 20 June 2016.

5   See Shaden Khallaf, "The Syrian Refugee Crisis in the Middle East", in Karim Makdisi and Vijay Prashad (eds), *The Land of Blue Helmets: The United Nations and the Arab World*, Oakland, CA, University of California Press, 2017.

6   UNHCR defines three types of durable solution as part of its core mandate: voluntary repatriation, local integration and resettlement. See UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern*, Geneva, May 2003.

7   Most European media outlets refer to the migration flow as the "European migrant crisis" or "European refugee crisis". See, for instance, "Migrant Crisis: Migration to Europe Explained in Seven Charts", *BBC News*, 4 March 2016, available at www.bbc.com/news/world-europe-34131911; "Crise migratoire en Europe: Des chiffres pour comprendre", *Le Parisien*, 16 June 2017, available at: www.leparisien.fr/flash-actualite-monde/crise-migratoire-en-europe-des-chiffres-pour-comprendre-16-06-2017-7057359.php.

8   See UNHCR, *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic: Update IV*, Geneva, November 2015.

9   See UNHCR, *UNHCR Position on Returns to Iraq*, Geneva, November 2016.

caused a displacement crisis in the Middle East region itself. The largest number of displaced persons remain in their countries of origin,[10] with neighbouring countries receiving the lion's share of refugees.[11] Nevertheless, as the focus of the present article is on transit countries, the migratory wave into Europe is of particular interest for two reasons: first, it concerns the applicability of international refugee law (IRL), which does not cover internally displaced persons (IDPs); and second, the majority of refugees located in the Middle East region are there to stay[12] – for them, countries such as Lebanon may be considered not as transit countries, but rather as countries of destination.

With respect to Middle Eastern refugees moving into Europe, official estimates indicate that a total of 850,230 persons of Syrian and Iraqi origin became first-time asylum applicants in various European Union (EU) member States in 2015 and 2016 alone. This represents a significant increase compared to the previous two-year period (2013/14), when that number was 189,070.[13] A large number of these persons reached Central and Western Europe by taking the "Western Balkans route",[14] which meant travelling through countries which were not bound by EU asylum legislation,[15] whose asylum systems were (and remain) of poor quality,[16] and where they were not interested in seeking refuge.[17] As these countries' principal source of obligations towards refugees remains the 1951

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10 According to Khallaf, "[a] total of 16.4 million people have been displaced in the Syria and neighboring Iraq crises, including 6.6 million displaced within Syria and 4.8 million Syrian refugees abroad. In Iraq, 1.9 million were displaced in 2014 alone by internal fighting and the advance of militant extremists in both countries, adding to the 1 million previously displaced and the 220,000 who left the country to seek safety abroad. As of mid-2015 the total of internally displaced Iraqis had reached 3.9 million, with 377,747 persons having sought refuge abroad." S. Khallaf, above note 5, p. 360.

11 According to the Syria Regional Refugee Response, over 5 million Syrian refugees had been registered in Egypt, Iraq, Jordan, Lebanon and Turkey at the time of writing of this article. See UNHCR, "Syria Regional Refugee Response: Regional Overview", available at: data.unhcr.org/syrianrefugees/regional.php. See also Rawan Arar, Lisel Hintz and Kelsey P. Norman, "The Real Refugee Crisis Is in the Middle East, not Europe", *Washington Post*, 14 May 2016, available at: www.washingtonpost.com/news/monkey-cage/wp/2016/05/14/the-real-refugee-crisis-is-in-the-middle-east-not-europe/?utm_term=.d5d626c94b55.

12 See UNHCR, *Global Trends: Forced Displacement in 2016*, Geneva, 21 June 2017, pp. 14–15, available at: www.refworld.org/docid/594aa38e0.html.

13 Statistical data comes from EUROSTAT.

14 The Western Balkans region is usually taken to include Albania, Bosnia and Herzegovina, Croatia, Kosovo (UNSC Res. 1244), the former Yugoslav Republic of Macedonia, Montenegro and Serbia. The "Western Balkans route" refers to the flow of refugees and migrants entering Europe through Greece and moving northward to perceived destination countries through the former Yugoslav Republic of Macedonia and Serbia. Until September 2015, the mixed-migration flow moved from Serbia, through Hungary and Austria, and principally towards Germany; in September 2015, the route diverted from Hungary to Croatia and Slovenia.

15 The Common European Asylum System (CEAS) refers to a number of EU directives and regulations that set out certain common standards for member States' national asylum systems. This includes asylum procedures, reception conditions and refugee status determination (RSD) proceedings. CEAS also establishes a joint fingerprint database (EURODAC) and sets out criteria for the determination of which member State is responsible for examining a particular asylum claim.

16 See UNHCR, *Serbia as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia*, Geneva, August 2012; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Refugees in the Former Yugoslav Republic of Macedonia*, Geneva, August 2015; Lena Petrović (ed.), *Right to Asylum in the Republic of Serbia 2016*, BCHR, Belgrade, 2017.

17 See L. Petrović, above note 16.

Geneva Convention relative to the Status of Refugees (1951 Refugee Convention),[18] and taking into consideration the fact that the "refugee character" of the Western Balkans flow cannot easily be refuted,[19] they provide an excellent model for a broader examination of the position of transit countries under IRL.

The question of what is the extent of State obligations towards transiting refugees is multifaceted, with potentially far-reaching implications in terms of both the law and political response. To that end, this article shall first examine the relationship between the concept of (political) asylum and the provisions of the 1951 Refugee Convention *stricto sensu*. An analysis of the scope of application of the Convention to "mixed-migration flows"[20] under circumstances where persons refrain from seeking asylum in the country in which they are present will follow, and finally, an overview of the minimum standards that even transit countries are obliged to meet as a matter of both IRL and IHRL will be provided.

The present article seeks to contribute to a better understanding of these issues by drawing upon the experience of Western Balkan countries in 2015 and 2016, principally the former Yugoslav Republic of Macedonia and Serbia. Although neighbouring countries such as Croatia and Bulgaria are no less "transitory" than the former, their status as EU Member States, bound by EU *acquis*[21] and its intricate Dublin system,[22] adds an additional legal layer that is not strictly relevant to an analysis of universal legislation. They are therefore not considered in the present piece.

With respect to terminology, the author of this article prefers to use the phrase "refugees and migrants".[23] While different stakeholders use different terms

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18 Convention relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entered into force 22 April 1954).

19 According to UNHCR, the world's top countries of origin of refugees remain Syria, Afghanistan and Somalia, all of whose nationals represent a majority of forced migrants registered in Serbia. See Lena Petrović (ed.), *Right to Asylum in the Republic of Serbia 2015*, BCHR, Belgrade, 2016, pp. 38–39.

20 "Contemporary irregular migration is mostly 'mixed', meaning that it consists of flows of people who are on the move for different reasons but who share the same routes, modes of travel and vessels. They cross land and sea borders without authorisation, frequently with the help of people smugglers. [The International Organization for Migration] and UNHCR point out that mixed flows can include refugees, asylum seekers and others with specific needs, such as trafficked persons, stateless persons and unaccompanied or separated children, as well as other irregular migrants. The groups are not mutually exclusive, however, as people often have more than one reason for leaving home." Judith Kumin, "The Challenge of Mixed Migration by Sea", *Forced Migration Review*, No. 45, February 2014, p. 49.

21 See remarks on CEAS, above note 15.

22 The "Dublin system" or "Dublin regime" refers to a list of criteria established by the EU's eponymous Dublin Regulation in order to determine which country is responsible for addressing an individual's asylum claim. The criteria are applied in a subsidiary manner, and the member State in which an asylum-seeker is located may not necessarily be the one responsible for their case (for example, if they have a spouse or minor child who is already a beneficiary of international protection in another member State, that State should be the one examining their claim). See Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 (Recast).

23 This is also the preferred terminology of UNHCR, which stresses that the terms "refugee" and "migrant" cannot be used interchangeably. UNHCR, "'Refugees' and 'Migrants' – Frequently Asked Questions", 16 March 2016, available at: www.unhcr.org/afr/news/latest/2016/3/56e95c676/refugees-migrants-frequently-asked-questions-faqs.html.

to refer to the same phenomenon of forced migrations – employing such terms as "migrants", "vulnerable migrants",[24] "forced migrants", "asylum-seekers",[25] "persons in need of international protection"[26] or even "transit migrants"[27] – referring to "refugees and migrants" is the best way of highlighting the legal relevance of status in a mixed-migration flow.

Finally, the concept of a "transit country" is less easy to define than it may initially appear to be.[28] Very broadly, a transit country is a country that refugees and migrants pass through along the way to their preferred country of asylum – it may be located anywhere between the country of origin and the country of destination. While "institutionalized" transiting such as refugee resettlement schemes may also exist, this article refers only to irregular movement.[29] On the other hand, no transit country may be absolutely regarded as such – there will always be a certain number of persons interested in staying there and genuinely seeking some form of protection, and the designation is also subject to change as circumstances change.

The present author therefore proposes defining a transit country as a country in which, in a given moment, a large majority of refugees and migrants

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24   The International Red Cross and Red Crescent Movement employs the terms "migrants" and "vulnerable migrants", stressing the irrelevance of legal status with respect to the activities undertaken under its mandate. See International Federation of Red Cross and Red Crescent Societies (IFRC), *Policy on Migration*, Geneva, November 2009; Australian Red Cross, IFRC and International Committee of the Red Cross, *Implementation of Resolution 3 of the 31st International Conference, "Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion"*, Geneva, October 2015.

25   Stakeholders and NGOs providing legal assistance or analyzing asylum systems and proceedings will often use this term. See, e.g., European Council on Refugees and Exiles (ECRE), *Principles for Fair and Sustainable Refugee Protection in Europe: ECRE's Vision of Europe's Role in the Global Refugee Protection Regime*, Policy Paper No. 2, February 2017.

26   The term "international protection" is broader than the definition of refugee under the 1951 Refugee Convention and also covers persons who benefit from additional protection mechanisms under regional or human rights instruments. See UNHCR, *Persons in Need of International Protection*, Geneva, June 2017.

27   This is the term proposed by Missbach to refer to refugees and migrants in transit: "I prefer to use the generic term 'transit migrant' even though the term is controversial. Whereas categories of migration are generally labelled according to the circumstances of departure (voluntary or forced), the motivations for departure (economic or rescue), or the outcome of the migration process (resettled refugee, temporary migrant worker), transit migration does not denote a type of migration but rather certain phases in the whole migration process." Antje Missbach, "Transiting Asylum Seekers in Indonesia: Between Human Rights Protection and Criminalization", in Juliet Pietsch and Marshall Clark (eds), *Migration and Integration in Europe, Southeast Asia, and Australia: A Comparative Perspective*, Amsterdam University Press, Amsterdam, 2015, p. 118.

28   Discussing Hungary as a transit country, Irina Molodikova notes: "It is essential to ask if the term 'transit migration' has the same meaning now as in previous realities, or whether it is a new political construction. What are the most important factors that facilitate the transit of migrants through the country? For which groups of migrants does the country appear to be a country of transit? What is the difference between the groups of migrants who want to remain in Hungary and those who try to pass through Hungary into Western Europe? Does the recent readmission agreement create new realities for transit migration between the East and West?" Irina Molodikova, "Hungary and the System of European Transit Migration", in Franck Düvell, Irina Molodikova and Michael Collier (eds), *Transit Migration in Europe*, Amsterdam University Press, Amsterdam, 2014, p. 154.

29   This also appears to be the approach of Géraldine Chatelard, writing for UNHCR in the context of Jordan. Although the notion of "transit countries" is never defined, it is clear that the author takes irregular migration as the key criterion in determining Jordan to be such a country. See Géraldine Chatelard, *Jordan as a Transit Country: Semi-protectionist Immigration Policies and Their Effects on Iraqi Forced Migrants*, Working Paper No. 61, UNHCR, Geneva, 2002, p. 6.

otherwise interested in seeking and receiving international protection refrain from doing so, or do so without genuinely intending to stay there; where they do not remain for a significant span of time; and which they eventually attempt to leave in an irregular manner. Western Balkan countries meet this definition.

The Western Balkans route: Serbia and the former Yugoslav Republic of Macedonia as transit countries

The Balkans had been an entry point for refugees and migrants into Central Europe for years, although it was only starting in spring 2015 that the number of arrivals began to rival those crossing the Mediterranean. As before, Western Balkan countries such as the former Yugoslav Republic of Macedonia and Serbia remained almost exclusively transit States: the vast majority of refugees and migrants simply passed through them without intending to request asylum from their authorities.[30]

The prevailing context in which both countries' asylum systems function is remarkably similar. Both share a common legal background as former federal units of the Socialist Federal Republic of Yugoslavia (Yugoslavia), which had been one of the original States party to the 1951 Refugee Convention and, being non-aligned, a major receiving country for refugees from the Eastern Bloc.[31] Post-World War II Yugoslavia guaranteed the right to asylum (*pravo utočišta*) already in its 1946 Constitution.[32] In spite of that, the country had never developed a national refugee status determination (RSD) system; the Office of the United Nations High Commissioner for Refugees (UNHCR) itself used to conduct RSD under its mandate,[33] while the ultimate decision to grant asylum remained within the jurisdiction of the Federal Executive Council (i.e., the government).[34] It was not until after the breakup of the country that its federal units began to develop their own asylum systems: the Federal Republic of Yugoslavia (Serbia and Montenegro) adopted a Law on Refugees in 1992,[35] but this law (which remains in force) only pertains to the situation of Serbian and other refugees fleeing persecution in other former Yugoslav republics;

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30 See, L. Petrović, above note 16, pp. 11–12; UNHCR, *Serbia as a Country of Asylum*, above note 16, para. 7; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16, para. 36; Aleksandra Cvetanovska and Goce Kocevski (eds), *Annual Report on the Legal Protection of Human Rights in the Republic of Macedonia 2016*, Macedonian Young Lawyers Association (MYLA), Skopje, 2017, pp. 52–54; Pavle Kilibarda and Nikola Kovačević, *Asylum Information Database, Country Report: Serbia*, ECRE, March 2016, p. 18, available at: www.asylumineurope.org/sites/default/files/report-download/aida_sr.pdf.

31 For example, after the 1956 uprising in Hungary, almost 20,000 Hungarian refugees arrived in Yugoslavia. See UNHCR, *Report of the United Nations High Commissioner for Refugees*, UN Doc. A/3828/Rev.1, 1 January 1959.

32 Constitution of the Federal People's Republic of Yugoslavia, *Official Gazette of the FPRY*, 31 January 1946 (FPRY Constitution), Art. 31.

33 See the history page of the UNHCR Serbia website, available at: www.unhcr.rs/en/opste/o-nama/istorija-unhcra.html.

34 Vojin Dimitrijević, *Utočište na teritoriji strane države: Teritorijalni azil*, BCHR, Belgrade, 2015, pp. 84–85.

35 Law on Refugees, *Official Gazette of the Republic of Serbia*, Nos 18/92, 45/2002, and *Official Gazette of the Federal Republic of Yugoslavia*, No. 42/2002.

a general Law on Asylum did not enter into force until 2008.[36] The former Yugoslav Republic of Macedonia similarly adopted a Law on Asylum in 2003, which has since been amended several times.[37] Unlike most European asylum legislation, both of these countries' systems envision a procedural difference between "expressing the intention to seek asylum"[38] or "seeking asylum"[39] (sometimes imprecisely rendered in English as the asylum-seeker being "recorded" or "registered") and formally "submitting an application for asylum":[40] speaking *de jure*, only persons who have done the latter are actually considered as having entered the asylum procedure, which may have practical consequences for the position of asylum-seekers.[41]

The difference is telling. In Serbia, out of a total of 590,816 persons who "expressed the intention to seek asylum" in 2015 and 2016, a mere 1,157 (0.2%) submitted a formal application.[42] Similarly, in the former Yugoslav Republic of Macedonia, where 525,059 asylum-seekers were recorded in the same time span, only 2,660 (0.51%) persons submitted an application.[43] These statistics obviously do not include persons whom the authorities either did not treat in line with asylum legislation or with whom they did not interact at all during their stay.

Both countries' asylum systems have been described as poor and incapable of providing effective protection.[44] The problems alleged to plague the systems include difficulties in accessing the territory and asylum procedure (including expulsion and push-backs);[45] failure or refusal to admit persons into the asylum

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36 Law on Asylum, *Official Gazette of the Republic of Serbia*, No. 109/2007 (Serbian Law on Asylum).
37 Law on Asylum and Temporary Protection, *Official Gazette of the Republic of Macedonia*, Nos 49/03, 66/07, 142/08, 146/09, 166/12, 101/15 (Macedonian Law on Asylum).
38 Serbian Law on Asylum, above note 36, Art. 22.
39 Macedonian Law on Asylum, above note 37, Art. 16.
40 Serbian Law on Asylum, above note 36, Art. 25.
41 In Serbia, the asylum procedure is considered an administrative procedure that only starts once an asylum application has been submitted; it is only as of this moment that the general two-month deadline for enacting an administrative decision foreseen by the Serbian General Administrative Procedure Act becomes relevant. However, as the Law on Asylum does not specify deadlines for "submitting" an application once a person has expressed the intention to seek asylum (practically speaking, this requires Asylum Office staff to schedule an interview with the asylum-seeker in the asylum centre, where they do not have a permanent presence), persons who have expressed the intention to seek asylum may have to spend an unforeseeable length of time waiting for their claim to be addressed. This problem is less pronounced in the former Yugoslav Republic of Macedonia than in Serbia, as Article 3 of the Macedonian Law on Asylum defines an asylum-seeker as "an alien who seeks protection from the Republic of Macedonia from the day he has approached the Ministry of Interior until the day of issuance of a final decision in the procedure for recognition of the right of asylum". For more information, see Serbian Law on Asylum, above note 36; Macedonian Law on Asylum, above note 37.
42 L. Petrović, above note 16, pp. 22, 38; L. Petrović, above note 19, pp. 38–39.
43 Statistics provided by MYLA.
44 UNHCR, *Serbia as a Country of Asylum*, above note 16, para. 10; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16, para. 3.
45 Committee against Torture (CAT), *Concluding Observations on the Second Periodic Report of Serbia*, UN Doc. CAT/C/SRB/CO/2, May 2015, para. 15; UNHCR, *Serbia as a Country of Asylum*, above note 16, paras 12–14; L. Petrović, above note 16, pp. 19–36; CAT, *Concluding Observations on the Third Periodic Report of the Former Yugoslav Republic of Macedonia*, UN Doc. CAT/C/MKD/CO/3, June 2015, para. 19; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16, paras 10–12.

procedure;[46] the practice of automatic application of the safe third country principle without entering the merits of a claim or examining whether applying that concept was appropriate;[47] expulsion and extradition of persons still undergoing asylum proceedings;[48] unlawful detention of refugees and migrants,[49] occasionally followed by credible allegations of ill-treatment of persons deprived of liberty;[50] and general issues related to ensuring respect for the rights of persons granted asylum[51] and continuing lack of integration mechanisms.[52] Based on these issues, UNHCR has strongly advised against considering either Serbia or the former Yugoslav Republic of Macedonia as safe third countries[53] and returning asylum-seekers there.[54] In a recent judgement against Hungary, the European Court of Human Rights (ECtHR) agreed with these considerations, finding that country to have violated the European Convention on Human Rights (ECHR)[55] by returning asylum-seekers to Serbia.[56] Along with economic reasons, these deficiencies should be seen as critical towards understanding why neither Serbia nor the former Yugoslav Republic of Macedonia have become destination countries for any significant number of refugees and migrants.

An additional specificity of the Western Balkans route was the State-sanctioned movement from the former Yugoslav Republic of Macedonia, through Serbia and onward to Croatia and Slovenia, thereby facilitating the

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46 For example, in the first half of 2015, Serbian Border Police refused to admit 520 foreigners to Serbia, including eighteen Syrian and thirty Iraqi nationals. Vesna Petrović and Dušan Pokuševski (eds), *Human Rights in Serbia 2015*, BCHR, Belgrade, 2016, p. 264.

47 See Nikola Kovačević, *Asylum Information Database, Country Report: Serbia: 2016 Update*, ECRE, February 2017, pp. 28–30, available at: www.asylumineurope.org/sites/default/files/report-download/aida_sr_2016update.pdf.

48 *Ibid.*, p. 21.

49 *Ibid.*, p. 46; L. Petrović, above note 16, pp. 31–33; MYLA, *Immigration Detention in Macedonia 2016*, Skopje, 2016, available at: myla.org.mk/wp-content/uploads/2016/09/MYLA-Report-on-Immigration-Detention-in-Macedonia-FINAL.pdf.

50 See Human Rights Watch, *"As Though We Are Not Human Beings": Police Brutality against Migrants and Asylum Seekers in Macedonia*, New York, September 2015, available at: www.hrw.org/report/2015/09/21/though-we-are-not-human-beings/police-brutality-against-migrants-and-asylum.

51 See L. Petrović, above note 16, pp. 99–112.

52 See chapters on Serbia and the former Yugoslav Republic of Macedonia in Sonja Tošković (ed.), *Serbia from Transit to Destination Country*, BCHR, Belgrade, 2016, pp. 15–30, 43–62.

53 The notion of "safe third country" refers to a procedural limitation on examining an individual's asylum claim, introduced by certain countries, based on the fact that the individual entered the receiving country after having passed through one or more "safe" countries where they had the possibility of seeking and receiving effective international protection. For a discussion on this idea, see UNHCR, "Considerations on the 'Safe Third Country' Concept", Geneva, July 1996; Violeta Moreno-Lax, "The Legality of the 'Safe Third Country' Notion Contested: Insights from the Law of Treaties", Guy S. Goodwin-Gill and Philippe Weckel, *Migration and Refugee Protection in the 21st Century: International Legal Aspects*, Martinus Nijhoff, Leiden, 2015.

54 UNHCR, *Serbia as a Country of Asylum*, above note 16, para. 81; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16, paras 46–47.

55 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950 (entered into force on 3 September 1953).

56 ECtHR, *Ilias and Ahmed v. Hungary*, App. No. 47287/15, 14 March 2017. See also Pavle Kilibarda, "The ECtHR's Ilias and Ahmed v. Hungary and Why It Matters", *EJIL: Talk!*, 20 March 2017, available at www.ejiltalk.org/the-ecthrs-ilias-and-ahmed-v-hungary-and-why-it-matters/.

movement of refugees and migrants to Central Europe[57] – namely, this practice persisted for several months after Hungary had closed its borders,[58] and basically involved an open-border policy with respect to refugees and migrants crossing into the former Yugoslav Republic of Macedonia from Greece. The States involved provided medical care and humanitarian assistance along the route[59] as well as transportation and a number of provisional reception centres to accommodate the mass influx of persons in transit.[60] However, restrictions on this manner of free movement were gradually imposed, until finally, after the EU–Turkey deal of March 2016,[61] the Western Balkans route was completely "shut down".[62] This did not entail full border closure, but the States no longer sanctioned movement along the route, which meant that the situation had essentially reverted to the previous state of affairs – refugees and migrants could either seek asylum in the country where they were present, or face treatment as irregular migrants.[63]

For these reasons, it is submitted here that Serbia and the former Yugoslav Republic of Macedonia fully meet the above-proposed definition of a transit country for the purposes of IRL. As they are States party to the 1951 Refugee Convention, findings in relation to these two countries will also be relevant to other possible transit countries as well, and possibly to non-parties insofar as the relevant elements of IRL may be regarded as customary law.[64]

Asylum and refugee protection: Complementary, but separate regimes?

Although the terms "refugee status" and "asylum" may commonly be heard in the same context, they are not identical. Each has its own meaning and history in

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57 See European Commission, *Report from the European Commission to the European Parliament and the Council on the Follow-Up to the Leaders' Meeting on Refugee Flows along the Western Balkans Route*, Strasbourg, December 2015.

58 Kris Pollet and Minos Mouzourakis, *Crossing Boundaries: The New Asylum Procedure at the Border and Restrictions to Accessing Protection in Hungary*, ECRE, October 2015, pp. 33–34.

59 P. Kilibarda and N. Kovačević, above note 30, p. 25; State-sanctioned transportation in Serbia included taking refugees and migrants by bus from the Macedonia–Serbia border at Preševo to the Croatia–Serbia border at Šid on the Serbian side of the border, where they were placed under the jurisdiction of Croatian police officers. The Croatian police would conduct screening before allowing refugees and migrants to board a Croatian Railways train to the reception centre in Slavonski Brod. The author of this article observed the procedure himself as a member of a joint monitoring visit of the Ombudspersons of Croatia and Serbia to the centres in Šid and Slavonski Brod on 9 December 2015.

60 *Ibid.*, p. 28.

61 See European Commission, "EU–Turkey Statement: Questions and Answers", 19 March 2016, available at: europa.eu/rapid/press-release_MEMO-16-963_en.htm.

62 See, e.g., Balkan Investigative Reporting Network, "Balkan States Close Borders in Domino Effect", *BalkanInsight*, 9 March 2016, available at: www.balkaninsight.com/en/article/balkan-migrants-rute-is-no-more-slovenia-declares-03-09-2016-1.

63 "As of March 2016, following joint action by a number of countries along the Western Balkan route, the majority of refugees and migrants are no longer able to use this route to travel to those European countries perceived as countries of asylum. However, persons who do reach Serbia may still submit an asylum application here." P. Kilibarda and N. Kovačević, above note 30, p. 25.

64 For a discussion of customary IRL, see D. W. Greig, "The Protection of Refugees and Customary International Law", *Australian Yearbook of International Law*, Vol. 8, 1983.

international law, and understanding the difference is crucial to establishing the obligations of transit countries.

As a matter of IRL *stricto sensu*, sixty-five years since its adoption, the 1951 Refugee Convention, as modified by its 1967 Protocol,[65] remains the single most important element of the international system of refugee protection.

While, before World War II, the League of Nations system had already known several arrangements for the protection of persons fleeing persecution (such as the 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees[66] and the 1936 Provisional Arrangement concerning the Status of Refugees Coming from Germany),[67] such arrangements remained of limited scope in terms of the rights they conferred and the nationalities they covered. Building upon a refugee definition largely adopted by the UNHCR Statute of 1950,[68] the 1951 Refugee Convention was the first universal treaty governing the situation of refugees in a general manner, especially following the adoption of the 1967 Protocol, which removed the limits on the Convention's application contained in Article 1(A)(2).[69]

Although certain scholars have argued that the significance of the 1951 Refugee Convention has waned in light of developments in the field of IHRL,[70] it cannot be denied that at least some of its provisions reflect peculiarities of IRL and are not present in other branches of the law. For this reason, among others, the definition of a refugee[71] under the 1951 Refugee Convention remains crucial for the enjoyment of a number of substantive rights that it grants its beneficiaries.

Most importantly, the Convention establishes an objective regime of refugee protection which is independent of the will of the receiving State Party –

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65 Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967) (New York Protocol).

66 Arrangement relating to the Issue of Identify Certificates to Russian and Armenian Refugees, 89 LNTS 2004, 12 May 1926.

67 Provisional Arrangement concerning the Status of Refugees Coming from Germany, 171 LNTS 3952, 4 July 1936.

68 UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, UN Doc. A/RES/428(V), 14 December 1950 (UNHCR Statute), Art. 6(A)(ii).

69 The 1951 Refugee Convention permits States Parties to choose whether, with respect to their obligations, the words "events occurring before 1 January 1951" in Article 1(A) shall be understood to mean "events occurring in Europe before 1 January 1951" or "events occurring in Europe or elsewhere before 1 January 1951". 1951 Refugee Convention, Art. 1(B)(1).

70 "A closer examination of [the norms of refugee and human rights law] clearly demonstrates that human rights law has become the primary source of refugee protection. The Geneva Convention has been accordingly relegated to a supporting role." Vincent Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law", in Ruth Rubio-Marín (ed.), *Human Rights and Immigration*, Oxford University Press, Oxford, 2014, p. 22. For a more favourable approach to the Convention, see Jane McAdam, "The Enduring Relevance of the 1951 Refugee Convention", *International Journal of Refugee Law*, Vol. 29, No. 1, 2017.

71 According to the 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; or who, 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". 1951 Refugee Convention, Art. 1(A)(2).

once a person meets the requirements for refugee status, they are to benefit from its protection, regardless of whether they have been granted asylum by any country. Indeed, it has long been held that "a person becomes a refugee at the moment when he or she satisfies the definition, so that formal determination of status is declaratory, rather than constitutive".[72] In other words, the protection granted by the Convention is – for some of its provisions, at least – separate from the status of an asylum claim, unless of course it is determined, in fair proceedings, that the applicant in question is not a refugee in the first place.[73]

In line with the understanding that the asylum procedure is merely declaratory,[74] many States Parties today afford a considerable part, if not the full spectrum, of refugee rights to asylum-seekers, who are therefore presumed refugees until proven otherwise. For example, Serbian and Macedonian law both grant a wide spectrum of rights to asylum-seekers, including the right to free accommodation,[75] health care[76] social security[77] and, under certain circumstances, access to the labour market.[78]

On the other hand, in reality, a receiving country cannot usually be expected to discern of its own accord whether or not a foreigner entering or already present on its territory is, in fact, a refugee. Under regular circumstances (i.e., outside of the context of a mass influx situation), it must be up to the potential refugee – the asylum-seeker – to demonstrate his or her eligibility for the rights proceeding from refugee status. This is an argument used at times by governments,[79] and it is not an unsound one at that.

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72 Guy S. Goodwin-Gill, *The Refugee in International Law*, Clarendon Press, Oxford, 1989, p. 20.
73 Either by failing to meet the conditions for refugee status or being excluded from it under the exclusion clauses. 1951 Refugee Convention, Art. 1(D–F).
74 See UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)*, UN Doc. EC/SCP/2, 23 August 1977, para. 17; UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, 2011 (RSD Handbook), para. 28; D. W. Greig, above note 64, pp. 133–134; Mariagiulia Giuffré, "Access to Asylum at Sea? *Non-Refoulement* and a Comprehensive Approach to Extraterritorial Human Rights Obligations", in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *"Boat Refugees" and Migrants at Sea: A Comprehensive Approach*, Brill Nijhoff, Leiden, 2016, p. 251.
75 Macedonian Law on Asylum, above note 37, Art. 48; Serbian Law on Asylum, above note 36, Art. 39.
76 Macedonian Law on Asylum, above note 37, Art. 48; Serbian Law on Asylum, above note 36, Art. 40.
77 Macedonian Law on Asylum, above note 37, Art. 48; Serbian Law on Asylum, above note 36, Art. 41.
78 Macedonian legislation only allows asylum-seekers to work within reception centres or other places of accommodation assigned by the Ministry of Labour and Social Policy; Macedonian Law on Asylum, above note 37, Art. 48. In Serbia, the Law on Asylum only allows persons recognized as refugees in the asylum procedure to become employed, though the 2014 Employment of Foreigners Act allows asylum-seekers to apply for a work permit and access the labour market if nine months have passed since they have submitted their asylum application and no final decision has been reached through no fault of their own. See Serbian Law on Asylum, above note 36, Art. 43; Employment of Foreigners Act, *Official Gazette of the Republic of Serbia*, No. 128/2014, Art. 13; Lena Petrović and Sonja Tošković, *Institucionalni mehanizmi za integraciju osoba kojima je odobren azil*, BCHR, Belgrade, 2016, pp. 23–25.
79 The argument can take different forms. For example, the government of Australia recently ordered that asylum-seekers would have to formally apply for asylum or face deportation after a certain deadline had expired. See, e.g., "Peter Dutton Gives Asylum Seekers in Australia Deadline to Apply for Refugee Status", *The Guardian*, 21 May 2017, available at: www.theguardian.com/australia-news/2017/may/21/peter-dutton-gives-asylum-seekers-in-australia-deadline-to-apply-for-refugee-status. The author of the present article himself heard this argument raised by authorities in the Western Balkans during meetings related to the Western Balkans flow.

Neither the 1951 Refugee Convention nor its Protocol have anything to say on the matter of the RSD procedure as such. With respect to rights guaranteed by the Convention, there is no explicit discrimination within the treaty between rights to be awarded after asylum has been granted and those stemming already *ipso facto* from meeting the criteria for refugee status. However, certain provisions make reference to different types of refugee presence in States Parties' territory; this suggests that certain rights or obligations established by them only exist with respect to refugees whose stay has been formalized. For example, when Article 24 of the Convention discusses labour legislation and social security, it accords the same treatment to "refugees lawfully staying in their territory" as is accorded to that State's own nationals. This implies that refugees whose stay is not "lawful" continue to enjoy those Convention rights which are granted without the condition of lawful stay; however, it also implies that a State has the right to institute such procedures as are necessary for legalizing their stay on its territory before granting the full scope of Convention rights (as long as such procedures are not overly restrictive, which would go against the Convention's object and purpose).

Across Europe, as well as in most parts of the world, the national RSD procedure is referred to as the "asylum procedure". As stated above, while "asylum" is closely related to the notion of refugee status, the terms are not synonymous. Asylum may refer to the procedure of granting protection to a foreigner, as well as the protection itself, and just as a refugee may not be a beneficiary of asylum, so too may a person granted asylum not meet the criteria of the 1951 Refugee Convention for refugee status. As a result of developments in IHRL, many countries have instituted "subsidiary protection"[80] as a type of protection status granted specifically to persons who do not meet the definition of a refugee, but whose return to their country of origin would nonetheless be in violation of peremptory norms of IHRL;[81] likewise, a mandate refugee[82] located in a State which has not ratified the Convention or maintains geographic or temporal limits on its application may only enjoy "temporary protection"[83] in that country, if they enjoy any manner of protection at all. With respect to the Western Balkan

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80 See, e.g., European Council, Council Directive 2004/83/EC, 29 April 2004 (EC Qualification Directive), Arts 2(e), 15.

81 This primarily refers to the *jus cogens* prohibition against torture and other cruel, inhuman or degrading treatment or punishment, as well as the effectively absolute prohibition against arbitrary deprivation of life.

82 "A person who meets the criteria of the UNHCR Statute qualifies for the protection of the United Nations provided by the High Commissioner, regardless of whether or not he is in a country that is a party to the 1951 Convention or the 1967 Protocol or whether or not he has been recognized by his host country as a refugee under either of these instruments. Such refugees, being within the High Commissioner's mandate, are usually referred to as 'mandate refugees'." RSD Handbook, above note 74, para. 16.

83 Thus, Turkey provides "temporary protection" to Syrian refugees, with respect to whom it does not consider itself bound by the 1951 Refugee Convention, but nevertheless offers certain limited rights. See Oktay Durukan, Öykü Tumer and Veysel Essiz, *Asylum Information Database, Country Report: Turkey*, December 2015, pp. 104–136, available at: www.asylumineurope.org/sites/default/files/report-download/aida_tr_update.i.pdf.

examples, both Serbia[84] and the former Yugoslav Republic of Macedonia[85] legally foresee the possibility of granting subsidiary protection to persons who are not refugees but who may nevertheless be at risk of serious human rights violations. It should be noted that beneficiaries of subsidiary protection do not enjoy the full spectrum of refugee rights.[86]

Understood as long-term protection, asylum remains separate and different from the general obligations of States under such documents as the 1951 Refugee Convention. In fact, the Convention only mentions asylum in the Preamble, where it recognizes that "the grant of asylum may place unduly heavy burdens on certain countries" and that international cooperation on the issue is necessary.

The first mention of asylum in the United Nations (UN) system is made by the Universal Declaration of Human Rights (UDHR) itself.[87] However, the "right to asylum" under the UDHR was differentiated from the principle of *non-refoulement* under IRL because it did not oblige States to actually grant asylum to refugees (this stands in distinction to the obligation of *non-refoulement*, which is absolute). This implies that States had undertaken an undisputed obligation to refrain from the forced return of refugees, but did not have a corresponding obligation to provide durable solutions for their situation. When the UN General Assembly unanimously voted to adopt the Declaration on Territorial Asylum in 1967,[88] certain obligations, including those related to the principle of *non-refoulement* (such as the prohibition against rejections at the frontier, conspicuously absent from the text of the 1951 Refugee Convention), were fleshed out to a much greater extent, yet an obligation to grant asylum never materialized, and remained confined in broad terms to documents which were not *de jure* binding.[89] Coming back to the Yugoslav example, the right to asylum was guaranteed by all three of the country's post-World War II constitutions.[90]

84 Serbian Law on Asylum, above note 36, Art. 2.
85 In the former Yugoslav Republic of Macedonia, this type of protection is referred to as "humanitarian protection". Macedonian Law on Asylum, above note 37, Art. 5.
86 This is particularly true of labour legislation. In the former Yugoslav Republic of Macedonia, recognized refugees have the right to work as foreigners with a permanent residence, which is not granted to beneficiaries of humanitarian protection (who may only work as foreigners with temporary residence). In Serbia, the Law on Asylum does not give the right to work to beneficiaries of subsidiary protection, but this right was granted by the 2014 Employment of Foreigners Act. The legislation of these countries does not provide for issuing travel documents to beneficiaries of subsidiary or humanitarian protection, respectively. See Macedonian Law on Asylum, above note 37, Arts 42, 56, 60; Serbian Law on Asylum, above note 36, Arts 43, 62; Serbian Employment of Foreigners Act, above note 78, Art. 13.
87 The UDHR foresees that "everyone has the right to seek and to enjoy in other countries asylum from persecution." UN General Assembly, Universal Declaration of Human Rights, UN Doc. 217 A (III), 10 December 1948, Art. 14. However, the adopted terminology was purposefully ambiguous, reflected in the use of the term "to enjoy" rather than "to be granted." See G. S. Goodwin-Gill, above note 72, p. 104.
88 UN General Assembly, Declaration on Territorial Asylum, UN Doc. A/RES/2312(XXII), 14 December 1967.
89 Neither of the two 1966 Covenants contain provisions on the right to asylum *stricto sensu*, nor has a potential universal treaty that some had expected as follow-up to the 1967 Declaration ever been adopted.
90 FPRY Constitution, above note 32, Art. 31; Constitution of the Socialist Federal Republic of Yugoslavia, *Official Gazette of the SFRY*, Year XIX, No. 14, 10 April 1963, Art. 65; Constitution of the Socialist Federal Republic of Yugoslavia, *Official Gazette of the SFRY*, Year XXX, No. 9, 21 February 1974, Art. 202.

However, in spite of the fact that Yugoslavia had been engaged in the drafting of the 1951 Refugee Convention and became one of its original States Parties, the scope of this right remained much more narrow than the definition of a refugee under the Convention; in fact, the 1974 Constitution only granted the right to asylum to foreigners and stateless persons "who face persecution because of their advocacy of democratic opinions and movements, social and national liberation, the freedom and rights of the human person or the freedom of scientific or artistic creation".[91] The difference between the regimes of asylum and the 1951 Refugee Convention is important for establishing how the manner in which a State may choose to implement its international obligations may, at times, be at odds with those very obligations. Generally speaking, providing asylum for refugees is extremely beneficial, and may even go beyond what is strictly required by the 1951 Refugee Convention; however, conditioning the protection of the latter on requesting asylum can in practice undermine its implementation. Regardless of whether or not a State may grant permanent protection, individual rights as guaranteed by the 1951 Refugee Convention and various human rights instruments must be respected as soon as the conditions for their application have been met – irrespective of whether or not a formal procedure has actually been followed. This final point is crucial to understanding the position of transit countries, which are not really "countries of asylum" but remain bound by refugee law nonetheless.

Application of the 1951 Refugee Convention in transit countries: Counter-arguments raised in practice

As previously mentioned, the 1951 Refugee Convention as modified by its 1967 Protocol becomes applicable once a person meets the criteria of Article 1(A)(2) and is not excluded from refugee status under one of the so-called exclusion clauses (Article 1(D–F)). Likewise, in spite of the fact that the Convention does not explicitly establish a State Party's obligations vis-à-vis refugees as owed either to those on its territory or those under its jurisdiction, the latter, broader notion is generally taken to be relevant, which is particularly important for refugees intercepted at sea. Such people are certainly to be considered refugees from the moment they leave the territory of their country of origin,[92] but until they come under the jurisdiction of a State Party, the extent of that country's obligations

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91 Constitution of the Socialist Federal Republic of Yugoslavia, *Official Gazette of the SFRY*, Year XXX, No. 9, 21 February 1974, Art. 202.

92 "The Refugee Convention is silent on the issue of its extraterritorial applicability, yet it is submitted that there are a number of more or less compelling reasons which would seem to indicate that Art. 33(1) of the Refugee Convention ought to apply outside the territory of the States Parties. By way of a preliminary remark it is worthy to note that Art. 1(3) of the 1967 Protocol to the Refugee Convention states that the Protocol 'shall be applied by States Parties hereto without any geographical limitation.'" Killian S. O'Brien, "Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem", *Goettingen Journal of International Law*, Vol. 3, No. 2, 2011, p. 727.

towards them is questionable inasmuch as it is towards those on the territory of another State Party.

Bearing this in mind, it is reasonable to assume that, at least in terms of rights for the enjoyment of which the Convention establishes no further conditions, the obligations of a so-called transit country are no different from those of a destination country.

In the Western Balkans, however, several arguments, or groups of arguments, have been put forward asserting the contrary. They are both of a legal and factual nature and may conceivably be heard, *mutatis mutandis*, in the context of other transit countries as well. What will follow are the legal and factual merits of these arguments.

The most common argument that may be heard is that persons who do not seek asylum are not, in fact, entitled to the protection of IRL. When discussing the obligations of their respective countries, Western Balkan leaders often highlight that they only have legal obligations towards persons requesting asylum; statements to that effect were made in 2016 by the then labour minister of Serbia[93] as well as the prime minister.[94] These statements further suggest that any assistance provided to refugees and migrants who do not request asylum remains a question of policy, rather than law, and represents a measure of countries' "hospitality".[95] This is the principal legal argument against the application of IRL in such situations.

In addition, it has been argued by Western Balkan leaders that certain national groups travelling along the route come from countries where there is no armed conflict and therefore cannot be refugees,[96] and that persons travelling along the route have already passed countries where they could have applied for asylum and are therefore not entitled to protection in other countries. While this

93 In early 2016, discussing refugees and migrants returned to Serbia from Croatia, the Serbian Minister of Labour stated that these persons could either request asylum in Serbia or face forced return to those countries from which they had first entered Serbia. See "Bit će onemogućeno novo vraćanje migranata iz Hrvatske", *N1*, 17 February 2016, available at: hr.n1info.com/a104542/Svijet/Regija/Aleksandar-Vulin-Bit-ce-onemoguceno-novo-vracanje-migranata-iz-Hrvatske.html (in Croatian).

94 In 2016, the prime minister of Serbia stated at a press conference that "[o]ur prosecutors and courts will take all lawful measures to curb crime and show clearly to everyone that Serbia cannot be a parking lot for Afghans and Pakistanis whom no one in Europe wants to see, let alone receive", and that these persons could still request asylum "with minimal chances of getting it. And those who do not want to seek asylum will be removed from our territory according to the law." "Vučić: Zajednički timovi policije i Vojske Srbije na granicama", *Politika*, 16 July 2016, available at: www.politika.rs/sr/clanak/359265/Vucic-Zajednicki-timovi-policije-i-Vojske-Srbije-na-granicama (in Serbian, translated by the author).

95 Germann Molz and Gibson give an interesting perspective on what they term the "discourse of hospitality": "If the immigrant is imagined as 'the guest', the 'host nation' maintains its historical position of power and privilege in determining who is or is not welcome to enter the country, but also under what conditions of entry. … The host nation, despite explicit evidence to the contrary, often imagines itself narcissistically as being hospitable." The "discourse of hospitality" is thus often based on notions of sovereignty and nationalism and paradoxically "reveal[s] the hostility present within such policies of managing diversity within the 'host nation'". Jennie Germann Molz and Sarah Gibson, "Introduction: Mobilizing and Mooring Hospitality", in Jennie Germann Molz and Sarah Gibson (eds), *Mobilizing Hospitality: The Ethics of Social Relations in a Mobile World*, Ashgate Publishing, Aldershot, 2007, pp. 8–9.

96 See, e.g., "Potvrđeno pisanje Blica: Srbija zatvorila granice za ekonomske izbeglice", *Blic*, 20 November 2017, available at: www.blic.rs/vesti/politika/potvrdjeno-pisanje-blica-srbija-zatvorila-granice-za-ekonomske-izbeglice/17wfv4g (in Serbian).

argument may be attributed to a faulty understanding of the 1951 Refugee Convention – which concerns persons fleeing persecution, not armed conflict – it is very relevant from the perspective of the obligation to cooperate with UNHCR and to conduct gathering of country-of-origin information (COI).[97] Insofar as it is not a simple misreading of the law, this argument is factual, rather than legal.

(Non-)Applicability of the 1951 Refugee Convention: The legal argument

As has been discussed previously, the decision not to apply for asylum or any other form of protection that a country may offer should be seen as the key difference between countries of transit and destination. Such a decision, if it were to have any bearing on the legal relationship between a refugee and a State party to the 1951 Refugee Convention under whose jurisdiction the refugee finds themselves, has to be read with regard to its definition of a refugee.[98] Essentially, it must be examined whether a refugee has to take the initiative in order to receive international protection, or whether a country may be expected to take action regardless of the existence of any initiative on that person's part.

Bearing in mind that the 1951 Refugee Convention is silent on asylum and remains applicable to persons who objectively meet the criteria for refugee status, it is difficult to read the Convention as no longer being applicable to persons who do not seek asylum. In terms of Article 1(A)(2), the only element of the refugee definition that may feasibly be invoked as a basis for this argument is the "well-founded fear" requirement. This line of argument refers to situations where, for instance, persons decide not to apply for asylum in a certain country for reasons of what has been called "asylum shopping",[99] thus not demonstrating well-founded fear of persecution on Convention grounds, as, were they genuinely in distress, they would accept the first shelter offered to them. This argument is of a legal nature, and although not convincing to the present author, it should nevertheless be examined. It creates a situation wherein it is no longer a question of whether a refugee who does not ask for asylum is entitled to enjoy rights under the 1951 Refugee Convention regardless – the person actually fails to meet the criteria of the Convention in the first place.

Certain situations – albeit marginal – can be conceived wherein a refusal to seek asylum would amount to a failure to meet the criteria of having a "well-founded fear". The notion of such a fear is usually taken as consisting of two elements, one objective and the other subjective. The "objective" element lies in the requirement of

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97 It should be mentioned here that UNHCR recently published its new international protection guidelines, reaffirming its decades-old position that persons fleeing an armed conflict will often have a "well-founded fear of persecution" for the purposes of IRL. See UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions*, UN Doc. HCR/GIP/16/12, 2 December 2016, para. 13.

98 See above note 71.

99 "Asylum shopping" refers to a perceived practice on the part of some refugees and migrants who do not seek asylum in the first country where they may (ostensibly) receive protection, but decide to seek it elsewhere, primarily motivated by economic considerations.

being well-founded – i.e., that persecution on Convention grounds is a reasonable possibility, although it is important to note that "the Convention neither requires that the putative refugee shall have fled by reason of fear of persecution, nor that persecution should have actually occurred".[100] The "subjective" element, perhaps more difficult to define, naturally refers to an individual's own feelings. Obviously, under normal circumstances, the asylum-seeker will have shown fear through the very act of making an informed decision to ask for asylum, yet the subjective element will often remain decisive throughout the asylum procedure:

> At each stage, hard evidence is likely to be absent, so that finally the asylum-seeker's own statements, their force, coherence, and credibility must be relied on, in the light of what is known generally, from a variety of sources, regarding conditions in the country of origin.[101]

The asylum systems of most countries – including Western Balkan countries – are founded on the paradigm of the asylum-seeker as an individual seeking to enforce his or her rights rather than providing *a priori* protection for larger groups (as is the case in situations of mass influx).[102] Under the circumstances, a person facing forced return to any country where they may suffer treatment amounting to persecution in Convention terms but making the informed decision not to ask for asylum – thereby normally staying expulsion proceedings – could thereby be construed as not having demonstrated a well-founded fear, and therefore would not be a refugee in the first place. This situation is theoretically clear and practically plausible. However, the fact that it is plausible does not mean it happens in reality with any sort of regularity, and the transit context – being the principal situation where persons will generally refuse or avoid seeking asylum – is intrinsically different.

First of all, as has been attested with regard to the movement of refugees towards Central and Western Europe in 2015 and 2016, the Western Balkan "transit" countries are generally not perceived as being capable of providing adequate protection to refugees or enabling them to live their lives in relative safety and dignity.[103] Economic reasons may well have some bearing upon a decision to by-pass these countries' asylum systems, but this does not necessarily amount to "asylum shopping": countries with a poor economy and/or high corruption are usually also incapable of providing a safe protection environment to any significant number of people, and furthermore, refugees themselves often have very little or no knowledge at all of the asylum procedure and what it entails. Under such circumstances, omission or even explicit refusal to apply for asylum should not be understood as implying lack of a well-founded fear of

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100 G. S. Goodwin-Gill, above note 72, p. 25.
101 *Ibid.*
102 See Macedonian Law on Asylum, above note 37, Arts 62–66; Serbian Law on Asylum, above note 36, Arts 36–38.
103 L. Petrović, above note 16, pp. 11–12; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16, paras 8, 40–44.

persecution, especially in situations wherein refugees are not faced with a choice to ask for asylum or undergo forced return. In the latter situation, authorities should take particular care not to immediately assume that the person in question is seeking to abuse the asylum procedure in order to delay deportation, and should carefully assess the position of the potential refugee.

The mere fact that a particular country is party to the 1951 Refugee Convention and/or its Protocol and has a legal framework in place for their implementation does not *ipso facto* mean that it actually provides a safe protection environment. An analogy with practice regarding the application of the safe third country context may be made in order to examine key stakeholders' attitude as to what constitutes a safe country of asylum (in fact, transit countries themselves are often considered safe third countries by their neighbours).[104] Thus, for example, EU member States have refrained from executing Dublin returns[105] after the ECtHR had found such returns to be in violation of the ECHR,[106] and UNHCR itself has published reports describing the protection environment in certain countries and has even recommended that other States Parties not consider them safe third countries.[107] The implication is that failure to seek asylum in a country which does not adequately provide for refugee rights ought not to have any significant bearing upon that refugee's status as a matter of international law.

Refusal on the part of a potential refugee to seek asylum may cause significant issues of a different nature, particularly as a matter of national law. For example, national legislation may absolutely precondition the grant of asylum by requiring the individual to actually request such protection, thereby rendering *proprio motu* action by the State impossible even if that person's status as a refugee is not in doubt. However, national legislation may at the same time prohibit in absolute terms (in line with the principle of *non-refoulement* as present in human rights law) the return of any foreigner to a country where he or she may be at risk of torture or other ill-treatment. Such norms exist across Europe and are present in EU directives,[108] and even persons actually requesting asylum may be excluded from either recognition of refugee status or being granted subsidiary protection.[109] This may lead to a case wherein a person may neither receive asylum nor be removed from that particular country, and may

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104 Thus, Hungary considers Serbia a safe third country, and Serbia, in turn, considers the former Yugoslav Republic of Macedonia as such.

105 See above note 22.

106 In the well-known case of *M. S. S. v. Belgium and Greece*, an asylum-seeker was returned from Belgium to Greece under the Dublin Regulation in spite of the fact that he was at real risk of ill-treatment upon return. The ECtHR rejected the notion that the Dublin Regulation could take precedence over the norms of human rights law and found a violation of the European Convention in this regard. See ECtHR, *M. S. S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011.

107 See UNHCR, *Serbia as a Country of Asylum*, above note 16; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16.

108 EC Qualification Directive, above note 80, Art. 21.

109 *Ibid.*, Art. 17.

even face deprivation of liberty for unforeseeable lengths of time (as well as losing other rights resulting from refugee status).

With respect to protection and status, it is important to note that the content of protection granted to refugees under IRL goes far beyond simple *non-refoulement*.[110] When a person is excluded from refugee status, she or he is *ipso facto* excluded not only from the prohibition of *refoulement* under IRL, but also from such rights as refugees are entitled to under the 1951 Refugee Convention. Because of the gap that arguably exists between the principle of *non-refoulement* under IRL (which is limited) and the same principle under IHRL (which is absolute and non-derogable), it is entirely conceivable that a person excluded from refugee status for having committed a serious non-political crime[111] may nevertheless not be forcibly returned as a result of human rights legislation. However, because IHRL is not status-based, such persons would effectively remain without any form of status under international law. In fact, many countries – including both Serbia[112] and the former Yugoslav Republic of Macedonia[113] – could subject them to deprivation of liberty as "irregular migrants" for the duration of their stay in the country's territory. As this detention could last as long as there is a risk of ill-treatment in case of return, and if the legislation of the country *in casu* does not foresee an alternative way of resolving the individual's situation, such deprivation of liberty, even if it were lawful in the beginning, could soon become arbitrary and unlawful under IHRL.[114] Therefore, while a strict reading of the law could lead to a situation wherein a forced migrant could remain in legal limbo, it is submitted that allowing such situations to go without being resolved properly could very easily produce a situation which is in contradiction to international law.

(Non-)Applicability of the 1951 Refugee Convention: The factual aspects

A separate but similarly common issue concerns the obligation to gather COI and how this relates to the question of applying the 1951 Refugee Convention. Is a receiving country subject to higher standards in this respect when faced with an influx of persons who are known to be very likely to meet the Convention's criteria for refugee status?

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110 For this reason, UNHCR sees international protection as ensuring that "all women, men, girls, and boys of concern to UNHCR have equal access to and enjoyment of their rights in accordance with international law. The ultimate goal … is to help them rebuild their lives within a reasonable amount of time." UNHCR, *UNHCR and International Protection: A Protection Induction Programme*, Geneva, 2006, p. 12.
111 This is foreseen by the exclusion clauses of the 1951 Convention: see 1951 Refugee Convention, above note 18, Art. 1(F).
112 Law on Foreigners, *Official Gazette of the Republic of Serbia*, No. 97/2008, Arts 45, 49–50.
113 Law on Foreigners, *Official Gazette of the Republic of Macedonia*, No. 35, 23 March 2006, Arts 107–110.
114 In its General Comment No. 35, the Human Rights Committee recalls that, in the context of immigration control, "detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time", and that "the inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention". Human Rights Council, General Comment No. 35, "Article 9 (Liberty and Security of Person)", UN Doc. CCPR/C/GC/35, 16 December 2014, para. 18.

When faced with a mass influx situation, States have been known for decades to make a *prima facie* determination of the "refugee character" of a particular flow.[115] Such a determination is usually made when, due to the scale of the situation, protection considerations outweigh the need to make an individual assessment, and thus a group determination is made. This was arguably the case when, in September 2015, the government of Serbia enacted a "Decision on Issuing a Certificate of Having Entered the Territory of Serbia for Migrants Coming from Countries Where Their Lives are in Danger",[116] which circumvented the necessity of applying for asylum in Serbia in order to facilitate movement along the Western Balkans route. These certificates were initially provided to all persons transiting through Serbia at key checkpoints and were later issued exclusively to nationals of Afghanistan, Iraq and Syria.[117]

A number of States party to the 1951 Refugee Convention also provide for some form of temporary protection that may be enacted particularly in times of mass influx.[118] Otherwise, the determination may not always be made officially, especially if the State's national legislation does not provide for it; under such circumstances, the relevant authorities may opt to simply apply appropriate norms of refugee law in spite of the provisions of domestic law and national asylum bodies may informally choose to prioritize the claims of persons hailing from certain countries of origin.[119] Such responses are intrinsically connected to the practical necessity of gathering COI in order to ensure the implementation of the Convention in practice.

There are at least two grounds from which the existence of relevant legal standards may be inferred, and both may be gleaned from the Convention itself. The first is implicit yet self-evident, as it lies in the very nature of the Convention's provisions; for example, the whole of Articles 1 and 33 cannot be implemented without the State Party conducting at least some COI-gathering on its own. Yet such an obligation is very broad and is certainly one of result rather than means (i.e., what is necessary for it to be met is for a person objectively meeting the Convention definition of a refugee to enjoy such rights as are granted to them by it).

An additional, more precise obligation may be inferred from the relationship between States Parties and UNHCR. Article 35(1) of the Convention states the following:

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115 "*Prima facie* refugee determination is made on the basis of the objective circumstances leading to the mass displacement and the obvious refugee character of the individuals concerned." Jean-François Durieux and Jane McAdam, "*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies", *International Journal of Refugee Law*, Vol. 16, No. 1, 2004, p. 11.
116 Decision on Issuing a Certificate of Having Entered the Territory of Serbia for Migrants Coming from Countries Where Their Lives are in Danger, *Official Gazette of the Republic of Serbia*, No. 81/2015.
117 P. Kilibarda and N. Kovačević, above note 30, p. 25.
118 Macedonian Law on Asylum, above note 37, Arts 62–66; Serbian Law on Asylum, above note 36, Arts 36–38.
119 Prior to legislative amendments in 2016, this was the case in Germany, where the Federal Office for Migration and Refugees used to prioritize certain caseloads through different administrative measures, but without actual basis in law, and mainly with respect to claims that appeared manifestly unfounded. See Michael Kalkmann, *Asylum Information Database: National Country Report: Germany*, ECRE, May 2013, p. 31.

> The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.[120]

An almost identical obligation exists under Article 2(1) of the 1967 Protocol.[121] Taken at face value, these provisions are very broad, but also seemingly very "soft" in terms of what they require of States Parties. The nature of cooperation required of States Parties under the 1951 Refugee Convention is fleshed out in Article 35(2), which makes reference to the special role played by UNHCR in monitoring the implementation of the Convention. An obligation to cooperate with UNHCR had also already been recognized by the UN General Assembly in Resolution 428(V) of 14 December 1950, adopting the UNHCR Statute as an annex; the nature of cooperation with UNHCR is more precisely defined there, although again not in exhaustive terms.[122]

In line with its mandate, UNHCR's Executive Committee has already defined its role in the determination of refugee status, which includes making recommendations of minimal procedural requirements in the RSD procedure,[123] and many countries accommodate for UNHCR's opinion to be taken into account during such proceedings, even if not considering themselves bound by it.

Bearing in mind the general rule that treaties are to be interpreted with regard to their object and purpose,[124] Article 35 of the 1951 Refugee Convention can only be properly understood by reference to its Preamble, wherein the high contracting parties note UNHCR's role in "supervising international conventions providing for the protection of refugees" and recognize "that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner".[125] Because the problem of forced migrations cannot and should not be considered any single country's burden, the role of UNHCR in coordinating efforts remains crucial. In an international system where the grant of asylum remains particularized, a central coordinating body to ensure a certain level of uniform practice must exist.

UNHCR continues to act in line with such a role, *inter alia* by means of various position papers, such as the ones on the international legal status of persons fleeing Syria,[126] Iraq[127] or Libya.[128] In researching and publishing

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120 1951 Refugee Convention, Art. 35.
121 New York Protocol, above note 65.
122 UNHCR Statute, above note 68, Art. 2.
123 G. S. Goodwin-Gill, above note 72, p. 204.
124 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 22 May 1969 (entered into force 27 January 1980), Art. 31(1).
125 1951 Refugee Convention, Preamble.
126 UNHCR, above note 8.
127 UNHCR, above note 9.
128 UNHCR, *UNHCR Position on Returns to Libya: Update I*, Geneva, October 2015.

such documents, UNHCR provides support to national COI-gathering mechanisms, which may often be lacking or overburdened; beyond that, however, UNHCR offers its own opinion on the protection needs of certain categories, recommending that States take their asylum claims into particular consideration. Such positions are not legally binding, yet clearly no State party to the 1951 Refugee Convention can simply take them for granted – and this constitutes a clear legal obligation for all receiving countries, both in terms of the Convention and UNHCR's Statute.

The above argument can easily and credibly be made vis-à-vis objections that the legal status of a particular group cannot be presumed in advance and that persons who have not even filed a request for asylum cannot avail themselves of the protection of international refugee law. It should also be pointed out that while the risk of human rights violations amounting to persecution exists even in countries with a relatively solid human rights record (there is not a single country in the world whose citizens' asylum claims may be simply brushed aside as unfounded without ever even giving them the chance to explain them),[129] clearly proving the existence of circumstances amounting to persecution becomes more difficult in practice for individuals coming from such countries. When the phenomenon of seeking refuge is primarily individual, the merits of a case will have to be examined in a way that is more scrupulous than would be required in a situation of massive forced displacement. For good or ill, the "lonely" asylum-seeker may need to be more assertive with regard to their claim (always bearing in mind that the asylum procedure cannot have the same standard of proof as a criminal trial) than one arriving along a well-known refugee flow. This remains the crucial difference between a mass influx situation extensively covered by UNHCR and other bodies on the one hand, and "everyday" situations on the other.

How does this affect the position of a transit country? First of all, if the act of seeking asylum is disregarded as grounds for not benefiting from Convention rights, authorities facing mass influx situations cannot assert that the status of all or most arrivals is somehow "unclear", provided that UNHCR and, indeed, other organizations have communicated their views on the issue. Even if the situation is described as a "mixed-migration flow", wherein persons entitled to refugee status in line with the Convention may be travelling together with "economic migrants", such circumstances absolutely require that – at least in the interest of safeguarding the Convention rights of those entitled to them – everyone taking the route be given the benefit of the doubt before proper RSD proceedings may take place.

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129 "In so far as application of the [safe country of origin] concept would a priori preclude a whole group of asylum-seekers from refugee status, in UNHCR's view this would be inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees." UNHCR, "Background Note on the Safe Country Concept and Refugee Status", July 1991, para. 5.

Minimal standards of protection applicable to refugees in transit

Bearing in mind that the 1951 Refugee Convention continues to be applicable to refugees "transiting" through a particular country, the question of what rights[130] guaranteed by this treaty such persons may benefit from remains. Different provisions of the Convention provide different "criteria of entitlement" – while some rights are undeniably granted only to refugees staying "lawfully" in the receiving country, this issue is less clear when it comes to others. According to Goodwin-Gill, "there is little consistency in the language of the Convention … but three general categories may be distinguished: simple presence, lawful presence, and lawful residence".[131] The previously discussed distinction between the Convention regime and the concept of asylum therefore becomes significant in this respect, with refugees "lawfully residing" in a country arguably being those actually granted asylum there.

With respect to rights granted to refugees "simply present" in the territory of the State Party, however, there is no doubt that such rights are likewise owed to refugees merely transiting there. These rights include at least those guaranteed by Articles 3 (non-discrimination), 4 (religion), 16(1) (access to courts), 20 (rationing), 27 (identity papers), 31 (exemption from penalization for unlawful entry or stay) and, most importantly, 33 (*non-refoulement*).[132] However, even this core of Convention rights may be read as having a broader scope than being simply applicable to refugees in transit: crucially, for some of them it is obvious that some sort of initiative must be shown on the part of the refugee before the relevant provision becomes applicable.

Take Article 31 as an example of such a right.[133] Generally speaking, it requires that in order to be exempt from punishment for unlawful entry or stay, refugees "coming directly" from their country of origin must "present themselves without delay to the authorities and show good cause for their illegal entry or presence". As the provision sets a number of conditions to be fulfilled in order for the refugee to enjoy this right – although some domestic legislation

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130 It should be highlighted that traditional international law regards the right to (seek) asylum exclusively as an obligation that exists among States; the individual is therefore a beneficiary, but not the bearer, of this right. V. Dimitrijević, above note 34, at p. 110. Nevertheless, for the purposes of the present discussion, it is submitted that it is both useful and consistent to talk of refugee "rights" as practically emanating from corresponding State obligations, without prejudice to more abstract considerations of the nature of such rights.

131 G. S. Goodwin-Gill, above note 72, p. 160.

132 "Contrairement aux articles 32 ou 28 de la Convention, dont l'application est conditionnée respectivement par les expressions 'se trouvant régulièrement' et 'résidant régulièrement', l'article 33 n'exige aucune condition tenant à la légalité de la présence du bénéficiaire sur le territoire des Etats parties à la Convention." Vincent Chetail, "Le principe de non-refoulement et le statut de réfugié en droit international", in *La convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: Bilan et perspectives*, Institut pour les Droits de l'Homme, UNHCR and Bruylant, Brussels, 2001, p. 12.

133 It may be debated on a theoretical level whether the 1951 Refugee Convention grants rights to refugees, or rather bestows obligations upon States Parties. This is not an easy question to answer, and it is not necessary to delve into it here. However, the author of the present article subscribes to the belief that the Convention is best read as bestowing both negative and positive rights upon refugees themselves.

actually opts to drop one or more of them[134] – the crux of the matter is that it is generally not upon the authorities to determine the existence of such circumstances at their own initiative. In order for this article to come into play, some jurisdictions require that the refugee actually requests asylum, although it is debatable to what extent this is in line with the article's wording. At any rate, in a situation of mass influx, the phrase "show good cause" should be interpreted as broadly as possible, and there is very little doubt that refugees travelling along the State-sanctioned Western Balkans route in late 2015 and early 2016 should be considered as enjoying its benefits.[135] In practice, this means that these countries should refrain from penalizing for illegal entry persons coming from refugee-producing countries regardless of whether or not they seek asylum.

The most appropriate way of defining the scope of rights to which refugees in transit are entitled as a matter of refugee law is to draw a line between "positive" and "negative" ones – i.e., those obliging a State Party to act in a certain way, and those requiring it to refrain from doing something. Although such language is absent from the Convention, a plain reading of different provisions allows insight as to which group a particular right may best be placed in. Thus, whereas being granted an identity paper in line with Article 27 is best understood as a positive right, the prohibition against *refoulement* is not, and there the initiative to ensure that it is not violated in an individual case rests principally with the contracting State. Apart from Article 33, such rights are likewise bestowed by Articles 3 and 16(1).

It is extremely important to note that these rights are similarly guaranteed by human rights instruments,[136] although their specific application to the situation of refugees may often only be gleaned from case law. While some treaties make specific provision for a general prohibition against discrimination,[137] this is not the case with the ECHR, which bans discrimination only with respect to the enjoyment of other Convention rights. In this respect, Article 3 of the 1951 Refugee Convention remains of exceptional relevance.

However, arguably the most important right of refugees in a transit context is the prohibition against *refoulement*; here, the practice of human rights bodies is

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134 Thus, for example, the requirement of "coming directly" from the country of origin is abandoned under Serbian legislation. See Serbian Law on Asylum, above note 36, Art. 8.

135 During early discussions on Article 31, a number of countries were of the opinion that this provision should, depending on the circumstances of the case, also remain valid with respect to refugees who, having found refuge in one State Party, later decided to move to another one. In this respect, they shared the opinion of the High Commissioner for Refugees that "necessary transit" should be allowed for refugees arriving in an "ungenerous country". There is little reason why this approach should not be applicable to Western Balkan transit countries. See Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection*, UNHCR, Geneva, October 2001, paras 17–25.

136 See, e.g. International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976) (ICCPR), Arts 2, 7, 14, 18; ECHR, Arts 3, 6, 9, 14; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987), Art. 3.

137 ICCPR, Art. 26.

crucial to understanding what rights all refugees – and, indeed, other groups of migrants – are entitled to.

Unlike the prohibition contained in Article 33 of the 1951 Refugee Convention, which allows for exceptions with regard to refugees who are dangerous to the security of the receiving country or its community after having been convicted of a particularly serious crime, the equivalent prohibition in human rights law is universal and absolute.[138] Not even persons who pose a serious risk to national security may be expulsed to a country where they would face a real risk of ill-treatment. Naturally, the extent to which the principle of *non-refoulement* as espoused in refugee law correlates with the same principle in human rights law is debatable, bearing in mind that the latter primarily concerns the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. However, it cannot be contested that there is considerable overlap in practice, and that persons fleeing persecution on Convention grounds will usually likewise benefit from the protection of human rights law in this respect. Bearing in mind that the 1951 Refugee Convention sets out no relevant procedural safeguards, the standards of human rights law must be applied to the situation of refugees.

The ECtHR has, on a number of occasions, found violations of the ECHR with respect to the forced return of refugees and asylum-seekers in line with Article 3 of the ECHR.[139] More importantly, it has found violations of Article 13 (the right to an effective remedy) in conjunction with Article 3 even where the latter, as such, had not been or would not be violated – this being because the State Party had not set in place adequate procedural safeguards to determine if persons facing forced return would be at real risk of treatment contrary to Article 3 upon return.[140] Most recently, the ECtHR found Hungary to have violated both Article 3 and Article 13 in conjunction with Article 3 when it returned asylum-seekers to Serbia.[141] Similarly, the UN Committee against Torture has, in its 2015 Concluding Observations on Serbia, found wrongful practice with regard to national authorities who failed to do so.[142] In spite of the fact that States may implement their obligations in the way they deem most fitting, the resulting protection must fall in line with international standards.

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138 See Human Rights Council, CCPR General Comment No. 20, "Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)", UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 10 March 1992; CAT, General Comment No. 2, "Implementation of Article 2 by States Parties", UN Doc. CAT/C/GC/2, 24 January 2008; ECtHR, *Ireland v. The United Kingdom*, App. No. 5310/71, 19 January 1978, para. 163.

139 See ECtHR, *M. S. S.*, above note 106; ECtHR, *Mohammed v. Austria*, App. No. 2283/12, 6 June 2013; ECtHR, *Sharifi and Others v. Italy and Greece*, App. No. 16643/09, 21 October 2014; ECtHR, *Tarakhel v. Switzerland*, App. No. 29217/12, 4 November 2014.

140 ECtHR, *Mohammed*, above note 139, paras 64–111.

141 ECtHR, *Ilias and Ahmed*, above note 56.

142 It is important to note that the CAT has already taken the stance that the conduct and procedures employed by Serbian border police officials at Belgrade airport do not conform to procedural standards required under the 1984 Convention. See CAT, *Concluding Observations on the Second Periodic Report of Serbia*, above note 45, para. 15.

Finally, human rights standards – which are applicable to all refugees and migrants, including those transiting – should be seen as crucial with regard to the provision of humanitarian assistance to all vulnerable migrants. While the global debate on humanitarian assistance has primarily concerned itself with populations in armed conflict situations (bearing in mind that IHL remains the body of law most explicitly regulating such matters), beyond rationing, equivalent norms do not exist as a matter of refugee law *stricto sensu* (i.e., as referring to populations of war-afflicted areas once they have actually left their country). However, human rights standards may well be said to fill in the gap – the provision of humanitarian assistance is intrinsically linked to the right to life, according to which:

> [The] duty to take positive action implies that States have a duty to ensure that the population affected by a crisis is adequately supplied with goods and services essential to its survival and, if they are unable to do so or their own efforts fail, to allow third parties to provide the required relief supplies.[143]

In fact, the draft General Comment No. 36 to Article 6 of the International Covenant on Civil and Political Rights makes specific reference to asylum-seekers and refugees, noting that "the duty to protect the right to life requires States parties to take exceptional measures of protection towards vulnerable persons".[144] The provision of humanitarian assistance to all vulnerable migrants, regardless of their status under international law, cannot therefore be regarded as purely a matter of policy considerations for any country (transit ones included), but rather a legal obligation that needs to be adequately implemented in practice.

These considerations likewise bring us back to the closely related question of *prima facie* refugee status determination. It would be very difficult to interpret treaty law as obliging States to undertake such a determination. Where *prima facie* refugee status determination would entail higher standards than the ones discussed above – for example, by excluding the necessity of undergoing the asylum procedure altogether, wherefore the refugee's stay may also be deemed "lawful" in the sense of certain Convention provisions – such a policy should be encouraged, yet it can hardly be advocated as being required by international law. On the other hand, some form of *prima facie* recognition is absolutely necessary in mass influx situations if failure to react swiftly would deprive refugees of a minimum of core rights to which they remain entitled under all circumstances.

To summarize, when faced with a situation of mass influx of persons coming from countries long since described as "refugee-producing" by key stakeholders (most notably UNHCR), States through which these people

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143 Ruth Abril Stoffels, "Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps", *International Review of the Red Cross*, Vol. 86, No. 855, 2004, p. 517.
144 Human Rights Council, Draft General Comment No. 36, "Article 6: Right to Life", UN Doc. CCPR/C/GC/R.36, 1 April 2015, para. 26.

"transit" have the legal obligation, at the very least and regardless of the manner in which these matters are implemented in national legislation, to refrain from any manner of forced return, including push-backs, of even those persons who refuse to submit an asylum application on their territory, without undertaking a fair and effective determination of whether the return might lead to a violation of the individual's rights; no discrimination whatsoever is allowed with regard to refugees, and this includes decisions that certain national groups do not *a priori* qualify for refugee status and may therefore even face rejection at the border; and these countries must provide basic shelter and supplies – or otherwise allow others to do so in their stead – to all vulnerable migrants, regardless of their status. On a related note, allowing certain groups into reception centres while barring others solely on the grounds of their nationality is not in line with the norms of international refugee and human rights legislation.

Conclusion: Less is not more

It is difficult to limit any discussion of "transit countries" without taking into consideration such provisions as may have far greater scope than this relatively limited context. However, this is not a negative occurrence: the term "transit", so often used by the media and State authorities themselves, has no legal relevance under international law, and is to a certain extent a misnomer – some refugees choose to stay and apply for asylum in these countries as well; furthermore, it serves to reassert the continued relevance of the 1951 Refugee Convention even under such unclear circumstances, bearing in mind that its application is by no means limited to "destination" countries.

A proper response to refugee and migrant movement in the Western Balkans needs to be organized in a two-fold manner. First, urgent short-term measures have to be taken to ensure that legal protection, as well as humanitarian assistance, is provided to refugees and migrants. Legislative mechanisms for providing such a response in mass influx situations already exist at the national level (including "temporary protection").[145] Bearing in mind what is known about the demographics of the Western Balkans mixed-migration flow,[146] such measures could be complemented by efficient and fair screening procedures in order not only to identify upon arrival extremely vulnerable individuals (victims of sexual and gender-based violence, torture and other cruel, inhuman or degrading treatment or punishment, persons with disabilities, unaccompanied minors, victims of human trafficking, etc.), but also to facilitate the provision of

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145 Macedonian Law on Asylum, above note 37, Arts 62–66; Serbian Law on Asylum, above note 36, Arts 36–38.
146 According to the EU's border agency Frontex, nationals of Syria, Afghanistan and Iraq continue to top the chart of irregular arrivals into the EU from the Western Balkans. See Frontex, *Western Balkans Annual Risk Analysis 2017*, Warsaw, 2017, p. 38, available at: frontex.europa.eu/assets/Publications/Risk_Analysis/WB_ARA_2017.pdf.

international protection to persons coming from well-known refugee-producing countries (in a way which is not discriminatory towards refugees of other nationalities, which would be in violation of the 1951 Refugee Convention).[147] Strong cooperation and information-sharing between all of the countries along the route, as have already been suggested in practice,[148] coupled with an effective resettlement programme, would go a long way towards truly curbing irregular movement, eliminating human smuggling and trafficking, "taming" the migratory flow and enabling access to durable solutions in the near future. On the other hand, in order for transit countries to actually become destination countries, long-term asylum sector reform with a focus on the integration of beneficiaries of international protection is required.[149] Within the Western Balkans, such reform is scheduled to take place as part of EU accession;[150] however, it is very important to highlight the independent value of establishing strong protection mechanisms at the national level, as obligations under IRL exist independently of European integration.

At present, positive international law may place only very limited obligations on transit countries. In times of mass influx, IRL remains applicable to refugees in transit countries and regardless of whether they have actually requested protection in the receiving State, although the scope of rights provided – even when complemented by human rights law – may remain limited to the prohibition of *refoulement*, non-discrimination, non-penalization and humanitarian assistance. It must, however, be made clear that a change in individual or group circumstances may change the legal situation as well; for example, a refugee transiting through a country may change their mind or become stranded and choose to undergo the asylum procedure in that country, if possible.

Finally, although the above discussion has principally focused on Serbia and the former Yugoslav Republic of Macedonia, these countries remain representative more broadly of transit countries that are also States party to the 1951 Refugee Convention. The same minimal level of standards will be required of each of these countries under IRL, unless these norms are complemented by more generous legislation at the regional or national level. That being said, ensuring respect for minimal standards is by no means an ideal response to any refugee "crisis"; it should be seen as inherent in the nature of humanitarian

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147 1951 Refugee Convention, Art. 3.

148 A system of "burden-sharing" was suggested at a late 2015 EU–Western Balkans summit that produced a seventeen-point plan of action for regulating the Western Balkans flow. The plan foresaw stronger cooperation between States along the route and increasing reception capacity in transit countries. However, most of these points were generally rendered moot by the EU–Turkey deal of March 2016. See European Commission, "Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point Plan of Action", Brussels, 25 October 2015, available at: europa.eu/rapid/press-release_IP-15-5904_en.htm.

149 See S. Tošković (ed.), above note 52.

150 European Commission, *Commission Staff Working Document: The Former Yugoslav Republic of Macedonia 2016 Report*, SWD (2016) 362, 9 November 2016, pp. 65–66; European Commission, *Commission Staff Working Document: Serbia 2016 Report*, SWD (2016) 361, 9 November 2016, pp. 67–68.

action to advocate the greatest extent of protection and welfare available to one's beneficiaries. Other venues for achieving this purpose, including ethics-based arguments,[151] should not be disregarded. Being forced to invoke legal provisions in order to ensure a minimum of respect for human dignity should always be seen as an exceptional, even aberrant, situation.

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151 Thus, William O'Neill highlights the limits of pure law-based advocacy and suggests arguments based in philosophy and religion for a more "humanistic" approach to refugee rights advocacy. See William O'Neill, "What We Owe to Refugees and IDPs: An Inquiry into the Rights of the Forcibly Displaced", in David Hollenbach (ed.), *Refugee Rights: Ethics, Advocacy and Africa*, Georgetown University Press, Washington, DC, 2008.

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OPINION NOTE

In the name of (de)securitization: Speaking security to protect migrants, refugees and internally displaced persons?

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Abstract

This article examines how the protection of migrants, refugees and internally displaced persons (IDPs) is spoken about and framed. Today it is evident that the dominant responses of sovereign States to each of these groups is heavily reliant on the language of security and (de)securitization, and this article openly conceptualizes ongoing attempts to protect migrants, refugees and IDPs as a series of overlapping (de)securitized "games". At least three arguments follow from this claim. First, adopting this approach serves as a reminder that the ways in which different groups of people are spoken about often constitutes a dividing line

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between life and death. Second, the language games of (de)securitization are not identical when it comes to protecting different groups. Third, using securitization as the theoretical point of departure provides a timely reminder that none of the three categorizations listed above is guaranteed to apply. On the contrary, the adoption of each linguistic label – migrant, refugee, IDP – is subject to and dependent upon audience acceptance. Remembering the latter dimension is imperative to fully comprehend the ongoing contestations and countermoves in response to people moving in search of security. By way of conclusion, the article contends that far more attention must be paid to broader understandings of acceptance and love to ensure the protection of migrants, refugees and IDPs.

Keywords: securitization, migration, refugees, internally displaced persons, language game, acceptance, love.

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Speaking on World Refugee Day in 2016, Barack Obama surmised that "[t]he scale of this human suffering is almost unimaginable; the need for the world to respond is beyond question".[1] Unfortunately, this was not an isolated summation. Presenting the highest level of displacement that has ever been on record, in 2016 the Office of the United Nations High Commissioner for Refugees (UNHCR) estimated that "65.3 million people around the world have been forced from home".[2] A staggering 21.3 million of these people were said to be refugees. Although these dire numbers are alarming, it is necessary to foreground that they are precisely that: numbers, calculations, statistics, figures and estimates.

This is not to suggest that numbers do not matter. For many scholars, they are inherently political and powerful modes of governance.[3] However, when it comes to calculating the scale and costs of what the then United Nations (UN) Secretary-General, Ban Ki-Moon, termed a "crisis of solidarity" in 2016,[4] it is not enough to simply think or talk in terms of numbers. On the contrary, as the Secretary-General emphasized elsewhere, "we must change the way we talk about refugees and migrants. And we must talk with them. Our words and dialogue

1 The White House, "Statement by the President on World Refugee Day", 20 June 2016, available at: www.whitehouse.gov/the-press-office/2016/06/20/statement-president-world-refugee-day-2016 (all internet references were accessed in August 2017).
2 UNHCR, *Global Trends: Forced Displacement in 2015*, Geneva, 20 June 2016.
3 See André Broome and Joel Quirk, "The Politics of Numbers: The Normative Agendas of Global Benchmarking", *Review of International Studies*, Vol. 41, No. 5, 2015; Mark B. Salter, "Imagining Numbers: Risk, Quantification and Aviation Security", *Security Dialogue*, Vol. 39, No. 2–3, 2008; Judith G. Kelley and Beth A. Simmons, "Politics By Number: Indicators as Social Pressure In International Relations", *American Journal of Political Science*, Vol. 59, No. 1, 2015; Stephane J. Baele, Thierry Balzacq and Philippe Bourbeau, "It's The Numbers, Stupid! Understanding Quantification in Global Security Governance", *European Journal of International Security Blog*, 14 June 2017, available at: www.ejis.eu/2017/06/14/its-the-numbers-stupid-understanding-quantification-in-global-security-governance/.
4 Ban Ki-Moon, "Refugee Crisis about Solidarity, Not Just Numbers, Secretary-General Says at Event on Global Displacement Challenge", 15 April 2016, available at: www.un.org/press/en/2016/sgsm17670.doc.htm.

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matter."[5] In a similar fashion, Pope Francis told members of the US Congress that "we must not be taken aback by their numbers, but rather view them as persons, seeing their faces and listening to their stories, trying to respond as best we can to their situation".[6]

With these calls in mind, a guiding concern of this article is to examine how the protection of migrants, refugees and internally displaced persons (IDPs) is being spoken about and framed. Today it is evident that the dominant responses of sovereign States to each of these issues is heavily reliant on the language of security and (de)securitization.[7] Indeed, this article conceptualizes ongoing attempts to protect migrants, refugees and IDPs as a series of (de)securitized "games".[8] At least three arguments follow from this claim. First, adopting this lens reminds us that the ways in which we speak about and categorize different groups of people often constitute a dividing line between life and death. Second, the language games of (de)securitization are not identical when it comes to protecting different groups. Third, using securitization as the theoretical point of departure provides a timely reminder that the three discursive labels under consideration are not guaranteed to apply – quite the reverse, in fact. As will be seen below, the adoption of each linguistic label – migrant, refugee, IDP – is subject to and dependent upon audience acceptance. Remembering the latter dimension is imperative to fully comprehend the ongoing contestations over how to respond to people moving in search of security.

The article is divided into six sections. The first section is devoted to exploring how agents are "speaking security" to frame migrants, refugees and IDPs. To get to the crux of these narratives, it may be necessary to move beyond discussions of "security unbound" and catastrophic crises.[9] The second section outlines the securitization framework created by the Copenhagen School and

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5   Ban Ki-Moon, "General Assembly Adopts Declaration for Refugee and Migrants, as United Nations, International Organisation for Migration Sign Key Agreement", 19 September 2016, available at: www.un.org/press/en/2016/ga11820.doc.htm.

6   Holy See Press Office, "Congress of the United States of America Visit", 24 September 2015, available at: www.usccb.org/about/leadership/holy-see/francis/papal-visit-2015/media-resources/upload/11-EN-congressional-address.pdf.

7   References to (de)securitization in the text should be taken to mean securitization and desecuritization.

8   The concept of a "game" has multiple meanings in securitization studies. This article draws directly on Ludwig Wittgenstein's language game approach when it employs this term.

9   Within international relations and critical security studies there is no singular consensus on what "speaking security" means. Given that security is a contested term, there is no single way to speak security. As shown here, some scholars suggest that speaking security pertains to an unbound set of practices, whilst others think that it pertains to catastrophic crises. In this article, the focus on "speaking security" stems in part from the emphasis that the Copenhagen School and its securitization framework place on the role of speech acts in the social construction of security. This grammar is adopted here to explore how agents speak security during ongoing and entangled language games, as well as in wider contexts. The latter point echoes claims made by second-generation securitization scholars, who contend that speaking security is an iterative and interactive practice rather than a single speech act. For two excellent insights into how to conceptualize security as a contested concept, see Matt McDonald and Lee Wilson, "Trouble in Paradise: Contesting Security in Bali", *Security Dialogue*, Vol. 48, No. 3, 2017; Thierry Balzacq (ed.), *Contesting Security: Strategies and Logics*, Routledge, London, 2015.

amended by "second-generation" scholars to demonstrate the power of security speech, moves and practices.

The next three sections are dedicated to exploring how migrants, refugees and IDPs are (de)securitized. The third section questions the promise of using securitization as an analytical lens for mapping varied patterns of migration. Using this discussion as a springboard, the fourth section scrutinizes whether the securitization of migration informs how refugees are labelled, treated and protected. A quick look at countries openly pursing policies that securitize migrants reveals that complications are already establishing themselves in how the two words "migrant" and "refugee" have become synonymous with each other. The fifth section turns the arrow of analysis towards IDPs. The question raised here is whether these groups of persons are silenced by the (de)securitization games unfolding as this piece is being written. The sixth section discusses the prospects of leaving the current games of (de)securitization behind and creating alternative narratives that enable us to see the faces of migrants, refugees and IDPs, to listen to their stories and to respond to their situations.

Unbound securitization and crises? Rethinking security speech, moves and practices

Established scholars have already illustrated that the language of security plays an extremely powerful role in separating those who are worthy of protection and those who are not, those who are like "us" and those who are not, those who threaten "us" and those who do not, those lives that matter and those that do not.[10]

Yet the language of security can take a variety of forms. Following Ludwig Wittgenstein, the meaning of the word "security" depends on how it is used.[11] Evidently, this term can refer to something quite specific (e.g. having enough clothing) or to something more ambiguous (e.g. shadow economies). According to Jef Huysmans, security is "unbound" since it appears to be scattered everywhere, proliferating and rupturing in multiple directions all at once.[12] Paradoxically, as his work shows, the political effect of this unbinding is the diffusion of insecurities. Concurrently, a wider field of research has highlighted that the language of catastrophic risks, arresting dangers and apocalyptic crises

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10 There is a rich body of work on this topic that cannot be captured here or relegated solely to the field of security studies. See Giorgio Agamben, *State of Exception*, trans. Kevin Attel, University of Chicago Press, Chicago, IL, 2005; Judith Butler, *Precarious Lives: The Power of Mourning and Violence*, Verso, London, 2006; Judith Butler, *Bodies that Matter: On the Discursive Limits of "Sex"*, Routledge, New York, 1993; David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity*, University of Minnesota Press, Minneapolis, MN, 1998; Roxanne Lynn Doty, *Imperial Encounters: The Politics of Representation in North-South Relations*, University of Minnesota Press, Minneapolis, MN, 1996; Jenny Edkins, Véronique Pin-Fat and Michael J. Shapiro, *Sovereign Lives: Power in Global Politics*, Routledge, New York, 2004; Lene Hansen, *Security As Practice: Discourse Analysis and the Bosnian War*, Routledge, London, 2006; Edward W. Said, *Orientalism*, Penguin, London, 2003.
11 Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M Anscombe, 3rd ed., Blackwell, Oxford, 1974.
12 Jef Huysmans, *Security Unbound: Enacting Democratic Limits*, Routledge, London, 2014.

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has become common parlance when it comes to defining what security means and does.[13] The point of importance here is that references to unbound securities produce a picture of arresting complexity. Arguably, they also create a "void" that actors rush to fill in order to "regulate the meaning of unfolding events".[14] Yet these attempts seem problematic for two reasons.

First, no complete void ever really exists. Even when they face the most catastrophic crisis – whether it is a "migrant", "refugee" or "IDP" crisis – actors do not inherit a blank slate from which to restart. Hence, there is no bright line separating the discursive practices that exist before a catastrophe and those that are used to make sense of it thereafter. All of a sudden, security is not always unbound, at least not in the sense of any definitive rupture.[15] Instead, it has to exist within certain limits, irrespective of how ambiguous, porous and blurry these may be. To be clear, this piece is not suggesting that security discourses are somehow predetermined or rigid. If anything, the central argument advanced here illustrates that we are not permanently beholden to pre-existing vocabularies. Nonetheless, what should be avoided is equating the language of crises writ large with an unlimited ability to make security anew each time a catastrophic event appears on the scene. While media headlines throw the spotlight on unbound securities, the meaning of security does not always change at the same momentum, and nor should it. As such, it is necessary to push beyond snapshots that simply show the "newest" or "latest" security crisis. In the process, one can appreciate the intricate ways in which unbound securities and catastrophic crises frequently rely on and even quote what Brent J. Steele terms "critical security narratives".[16] At the risk of overstating the point, certain residues of meaning continue to matter in ways that are often hard to understand and explain if we only concentrate on the creation of "voids", "catastrophes" and "unbound securities".

It is here that the second fundamental concern surfaces. Crisis after crisis, there tends to be a synergy, a momentum, a rallying call for the implementation of

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13 See Louise Amoore and Marieke De Goede, *Risk and the War on Terror*, Routledge, London, 2008; Claudia Aradau and Rens Van Munster, *Politics of Catastrophe: Genealogies of the Unknown*, Routledge, London, 2011; Claudia Aradau and Rens Van Munster, "Governing Terrorism Through Risk: Taking Precautions, (Un)Knowing the Future", *European Journal of International Relations*, Vol. 13, No. 1, 2007; Ulrich Beck, *Risk Society: Towards a New Modernity*, trans. Mark Rittler, Sage, London, 1992; Didier Bigo, "Security and Immigration: Toward a Critique of the Governmentality of Unease", *Alternatives*, Vol. 27, Special Issue, 2002; Olf Corry, "Securitisation and 'Riskization': Second-Order Security and the Politics of Climate Change", *Millennium: Journal of International Studies*, Vol. 40, No. 2, 2012; Dirk Nabers, "Crisis as Dislocation", *Politics*, Online First View, DOI 10.1177/0263395716661341, 2016.

14 See Jack Holland, "From September 11th, 2001 to 9–11: From Void to Crisis", *International Political Sociology*, Vol. 3, No. 3, 2009, p. 276; Dirk Nabers, "Filling the Void of Meaning: Identity Construction in U.S. Foreign Policy after September 11, 2011", *Foreign Policy Analysis*, Vol. 5, No. 2, 2009.

15 For further discussions, see Jef Huysmans and Joao Pontes Nogueira, "Ten Years of IPS: Fracturing IR", *International Political Sociology*, Vol. 10, No. 4, 2016.

16 Brent J. Steele, "Maintaining (US) Collective Memory: From Hiroshima to a Critical Study of Security History", *Critical Studies of Security*, Vol. 1, No. 1, 2013; Brent J. Steele, "Critical Security and History", *Critical Studies of Security*, Vol. 3, No. 3, 2015. According to Steele, critical security history reveals "several *functions* of historical narratives". He also contends that it is based on the question: "What do dominant narratives of a historical event or process tell us about the subject at hand – the speaker, the community they are in, and beyond?" *Ibid.*, p. 305 (emphasis in original).

heightened securitized measures. More pointedly, these calls continue to occur even when securitization is already in play. Consequently, one process of securitization appears to breathe life into another. These modes of resuscitation do not have to be identical or complementary; occasionally they will overlap, and at other times they will diverge. Either way, it can be acknowledged that these encounters can be joined together to create larger and intertextual narratives.[17] To take stock of these landscapes, a number of scholars have turned to concepts like resecuritization[18] or macrosecuritization.[19] In different ways, both concepts deal with the intricate ways in which securitization can evolve to organize and bundle "relations around the most powerful call of a given time".[20] Indeed, Scott D. Watson carves out space for us to study "an intensification of humanitarian securitization".[21] Going a step further, Amir Lupovici introduces the concept of "securitization climax" to unpack situations in which "actors attempt to justify taking more intensive and

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17 James Der Derian and Michael J. Shapiro, *International/Intertextual Relations: Postmodern Readings of World Politics*, Lexington Books, Lexington, MA, 1989. Lene Hansen's account of one icon quoting another is also very useful in thinking about this point. See Lene Hansen, "How Images Make World Politics: International Icons and the Case of Abu Ghraib", *Review of International Studies*, Vol. 41, No. 2, 2015, p. 269.

18 Resecuritization does not have a concrete definition in securitization studies. The premise of this concept is that it leaves open a possibility that (de)securitization processes can evolve and change over time. The most common example of resecuritization provided in the literature is an instance where an issue that was desecuritized becomes securitized again. However, arguably, resecuritization can also occur without a securitization process ever ending. In other words, it does not only signal a shift from desecuritization back into securitization. For instance, it is possible that as a securitization process adapts, evolves and intensifies, resecuritization will occur in order to maintain and preserve the game(s) in play. This discussion points to an overlapping potentiality: that institutionalization may constitute a modality of resecuritization. Finally, it is also possible for readers to consider that modes of resistance, contestation and counter-securitization can entail strands of resecuritization. It should be noted that these are only some examples of where one may find resecuritization in operation. For an entry point for further research on this topic, see Matt McDonald, "Deliberation and Resecuritization: Australia, Asylum-Seekers and the Normative Limits of the Copenhagen School", *Australian Journal of Political Science*, Vol. 46, No. 2, 2011; Luca Mavelli, "Security and Secularization in International Relations", *European Journal of International Relations*, Vol. 18, No. 1, 2011; Fabrizio Tassinari, "The European Sea: Lessons From the Baltic Sea Region for Security and Cooperation in the European Neighbourhood", *Journal of Baltic Studies*, Vol. 36, No. 4, 2005; Patrick Lebond, "Globalization and World Insecurity", *International Studies Review*, Vol. 7, No. 4, 2005; Stefano Guzzini, "Foreign Policy Identity Crises and Uses of the 'West'", DIIS Working Paper No.5, 2015.

19 Macrosecuritization relates to the construction of security constellations and securitization processes that bundle and/or hierarchically arrange lower-level securitization processes. See Barry Buzan and Ole Wæver, "Macrosecuritisation and Security Constellations: Reconsidering Scale in Securitization Theory", *Review of International Studies*, Vol. 35, No. 2, 2009; Barry Buzan, "Will the 'Global War on Terrorism' be the New Cold War?", *International Affairs*, Vol. 82, No. 6, 2006; Juha A. Vuori, "A Timely Prophet? The Doomsday Clock as a Visualization of Securitization Moves with a Global Referent Object", *Security Dialogue*, Vol. 41, No. 3, 2010; Scott D. Watson, "Macrosecuritization and the Securitization Dilemma in the Canadian Arctic", *Critical Studies on Security*, Vol. 1, No. 3, 2013; James Sperling and Mark Weber, "NATO and the Ukraine Crisis: Collective Securitization", *European Journal of International Security*, Vol. 2, No. 1, 2017.

20 B. Buzan and O. Wæver, above note 19, p. 259.

21 Scott D. Watson, "The 'Human' as Referent Object? Humanitarianism as Securitization", *Security Dialogue*, Vol. 42, No. 1, 2011, p. 9. For another discussion of intensification as a key part of the securitization process, see Michael C. Williams, "The Continuing Evolution of Securitization Theory", in Thierry Balzacq (ed.), *Securitization Theory: How Security Problems Emerge and Dissolve*, Routledge, London, 2011.

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exceptional measures than those previously accepted by the target audience".[22] There can be little doubt that these perspectives foster a more holistic understanding of the wider contexts in which security threats emerge and evolve.

However, there are still causes for concern. On the one hand, overarching narratives of this scale may imply that security crises are unending and, by extension, that securitization processes are unbound. They may also ensure that catastrophes become a normal part of our everyday realities. In sync, the exception continues to become the rule.[23] In some times and places, this picture comes close to reality. Even so, it is worth pondering how productive it is to speak incessantly of catastrophic crises and never-ending threats, and whether the persistent use of these terms makes them difficult to leave behind.[24] It is easy to imagine the devastating effect of an escalating macrosecuritization that is bundling crisis after crisis together into a compound cluster. The so-called "global war on terror" is an excellent example. To study this enormous metanarrative is to find one securitized agenda breathing life into an elongated chain of other security agendas in ways that were never anticipated, not even by its architects. At present there appears to be no point of saturation, no sign of securitization fatigue or overload. Instead, what can be found is that as more and more security discourses are linked together through this macrosecuritization, it becomes harder to unmake.[25] This kind of outcome overlaps with Lene Hansen and Helen

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22 Amir Lupovici, "Securitization Climax: Putting the Iranian Nuclear Project at the Top of the Israeli Public Agenda (2009–2012)", *Foreign Policy Analysis*, Vol. 12, No. 3, 2016, p. 413. In another article, Lupovici adopts the term "deep securitization" to ask "what securitization success means in a country with a permanent and deep perception of (traditional) insecurity and in which the state of emergency is already deeply engrained". Amir Lupovici, "The Limits of Securitization Theory: Observational Criticism and the Curious Absence of Israel", *International Studies of Review*, Vol. 16, No. 3, p. 401. Here, it is important to note that Lupovici draws directly on Uriel Abulof's concept of "deep securitization" to frame his argument. According to Abulof's account, deep securitization occurs when "threats are *explicitly* framed as *probable* and *protracted*, endangering the *very existence* of the *nation/state* and that discourse is *incessantly* and *widely* employed by society". Uriel Abulof, "Deep Securitization and Israel's 'Demographic Demon'", *International Political Sociology*, Vol. 8, No. 4, 2014, p. 397 (emphasis in original).
23 Rens Van Munster, "The War on Terrorism: When the Exception Becomes the Rule", *International Journal For the Semiotics of Law*, Vol. 17, No. 2, 2004; Claudia Finotelli and Maria Caterina La Barbera, "When the Exception Becomes the Rule: The Spanish Citizenship Regime", *Migration Letters*, Vol. 10, No. 2, 2013; Mark B. Salter, "When the Exception Becomes the Rule: Borders, Sovereignty and Citizenship", *Citizenship Studies*, Vol. 10, No. 4, 2008.
24 On this point, see Harmonie Toros, "'9/11 is Alive and Well' or How Critical Terrorism Studies has Sustained the 9/11 Narrative", *Critical Studies on Terrorism*, Vol. 10, No. 2, 2017; Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis*, Lynne Rienner, London, 1998, pp. 1, 34, 212.
25 Stephen Graham raises an important insight into how the war on terror has morphed by exploring processes of imitation and appropriation. As a result, his account illustrates that the war on terror has not only evolved from a US perspective over time; in sync, the war on terror has escalated as other actors have strategically learnt how to adapt this language game for use in a different context. Graham's ideas of active learning, shared practices and even overt mimicry are worthy of future research. See Stephen Graham, "Laboratories of War: United States–Israeli Collaboration in Urban War and Securitization", *Brown Journal of World Affairs*, Vol. 17, No. 1, 2010. For a financial take on the idea of mimicry and the final process of securitization, see David Bassens, Ewald Engelen, Ben Derudder and Frank Witlox, "Securitization Across Borders: Organizational Mimicry in Islamic Finance", *Journal of Economic Geography*, Vol. 13, No. 1, 2013.

Nissenbaum's discussion of hypersecuritization in the cyber sector.[26] As they note, "what distinguishes hypersecuritizations from 'mere' securitization is their instantaneity and inter-locking effects".[27] Paying attention to these trends raises a flag of concern about moving from one securitized "game" to another without taking a critical step back to explore the configuration or consequences of these larger constellations. Simply put, we must think more about how to leave the language of securitization behind if it continues to grow. This raises more nuanced questions. What happens if securitization becomes unbound? What happens when macrosecuritization becomes hypersecuritized? Can we desecuritize macrosecuritized games and hypersecuritized processes? At which level do we attempt to desecuritize such multi-layered constellations?

With an aim of addressing these questions, this article first conceptualizes securitization and then examines how it shapes discourses on how to protect migrants, refugees and IDPs.

Constructing (de)securitization: The Copenhagen School

The Copenhagen School and its securitization framework have gained enormous currency in critical security studies. At base, they provide a way to study the social and discursive construction of security.[28] Inspired by the work of John L. Austin, the Copenhagen School contends that "saying security" does something. More specifically, it argues that speaking security constitutes a securitizing move that frames certain referent object(s) as an existential threat.[29] This means that security threats are not fixed or objective. Instead they must essentially be understood as discursive articulations of threatened "we" identities.[30] Although securitizing speech, acts and moves take centre stage in the Copenhagen School's framework, audience acceptance is said to determine whether securitizing moves fail or succeed.[31] A major reason why so much emphasis is placed on audience acceptance collapses back into the Copenhagen School's claim that securitization is an intersubjective and socially constructed process. In equal measure, it supports the Copenhagen School's suggestion that "security should be seen as a negative, as a failure to deal with issues of normal

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26 Lene Hansen and Helen Nissenbaum, "Digital Disaster, Cyber Security, and the Copenhagen School", *International Studies Quarterly*, Vol. 53, No. 4, 2009.

27 *Ibid.*, p. 1164.

28 According to the Copenhagen School, anyone can study and create security. However, the Copenhagen School also suggests that elite actors, such as politicians, will have more authority, power and potential to speak security.

29 B. Buzan, O. Wæver and J. de Wilde, above note 24, pp. 21–25.

30 *Ibid.*, p. 120; also see Jarred Hayes, "Identity and Securitization in the Democratic Peace: The United States and the Divergence of Response to India and Iran's Nuclear Programs", *International Studies Quarterly*, Vol. 53, No. 4, 2009.

31 B. Buzan, O. Wæver and J. de Wilde, above note 24, p. 25.

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politics".[32] This possibility might pique curiosity. Does securitization not symbolize a positive outcome?[33]

In certain circumstances, the Copenhagen School maintains that securitization is "unavoidable".[34] Within such circumstances, securitization can potentially be viewed as a positive outcome given that with audience acceptance it empowers actors to break free of rules that would otherwise bind them to eliminate the given threat.[35] However, according to the Copenhagen School, securitization has "problematic side effects".[36] Precisely because securitization has the power to take issues into the realm of the extraordinary and silence contesting voices, the Copenhagen School maintains that more security is not always better.[37] Rather, it casts desecuritization as the "optimal long-range option" to move issues "out of this threat-defense sequence and into the ordinary public sphere".[38] Although the latter concept is contested, Jef Huysmans presents it as an avenue for "unmaking" the fabrication of any security threat that arises in the process of securitization.[39] According to Thierry Balzacq, Sara Depauw and Sarah Léonard, a general consensus exists within the literature that desecuritization "*ought* to be sought on the grounds that it would normatively be better than securitization".[40] In effect, desecuritization signals that securitization was not intended to be unbound.

Reconstructing securitization: Introducing second-generation scholars

Continued discussions about what securitization is and how it can be applied reinforce the maxim that words gain their meaning in use.[41] According to "second-generation"

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32 *Ibid.*, p. 29.
33 For further insights into the positive and negative effects of securitization, see Rita Floyd, "Can Securitization Theory be Used in Normative Analysis? Towards a Just Securitization Theory", *Security Dialogue*, Vol. 42, No. 4–5, 2011; Rita Floyd, "Just and Unjust Desecuritization", in T. Balzacq (ed.), above note 9.
34 See B. Buzan, O. Wæver and J. de Wilde, above note 24, p. 29, where they argue that this scenario arises when "states are faced with an implacable or barbarian aggressor".
35 *Ibid.*, pp. 21, 24
36 *Ibid.*, pp. 29, 41.
37 *Ibid.*, pp. 4, 29.
38 *Ibid.*
39 Jef Huysmans, "The Question of the Limit: Desecuritization and the Aesthetics of Horror in Political Realism", *Millennium: Journal of International Studies*, Vol. 27, No. 3, 1998, p. 572. Also see Claudia Aradau, "Security and the Democratic Scene: Desecuritization and Emancipation", *Journal of International Relations and Development*, Vol. 7, No. 4, 2004; Lene Hansen, "Reconstructing Desecuritization: The Normative-Political in the Copenhagen School and Directions on How to Apply It", *Review of International Studies*, Vol. 38, No. 3, 2012; Philippe Bourbeau and Juha A. Vuori, "Security, Resilience and Desecuritization: Multidirectional Moves and Dynamics", *Critical Studies on Security*, Vol. 3, No. 3, 2015; Faye Donnelly, "The Queen's Speech: Desecuritizing the Past, Present and Future of Anglo-Irish Relations", *European Journal of International Relations*, Vol. 21, No. 4, 2015.
40 Thierry Balzacq, Sara Depauw and Sarah Léonard, "The Political Limits of Desecuritization: Security, Arms Trade, and the EU's Economic Targets", in T. Balzacq (ed.), above note 9, p. 104 (emphasis in original).
41 This is already spelt out by the Copenhagen School, which has noted that "the meaning of a concept lies in its usage": B. Buzan, O. Wæver and J. de Wilde, above note 24, p. 24.

scholars, securitization is best understood as a continuous process of negotiation, contestation and resistance.[42] For those orientated towards these more "sociological" approaches, concentrating solely on the semantic side of a security utterance at a single moment in time is too limited.[43] Instead, they focus on what security speech acts do and, in turn, how the meaning of security can change as securitization unfolds. They also consider what happens when multiple speakers and audiences canvas different and partial viewpoints. In parallel, second-generation scholars have started with the question of silence.[44] Others still have begun to fold images,[45] videogames,[46] emotions, feelings and sensations[47] into securitization studies.

Taking these broader insights seriously has led many second-generation scholars to conceptualize securitization as a "game".[48] Encapsulating this stance, Juha A. Vuori describes it as a "type of political game constituted by moves and

42 Second-generation securitization studies represent a huge and still emerging canon of work which cannot be covered here. For excellent overviews of how this debate has unfolded, see Thierry Balzacq, "The Three Faces of Securitization: Political Agency, Audience and Context", *European Journal of International Relations*, Vol. 11, No. 2, 2005; Thierry Balzacq (ed.), *Securitization Theory: How Security Problems Emerge and Dissolve*, Routledge, London, 2011; T. Balzacq (ed.), above note 9; Thierry Balzacq, Sarah Léonard and Jan Ruzicka, "Securitization Revisited: Theory and Cases", *International Relations*, Vol. 30, No. 4, 2016.

43 See the three references by T. Balzacq cited in above note 42; Philipp Klüfers, "Security Repertoires: Towards a Sociopragmatist Framing of Securitization Processes", *Critical Studies on Security*, Vol. 2, No. 3, 2014; Matt McDonald, "Securitization and the Construction of Security", *European Journal of International Relations*, Vol. 14, No. 4, 2008; Paul Roe, "Actor, Audience(s) and Emergency Measures: Securitization in the UK's Decision to Invade Iraq", *Security Dialogue*, Vol. 39. No. 6, 2008; Mark B. Salter, "Securitization and Desecuritization: Dramaturgical Analysis and the Canadian Aviation Transport Security Authority", *Journal of International Relations and Development*, Vol. 11, No. 4, 2008; Holger Stritzel, "Towards a Theory of Securitization: Copenhagen and Beyond", *European Journal of International Relations*, Vol. 13, No. 3, 2007; Juha A. Vuori, "Illocutionary Logic and Strands of Securitization: Applying the Theory of Securitization to the Study of Non Democratic Political Orders", *European Journal of International Relations*, Vol. 14, No. 1, 2008.

44 See Lene Hansen, "The Little Mermaid's Silent Security Dilemma and the Absence of Gender in the Copenhagen School", *Millennium: Journal of International Studies*, Vol. 29, No. 2, 2000.

45 It has become increasingly common for leading securitization scholars to examine the role of images. For further readings, see Michael C. Williams, "Words, Images, Enemies: Securitization and International Politics", *International Studies Quarterly*, Vol. 47, No. 4, 2003; Lene Hansen, "Theorizing the Image for Security Studies: Visual Securitization and the Muhammad Cartoon Crisis", *European Journal of International Relations*, Vol. 17, No. 1, 2011; J. A. Vuori, above note 19.

46 See Mark B. Salter, "The Geographical Imaginations of Video Games: *Diplomacy*, *Civilization*, *America's Army* and *Grand Theft Auto IV*", *Geopolitics*, Vol. 16, No. 2, 2011; Felix Ciută, "Call of Duty: Playing Video Games with IR", *Millennium: Journal of International Studies*, Vol. 44, No. 2, 2016.

47 Emotions and feelings have begun to be studied within securitizations. For interesting insights, see Thierry Balzacq, above note 9; Eric Van Rythoven, "Learning to Feel, Learning to Fear? Emotions, Imaginaries, and Limits in the Politics of Securitization", *Security Dialogue*, Vol. 46, No. 5, 2015; Ludvig Norman, "Theorizing the Social Foundations of Exceptional Security Politics: Rights, Emotions and Community", *Cooperation and Conflict*, Vol. 53, No. 1, 2018. To date, sensations are less well studied in security and securitization studies. For an interesting insight on this dimension, see C. Aradau and R. Van Munster, above note 13, pp. 85–106.

48 Faye Donnelly, *Securitization and the Iraq War: The Rules of Engagement in World Politics*, Routledge, London, 2013; T. Balzacq (ed.), above note 9; Juha A. Vuori, "Contesting and Resisting Security in post-Mao China", in T. Balzacq (ed.), above note 9; Gary T. Marx, "Security and Surveillance Contests: Resistance and Counter-Resistance", in T. Balzacq (ed.), above note 9; Holger Stritzel and Sean C. Chang, "Securitization and Counter-Securitization in Afghanistan", *Security Dialogue*, Vol. 46, No. 2, 2015.

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countermoves".[49] A similar suggestion has been put forward by Holger Stritzel and Sean C. Chang to conceptualize countersecuritization: from their point of view, securitization is "as a game of moves and counter-moves in a communicative struggle of adversarial wills".[50] Envisioning securitization as a game illustrates that the beginning and ending of (de)securitization processes are not clear-cut; instead, such processes can unfold without a fixed script, sound or rhythm. However, there is no uniform definition of what counts as a "game" within securitization studies.[51] This article draws on the concept of a language game outlined by Ludwig Wittgenstein in *The Philosophical Investigations* to contribute to debates conceptualizing games of (de)securitization.[52] This is not to suggest that Wittgenstein's approach is flawless[53] or that his language game approach is the only way we can conceptualize games in securitization studies. For Wittgenstein, however, the presence of alternative pathways is always welcome as readers continue to "look and see" how security and securitization are spoken, enacted and altered.

Language games and games of (de)securitization

Studying Wittgenstein's later writings highlights that he considers language games to be an interactive activity. More specifically, he presents language as a "form of life".[54] Developing this line of argument enables Wittgenstein to show that language is embedded in and constitutive of human actions and interactions.[55] Put differently, "the term language-game is meant to bring into prominence the fact that the speaking of language is part of an activity, or of a form of life".[56] Building on these themes, Wittgenstein presents the concept of "meaning in use"[57] to describe how a word, like securitization, becomes meaningful in the process of play. This insight has ramifications for how we understand securitization, since "saying something is an important step, one which must then be constantly put into use to remain in existence".[58] To talk of "meaning in use" also introduces multiplicity and overlaps since any word can acquire a different set of meanings in the course of play. Moreover, the meanings in one language game can come to criss-cross with another language game, which, in turn, can also come to criss-cross with another, and so forth. In short, meanings are

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49   J. A. Vuori, above note 48, p. 191.
50   Holger Stritzel and Sean C. Chang, "Securitization and Counter-Securitization in Afghanistan", *Security Dialogue*, Vol. 46, No. 6, 2015.
51   For most second-generation scholars, the concept of a game does not have a single definition. To date, it has tended to be tied to their idea of ongoing "practices" of contestation.
52   L. Wittgenstein, above note 11.
53   Arguably a language game approach is haunted by the priority it places on language rather than more visual and material dimensions of speech. However, a closer reading of Wittgenstein's approach demonstrates that it allows for interrelations between these aspects.
54   *Ibid.*, § 23, p. 11.
55   A daily exchange of greetings would be an example of how language is a form of life.
56   *Ibid.*, § 23, p. 11
57   *Ibid.*, § 43, p. 20.
58   F. Donnelly, above note 48, p. 76.

layered. To capture these pluralistic dimensions, Wittgenstein adopts the term "family resemblances".[59] This idea explains how security can refer to shadow economies and having enough clothes simultaneously. It is crucial to note that Wittgenstein's rationale does not only allow for a single word to have multifarious meaning; it also allows for players to undertake multiple moves within a single game on the one hand, whilst participating in more than one game on the other. Adding another layer of analysis, Véronique Pin-Fat notes that "the people with whom we are in relation may also be in motion, moved to change themselves".[60]

Taking a cue from Wittgenstein, then, the limits of any language game are never secure since the flow of the game can always be changed. Nevertheless, they are never totally unbound. Conversely, within every single language game, agents draw on rules "as a *matter of course*".[61] The idea of rules being obeyed, followed and used does not mean they cannot be disobeyed, broken or thrown away. Nevertheless, Wittgenstein maintains that rules are always present since we cannot "know how to go on" without them.[62] This represents another important change in how we conceptualize securitization.[63] Whilst securitized games are presented as a set of practices that empower players to break free of rules that would normally hold, Wittgenstein maintains that there will always be some kind of rules in operation, even when security is spoken and securitizing moves are accepted. At the very least, "departing from one set of rules or interpreting them differently requires some form of justification".[64] Meanwhile, actions that plainly break the rules of one game without any justification can be penalized.

Whether taken individually or collectively, Wittgenstein's insights help us to appreciate how the protection of migrants, refugees and IDPs can come to gain multiple meanings in certain language games. What he also helps us realize is that rules are in jeopardy if we allow actors to break them without any consequences.[65] Worse still, words and rules can become meaningless if we repeatedly fail to put them into use.

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59 L. Wittgenstein, above note 11, § 67, p. 32.
60 Véronique Pin-Fat, "Writing Narrative as Ethics and Philosophy in International Relations: Reflections on a Difficulty in Writing a Research Monograph", *Journal of Narrative Politics*, Vol. 3, No. 1, 2016.
61 L. Wittgenstein, above note 11, § 238, p. 87 (emphasis in original).
62 *Ibid.*, § 179, p. 73.
63 For further discussion on the role of rules in securitization, see, B. Buzan, O. Wæver and J. de Wilde, above note 24, pp. 25–26; F. Donnelly, above note 48, pp. 56–60; Michael C. Williams, above note 21, pp. 217–218; Jonathan Bright, "Securitization, Terror and Control: Towards a Theory of the Breaking Point", *Review of International Studies*, Vol. 38, No. 4, 2012.
64 F. Donnelly, above note 48, p. 83.
65 Drawing on Wittgenstein's writings, it is possible to conceptualize international law and codified conventions established to protect migrants, refugees and IDPs as language games that abide by specific sets of rules. For further reading on this connection, see Wouter Werner, "What is Going On? Reflections on Kratochwil's Concept of Law", *Millennium: Journal of International Studies*, Vol. 44, No. 2, 2016; Friedrich Kratochwil, *The Status of Law in World Society: Mediations on the Role of Rule and Law*, Cambridge University Press, Cambridge, 2014; Norman Malcolm, "Wittgenstein on Language and Rules", *Philosophy*, Vol. 64, No. 247, 1989.

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The securitization of migration: A *fait accompli*?

This section taps into debates surrounding the securitization of migration in order to problematize storylines that depict this process as a *fait accompli*. The logic that migrants pose a threat to national security is now a prominent technique employed by States to manage their territorial borders. As Philippe Bourbeau notes, "the movement of people is provoking worldwide anxiety and apprehension and casting long-established questions of cultural identity, belonging, and security into a state of uncertainty".[66] Similar views have been articulated by key political figures in the United Kingdom. As then home secretary Theresa May quipped, large-scale migration made a "cohesive society" impossible.[67] Adopting a more securitizing tone towards migrants and refugees living in makeshift camps in Calais, David Cameron, then prime minister, maintained that there is "a swarm of people coming across the Mediterranean, seeking a better life, wanting to come to Britain because Britain has got jobs, it's got a growing economy".[68] The campaign slogans championed by political parties backing "Brexit" have escalated matters.[69] As Nigel Farage's UK Independence Party anti-immigration poster maintained, the nation was at "breaking point" and "the EU had failed".[70]

Yet there is nothing in the broadest arc of these tales that deviates from the securitization of migration taking place in other countries. Among "Western" societies alone, a long list of comparisons can be drawn, ranging from the United States to Australia to Greece.[71] Hence, as Scott D. Watson points out, "the association of human migration with insecurity is not new".[72] Against this backdrop, signs are emerging to suggest that the securitization of migration is now *a fait accompli*.

Adopting a language game perspective, however, it is worth remembering that this type of account is misleading for several reasons. First, nothing is ever a

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66 Philippe Bourbeau, *The Securitization of Migration: A Study of Movement and Order*, Routledge, London, 2011.

67 "Theresa May Pledges Asylum Reform and Immigrant Crackdown", *BBC News*, 6 October 2015, available at: www.bbc.co.uk/news/uk-politics-34450887.

68 Jessica Elgot and Matthew Taylor, "Calais Crisis: Cameron Condemned for 'Dehumanising' Description of Migrants", *The Guardian*, 30 July 2015, available at: www.theguardian.com/uk-news/2015/jul/30/david-cameron-migrant-swarm-language-condemned.

69 Faye Donnelly and Jasmine K. Gani, "The #LondonIsOpen Campaign: Desecuritizing Brexit?", *E-International Relations*, 21 June 2017, available at: www.e-ir.info/2017/06/21/the-londonisopen-campaign-desecuritizing-brexit/.

70 Heather Stuart and Rowena Mason, "Nigel Farage's Anti-Immigrant Poster Reported to Police", *The Guardian*, 16 June 2016, available at: www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants.

71 For further discussions on the securitization of migration, see Alessandra Buonfino, "Between Unity and Plurality: The Politicization of Migration", *New Political Science*, Vol. 26, No. 1, 2004; Ayse Ceyhan and Anastassia Tsoukala, "The Securitization of Migration in Western Societies: Ambivalent Discourses and Societies", *Alternatives*, Vol. 27, Special Issue, 2002; Georgios Karyotis, "Securitization of Migration in Greece: Process, Motives and Implications", *International Political Sociology*, Vol. 6, No. 4, 2012; Georgios Karyotis and Stratos Patrikios, "Religion, Securitization and Anti-Immigration Attitudes: The Case of Greece", *Journal of Peace Research*, Vol. 47, No. 1, 2010.

72 Scott D. Watson, *The Securitization of Humanitarian Migration: Digging Moats and Sinking Boats*, Routledge, London, p. 15.

fait accompli since words can change meaning, for better or worse, in the course of play. Second, paying attention to Wittgenstein's concept of multiplicity shows that migration is not a crisis for all migrants. In short, not all migrants are being labelled as a security threat. Instead, the securitization of migration creates multi-layered processes of identification and discrimination between those deemed to have entered through the "regular" channels and those who have entered through "illegal" or "irregular" ones.[73] The presence of this discursive layering and labelling challenges claims that the securitization of migration is a *fait accompli*. Third, oversimplifying the securitization of migration blinds us to who migrants are. Framing migrants as a security threat creates and reproduces negative stereotypes of external groups. On closer inspection, these modes of identification fray in reality. Indeed, William Lacy Swing, general director of the International Organization for Migration, has calculated that "one in every seven of us is a migrant".[74] Despite this statistic, however, diverse groups of migrants are being homogenized, helping to maintain a singular and anonymized "other". Fourth, omnipotent securitized narratives about migrants are making it difficult for alternative narratives to be heard. Certainly across Europe, perceptions of migration have changed significantly, as country after country has moved to close or restrict its borders. As a result, hateful speech about migrants has undoubtedly risen, as have violent actions against them.[75] A report produced by the Danish Institute of International Security also maintains that the assumptions that "refugees are vulnerable to radicalization" and that refugee flows provide "a backdoor for terrorists" are gaining political momentum.[76] As will be shown below, these speech acts, moves and practices jeopardize the protection of many refugees trying to escape violence. Finally, the securitization of migration prompts one to wonder how to leave securitized games behind. This matters given that ongoing attempts to desecuritize migration are under duress.[77]

73 Fiona H. McKay, Samantha L. Thomas and Susan Kneebone, "'It Would Be Okay if They Came through the Proper Channels': Community Perceptions and Attitudes toward Asylum Seekers in Australia", *Journal of Refugee Studies*, Vol. 25, No. 1, 2011.

74 William Lacy Swing, "Statement of IOM Director General William Lacy Swing at the September Summit and Signing of the IOM–UN Agreement", 19 September 2016, available at: www.iom.int/speeches-and-talks/statement-iom-director-general-william-lacy-swing-september-summit-and-signing.

75 Since the Brexit vote, a spike in the number of hate crimes has been reported and recorded. See "'Record Hate Crimes' After EU referendum", *BBC News*, 15 February, 2017, available at: www.bbc.co.uk/news/uk-38976087.

76 Manni Crone and Maja Felicia Falkentoft, *Europe's Refugee Crisis and the Threat of Terrorism: An Extraordinary Threat?*, Danish Institute for International Studies, Copenhagen, 2017, available at: pure.diis.dk/ws/files/910914/Report_05_Europes_Refugee_Crisis_Web.pdf.

77 See Vicki Squire, Angeliki Dimitriadi, Nina Perkowski, Maria Pisani, Dallal Stevens and Nick Vaughan-Williams, *Crossing The Mediterranean Sea by Boat: Mapping and Documenting Migratory Journeys and Experiences*, Final Report, 4 May 2017, available at: www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/irs/crossingthemed/ctm_final_report_4may2017.pdf.

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The securitization of refugees: A contradiction in terms?

In theory, the securitization of migration should have absolutely no bearing on the protection of refugees. Labelling someone as a refugee should ensure that they are not framed as an existential threat. To borrow from the poem "Home" by Warsan Shire, "You have to understand that no one puts children in a boat unless the water is safer than the land."[78] Abiding by various iterations of international refugee law, when a person is awarded refugee status, it should automatically entitle them to rights and protections. It should also automatically endow the international community with responsibilities to watch over them. These principles are why UNHCR was created in 1950 and why the Refugee Convention[79] was approved by the UN in 1951.[80]

These simple creeds are not always reflected in practice, however.[81] One reason for this stems from the escalation of securitized games in operation to manage internal and external migration flows. The deal struck between the European Union and Turkey on 18 March 2016 is a case in point.[82] Here, one securitized game is breathing life into another. Apart from simply framing migrants as threats, this deal represents a toxic form of discursive osmosis that has attempted to recast both refugees and asylum-seekers as threats rather than persons who are threatened.[83] Although the words "migrant" and "refugee" are now held to share family resemblances, they do not abide by the same sets of rules.

Take, for example, the international law principle of *non-refoulement*,[84] which categorically prohibits States from returning refugees and asylum-seekers to any territory where their security will be jeopardized and where they have

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78 This poem resonated with many audiences around the world. It was widely (re)tweeted and used as part of a charity single/song to raise awareness about the refugee crisis. For access to the entire poem and information about how it was circulated, see Martha Bausells and Maeve Shearlaw, "Poets Speak Out for Refugees: 'No One Leaves Home, Unless Home is the Mouth of a Shark'", *The Guardian*, 16 September 2015, available at: www.theguardian.com/books/2015/sep/16/poets-speak-out-for-refugees-.

79 Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954).

80 See Natasha Saunders, "Paradigm Shift or Business as Usual? An Historical Appraisal of the 'Shift' to the Securitization of Refugees", *Refugee Studies Quarterly*, Vol. 33, No. 3, 2014; Natasha Saunders, *International Political Theory and the Refugee Problem*, Routledge, New York, 2018.

81 See Young Hoon Song, "International Humanitarian Response and Militarization of Refugee and IDP Camps in Kenya and Sudan", *Journal of International and Area Studies*, Vol. 19, No. 1, 2012.

82 See Elizabeth Collett, "The Paradox of the EU-Turkey Refugee Deal", *Migration Policy Institute*, March 2016, available at: www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal.

83 See Alexandria J. Innes, "When the Threatened Become the Threat: The Construction of Asylum Seekers in British Media Narratives", *International Relations*, Vol. 24, No. 4, 2010; Saskia Llewllyn, "Testing the Solid in Solidarity: An Examination of Why the Ongoing Refugee Crisis is the Most Important Challenge Facing the EU", *Quarterly Access – Australian Institute of International Affairs*, Vol. 9, No. 3, 2016.

84 As Cordula Droege, amongst others, notes, the principle of *non-refoulement* is codified in refugee law, extradition treaties, international humanitarian law and international human rights law. Within these legal frameworks there is also some variation regarding the persons whom this principle protects. For further discussion, see Cordula Droege, "Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges", *International Review of the Red Cross*, Vol. 90, No, 871, 2008; Jean Allain, "The *Jus Cogens* Nature of *Non-Refoulement*", *International Journal of Refugee Law*, Vol. 13, No. 4, 2002; Aoife Duffy, "Expulsion to Face Torture? *Non-Refoulement* in International Law", *International Journal of Refugee Law*, Vol. 20, No. 3, 2008.

reason to fear persecution. This principle stands in sharp contrast to ongoing attempts to deny asylum claims before they are fully processed.[85] It also prohibits moves undertaken to send refugees and asylum-seekers home or to detainment centres whilst they are in transit. In effect, the creation of such securitized agendas signals a contradiction in terms and a growing redundancy for the legal apparatus that is meant to protect refugees and asylum-seekers. Looking ahead, these trends are alarming since they may also signal the construction of a new set of rules for determining who "counts" as a refugee and what protections they should be afforded.

There is one scenario where securitization could be linked to protecting refugees and asylum-seekers. It is one in which refugees are allowed to be the speakers, and the international community to be the audience.[86] In this case, the game shifts gears. Technically, it would allow refugees and asylum-seekers to speak security in order to frame the State from which they are fleeing as an existential threat. Under international law, the power of these speech acts stems from their ability to allow refugees and asylum-seekers to break free of rules that would otherwise bind, like crossing a national border without a passport, a residence permit, a piece of jewellery or a penny to their name. This, however, is where the workings of unbound securitization games and crises resurface. A distressing lesson to learn from the so-called "refugee crisis"[87] is that audiences[88] require more convincing than they should when it comes to accepting speech acts and securitizing moves undertaken by refugees and asylum-seekers. For example, as the "refugee crisis" has escalated, audiences want further clarifications. As a result, refugees are asked with increased frequency to prove that "their" claims

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85 As the migration and refugee crises in Europe have escalated, for example, the European Union (EU) has introduced several bureaucratic procedures and tougher rules to manage the flow of people into this territory. In July 2016, this organization openly stated that "asylum seekers moving to other EU countries after arriving in Europe will face having their applications for international protection rejected". For further information on the EU procedures, see James Crisp, "Refugees Face Asylum Rejection if they Leave Country of Arrival, Under New EU Rules", *Euractiv*, 13 July, 2016, available at: www.euractiv.com/section/global-europe/news/under-new-eu-rules-refugees-face-asylum-rejection-if-they-leave-country-of-arrival/; Natascha Zaun, *EU Asylum Policies: The Power of Strong Regulating States*, Palgrave Macmillan, Cham, 2017. The author is grateful to Natasha Saunders for her advice to put stronger emphasis on this point.

86 Obviously it is also possible that the international community and humanitarian organizations like UNHCR securitize refugees as a way to safeguard their right of survival. Here again their securitizing moves are dependent on audience acceptance from host States. On this point, see Jocelyn Vaughn, "The Unlikely Securitizer: Humanitarian Organizations and the Securitization of Indistinctiveness", *Security Dialogue*, Vol. 40, No. 3, 2009. Also see Anne Hammerstad, "UNHCR and the Securitization of Forced Migration", in Alexander Betts and Gil Loescher (eds), *Refugees in International Relations*, Oxford University Press, Oxford, 2011.

87 The term "so-called" is deliberately used here to draw attention to the active construction of this discursive label and to problematize the naturalization of coining these refugee flows as a "crisis".

88 The fact that there is not a singular audience listening to these claims adds another layer of complexity that has hampered many claims for asylum. Technically, the international community writ large is one audience that refugees speak to when they make their claims for protection and humanitarian assistance. Host governments and their populations are two other audiences listening to and processing their asylum claims. For analytical purposes, however, the author prefers to retain some degree of anonymity when discussing the audiences since there are often many audiences in play that do not neatly fall into official categories.

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for asylum are legitimate, to verify that "they" are not a migrant or terrorist, to provide evidence that "they" came through the correct channels, to confirm how long "they" wish to stay. This is not the end of the process, since audiences weighing up the legitimacy of these speech acts and securitizing moves then proceed to check whether "they" will overtax their refugee quota and calculate how much it will cost to resettle "them" and "their" families.

Needless to say, these scenarios are hypothetical by design. In turn, some may dismiss them as an unfair demonization of the audience that is supposedly engaging with refugees in this fashion. Others may take this author to task for trivializing important dimensions of refugee settlement programmes and legitimate asylum procedures. On both counts, perhaps an apology should be issued. Even so, the bigger question that should not fall through the cracks is how it has become possible for refugees and asylum-seekers to be framed as anything other than people who are existentially threatened.

The securitization of IDPs: A missing category of concern?

So far, the "migration" and "refugee" crises occurring across the world have been discussed. The purpose of this section is to illustrate that "for all those that flee, others stay behind, some choosing to take up weapons, others believing they can 'ride out the storm'".[89]

While IDPs are not gaining much coverage within the securitized games surrounding the "migrant" and "refugee" crises, they are threatened. Concerns about food, shelter, health, belonging and living are ritualistically interwoven into their everyday existence. Compounding these concerns is the fact that the internally displaced remain in a hostile domestic environment where they can become more vulnerable to forcible resettlement, sexual assault and food deprivation.[90] As Monika Barthwal-Datta indicates, "without financial means to leave the country, IDPs are dependent on the local or national authorities for assistance, even for basic survival".[91] It is also well established that IDP camps are fertile ground for militarization,[92] with encampment policies leading to active recruitment of rebel groups and child soldiers.[93] Within IDP camps, militarization can also happen through the siphoning of humanitarian funding and other resources for small arms sales. As a result, "the distinction between

89 Will H. Moore and Stephen M. Shellman, "Refugee or Internally Displaced Person? To Where Should One Flee?", *Comparative Political Studies*, Vol. 39, No. 5, 2006, p. 599; Jon Bennett, "Forced Migration Within National Borders: The IDP Agenda", *Forced Migration Review*, Vol. 1, April 1998.
90 Francis M. Deng, "Frontiers of Sovereignty: A Framework of Protection, Assistance and Development for the Internally Displaced", *Leiden Journal of International Law*, Vol. 8, No. 2, 1995.
91 Monika Barthwal-Datta, *Understanding Security Practices in South Asia: Securitization Theory and the Role of Non-State Actors*, Routledge, London, 2012, p. 39.
92 See Robert Muggah, *No Refuge: The Crisis of Refugee Militarization in Africa*, Zed Books, London, 2013.
93 See Mary-Jane Fox, "Child Soldiers and International Law: Patchwork Gains and Conceptual Gains", *Human Rights Review*, Vol. 7, No. 1, 2005; Mary-Jane Fox, "Girl Soldiers: Human Security and Gendered Insecurity", *Security Dialogue*, Vol. 35, No. 4, 2004.

civilian and military space is not clear".[94] Although militarization does not automatically equate with securitization, Young Hoon Song suggests that the two are inherently interconnected for IDPs living in Kenya and Sudan. Another indicator of the securitization dynamics at work when it comes to the protection of all IDPs are the existential threats faced by humanitarian actors attempting to reach and help them.[95] In many circumstances, they are not simply targets of attack. They are also kidnapped, held hostage and executed.

Against these backdrops, it is surprising that the flight of IDPs and the types of violence surrounding their protection has attracted so little attention in security and securitization studies. This missing category of concern is even more surprising if one looks at the numbers. For instance, several studies have reported that the number of IDPs forcibly displaced across the globe far exceeds the number of refugees and asylum-seekers.[96] According to a 2017 report compiled by the Internal Displacement Monitoring Centre, "there are currently twice as many IDPs as refugees in the world".[97] In an earlier report, UNHCR estimated that in 2015 there were 21.3 refugees, 40.8 million IDPs and 3.2 million asylum-seekers.[98] If these numbers are true, why are we not talking about an "IDP crisis" as a bigger security issue? Perhaps it is because IDPs have not crossed an internationally recognized State border. By not crossing any internationally recognized State border, IDPs fail to qualify for the same legal protections as refugees. In effect, this means that the linguistic distinction drawn between IDPs and refugees is premised predominantly on the fact that this kind of movement occurs within national borders.[99] By extension, certain types of internal displacement will not concern the international community or infer any obligations onto it, since IDPs "really only need access to meaningful enforcement of generic internationally recognized human rights".[100]

Another reason why IDPs may be missing from the dominant security narratives is because there is no consensus on what this category means, who

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94 Y. H. Song, above note 81, p. 127.
95 For further reading on this topic, see the thematic issues on "Violence Against Health Care" (Parts I and II), *International Review of the Red Cross*, Vol. 95, Nos 899–890, 2013; Y. H. Song, above note 82, pp. 124–129; Larissa A. Fast, "Mind the Gap: Documenting and Explaining Violence Against Aid Workers", *European Journal of International Relations*, Vol. 16, No. 3, 2010; J. Vaughn, above note 88; Caroline Abu Sa'Da, "Attacks on Medical Missions: Overview of a Polymorphous Reality: The Case of Médecins Sans Frontières", *International Review of the Red Cross*, Vol. 95, No. 890, 2013.
96 Nils Geissler, "The International Protection of Internally Displaced Persons", *International Journal of Refugee Law*, Vol. 11, No. 3, 1999.
97 International Displacement Monitoring Centre, *Global Report on Internal Displacement*, Geneva, 2017, available at: www.internal-displacement.org/global-report/grid2017/.
98 UNHCR, *Global Trends: Forced Displacement in 2015*, Geneva, 2016, p. 2, available at: s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf.
99 UNHCR, *The Guiding Principles on Internal Displacement*, Geneva, 1998, available at: www.unhcr.org/uk/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html. Also see Roberta Cohen, "The Guiding Principle of Internal Displacement: An Innovation in International Agenda Setting", *Global Governance*, Vol. 10, No. 4, 2004.
100 James C. Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?", *Journal of Refugee Studies*, Vol. 20, No. 3, 2007, p. 359.

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should be included and when internal displacement ends.[101] Depending on which definition is put into use, people who are internally displaced share certain family resemblances with migrants and refugees – indeed, they can be labelled as "internal refugees" or "economic migrants".[102] Yet, many oppose stretching the definition of IDPs in these directions as it jettisons any specific focus given to this category of persons. Beyond the language games of migrant and refugees, however, a more complex fractioning of the IDP category is already occurring around the world. Documenting the mass flight of people from Iraq after 2003, for example, Géraldine Chatelard noted that "vulnerabilities span different categories of people: registered and non-registered IDPs or returnees, but also displaced and non-displaced persons".[103] To capture and adapt to these complexities, it is necessary not to fall into the trap of simply "relabelling populations with new words".[104] On the contrary, Peter Van der Auweraert has already identified that "the 'slicing up' of the displaced and returning families into different categories" can produce, rather than reduce, the kinds of obstacles facing IDPs.[105] Cathrine Brun has also documented the "unintended consequences following … the establishment of the IDP category".[106]

To say the least, then, the plight of the internally displaced deserves far more attention and linguistic nuance than it is currently afforded when we talk about people on the move in search of security. This point must hold even though IDPs never cross international borders, and even if they never cross into mainstream securitization studies. Finding connections between IDPs and security will not be difficult. As Marguerite Contat Hickel explains, "no action to provide effective and lasting protection can be contemplated unless there is a satisfactory security environment".[107] The key challenge will be to create (de)securitized games in which IDPs are not simply spoken *about* but also spoken *to*, through gestures of kindness and love.[108]

101 Erin Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern", *Refugee Survey Quarterly*, Vol. 24, No. 3, 2005.
102 *Ibid*. Also see Roger Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization", *Journal of Refugee Studies*, Vol. 20, No. 2, 2007; Cathrine Brun, "Local Citizens or Internally Displaced Persons? Dilemmas of Long Term Displacement in Sri Lanka", *Journal of Refugee Studies*, Vol. 16, No. 4, 2003.
103 Géraldine Chatelard, "Iraqi Refugees and IDPs: From Humanitarian Intervention to Durable Solutions", Middle East Institute–Fondation pour la Recherche Stratégique (MEI-FRS) Analysis Report, 9 June 2011, p. 16, available at: www.humanitarianlibrary.org/sites/default/files/2013/05/09_chatelard.pdf.
104 Georigia Cole, "Beyond Labelling: Rethinking the Role and Value of the Refugee 'Label' Through Semiotics", *Journal of Refugee Studies*, Online First View, DOI 10.1093/jrs/fex021, 2017, p. 3.
105 Peter Van der Auweraert, "Displacement and National Institutions: Reflections on the Iraqi Experience", MEI-FRS Analysis Report, 6 June 2011, p.8, available at: www.refugeecooperation.org/publications/iraq/pdf/08_auweraert.pdf.
106 C. Brun, above note 102, p. 377.
107 Marguerite Contat Hickel, "Protection of Internally Displaced Persons Affected by Armed Conflict: Concept and Challenges", *International Review of the Red Cross*, Vol. 83, No. 834, 2001, pp. 705–706.
108 For a similar idea, see Paul Bouvier, "Humanitarian Care and Small Things in Dehumanised Places", *International Review of the Red Cross*, Vol. 94, No. 888, 2012.

Acceptance and evolving language games: The way forward?

This article has focused on complex topics that surely warrant further discussion. Overall, it has questioned the soundness of numbers as a beneficial blueprint for protecting migrants, refugees or IDPs. It also cautioned against the proliferation of security narratives that resuscitate and naturalize storylines of "inherent" catastrophes and crises. It is important to bear in mind that security is unbound in the sense that it has no fixed meaning. However, this outlook does not legitimate the escalation of unbound securitized games. A general finding of this article is that once securitization occurs, it can be extremely difficult to unmake. By extension, desecuritization is not an automatic guarantee even if the general consensus is that "it *ought* to be sought".[109]

That said, this article is careful not to undermine the integrity and relevance of ongoing efforts to protect migrants, refugees and IDPs. It also does not want to nullify the prospects of change as we go forward. At this point, one may certainly ask what remains to be done. While second-generation scholars have already begun to explore the role of emotions and feelings in securitization processes, more energy must be put into understanding if, when and how these individuals feel threatened or protected or a mixture of both. Acceptance will be a vital tool to taking steps in this direction. To date, the concept of acceptance put into use in securitization studies has rotated around the ability of certain audiences to support the (de)securitizing moves enacted by securitizing actors and speakers. Extending an unconditional invitation to migrants and refugees whenever and wherever they arrive on our shores is a very different logic of acceptance. Acknowledging that too many people are still missing in our efforts to solve the ongoing "migrant" and "refugee" crises will also require a broader conceptualization of acceptance – including IDPs into our analysis is simply the tip of the iceberg. In the end, perhaps what it all comes down to is a hope that we can accept that we are all equals. Dr Martin Luther King Jr expressed this idea far more eloquently in his Nobel Peace Prize, when he said:

> Sooner or later all the people of the world will have to discover a way to live together in peace …. If this is to be achieved, man must evolve for all human conflict a method which rejects revenge, aggression and retaliation. The foundation of such a method is love.[110]

Only time will tell if this kind of love is attainable in the name of (de)securitization. For some scholars, activists and policy-makers, the conceptual foundation that Dr King called for will be labelled as utopian and naive. For others, carving out broader understandings of acceptance and love will be out of sync with the "us" versus "them" identities that the securitization process constructs, and the

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109 T. Balzacq, S. Depauw and S. Léonard, above note 40.
110 Martin Luther King Jr., "Nobel Peace Prize Acceptance Speech", 10 December 1964, available at: www.nobelprize.org/nobel_prizes/peace/laureates/1964/king-acceptance_en.html.

In the name of (de)securitization: Speaking security to protect migrants, refugees and internally displaced persons?

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extraordinary measures that are legitimated in the process. Presumably, others will contend that moves in these directions will generate conceptual confusion rather than any analytical rigor. Each reader must make their own decisions about which arguments hold weight for them. However, the brief assessment of the (de) securitized games at play when it comes to the protection of migrants, refugees and IDPs presented above illustrates that we must wrestle with broader themes of acceptance and love if we are to genuinely try to create alternative narratives in order to talk to migrants, refugees and IDPs long before we read about them in another journal article such as this one. This article also concludes that returning to these conversations with a richer conceptualization of acceptance and love in tow may help us to move the terms of reference away from extraordinary measures and towards long-term solutions.[111]

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111 See Shin Chiba, "Hannah Arendt on Love and the Political: Love, Friendship and Citizenship", *Review of Politics*, Vol. 57, No. 3, 1995; Marita Eastmond, "Stories of Lived Experience: Narratives in Forced Migration Research", *Journal of Refugee Studies*, Vol. 20, No. 2, 2007.

Protecting internally displaced persons: The value of the Kampala Convention as a regional example

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Abstract

This article examines the value of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) in the general quest for the regional and global protection of internally displaced persons (IDPs). It contends that the absence of a globally binding legal instrument for the protection of IDPs underlines the importance of the Kampala Convention and the possible contribution it can make to global and regional efforts to create a binding legal framework for the protection of IDPs. While recognizing some challenges that may impact the full implementation of the Convention, the article concludes by noting its various positive elements that are invaluable in overall efforts to create a comprehensive global legal framework to enhance protection of IDPs.

Keywords: African Union, IDPs, international human rights law, international humanitarian law, international law, Kampala Convention.

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Introduction

In October 2009, the African Union (AU, formerly the Organisation of African Unity, OAU) adopted the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) as a normative framework to protect and assist internally displaced persons (IDPs) on the continent.[1] The adoption of this Convention was largely dictated by the reality that Africa is a region with large-scale internal displacement.[2] This article argues that the decision to adopt the Kampala Convention was inspired by the need to go beyond the 1998 Guiding Principles on Internal Displacement (Guiding Principles) earlier developed by the United Nations (UN), in order to guarantee protection of the displaced on the continent. Perhaps more compelling was the fact that Africa is disproportionately affected by the challenge of displacement, and as such it was in the interest of African countries to establish a permanent framework within which they could cooperate in addressing this phenomenon. The Convention was a bold and landmark measure to create an instrument defining the rights and responsibilities of IDPs and States within the African context.[3]

The underlying goal of this article is to examine the challenge of internal displacement and to look at how the Kampala Convention addresses this challenge and could potentially serve as an example for the adoption of a future global legal framework for IDPs or as a model for other regions with large-scale internal displacement. It is argued here that internal displacement presents a unique challenge because it more often than not entails interventions by external actors that are called upon when humanitarian needs arising from the sudden onset of large-scale internal displacement exceed the capacity of a single State to provide protection and assistance to the displaced which would ideally be provided for by that State.

Further, this article seeks to examine how the Convention allocates and distinguishes obligations toward States, IDPs and non-State actors, and how the international community can ensure that its activities do not serve as a basis to

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1   African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 22 October 2009 (entered into force 6 December 2012). For further work on the Kampala Convention, see Chrysanthus Ache and Charles Riziki Majinge, "International Law as a Mechanism to Advance the Rights of the Displaced in Africa: Examining the Role of the African Union Convention for the Protection and Assistance of the Internally Displaced Persons in Africa", *African Yearbook of International Law*, Vol. 18, No. 1, 2010. See also Marina Sharpe, "Engaging with Refugee Protection? The Organization of African Unity and African Union since 1963", New Issues in Refugee Research Series, UNHCR Research Paper No. 226, 2011.

2   At the end of 2015, the Office of the UN High Commissioner for Refugees (UNHCR) estimated that Africa hosted close to 30% of the global total of displaced persons. See: www.unhcr.org/figures-at-a-glance.html (all internet references were accessed in April 2017). See also: www.internal-displacement.org/publications/2016/africa-report-2016/. The statistics do suggest that today Africa is second only to the Middle East in internal displacement caused by conflict, at 2.4 million people, plus 1.1 million caused by disasters.

3   Won Kidane, "Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention", *Vanderbilt Journal of Transnational Law*, Vol. 44, No. 1, 2011, p. 6. See also Guy S. Goodwin-Gill, "The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change", *International Journal of Refugee Law*, Vol. 28, No. 4, 2016.

justify the failure or unwillingness of the concerned State to discharge its obligations towards its own citizens. These questions are crucial because they will help explain the framework of international assistance towards IDPs and how the international community could complement the concerned State's efforts to provide assistance and protection to its own citizens. They will further help in clarifying the fundamental character of IDPs as the primary responsibility of their respective governments.

The Charter of the United Nations (UN Charter)[4] and international customary law have unequivocally reaffirmed the right of States to determine their internal affairs without outside interference,[5] yet the failure of countries to protect both their people and their frontiers has consistently challenged this doctrine. This failure could be attributed to State collapse, weak governance structures, protracted conflicts and/or the inability of States to exercise sovereignty over part or the whole of their territories. It is these challenges which provide a compelling need for the international community to extend protection to those unable to avail themselves of protection from their own governments within their countries. This argument is made in light of the fact that international law recognizes the responsibility of the international community to provide protection and assistance to those who may not be able to avail themselves of the same from their governments.[6]

The article is divided into six main sections. The first section examines the existing normative gap for protecting IDPs, while the second discusses the role and impact of the Guiding Principles. The third section offers an overview of efforts leading up to the Kampala Special Summit where the AU instrument on IDPs was adopted, followed by a reflection on its most prominent features. The fifth section provides arguments on how the Kampala Convention can serve as an example for a global IDP legal protection model. The article concludes with suggestions on measures that could help enhance protection of IDPs through international solidarity and a comprehensive global protection legal instrument.

The existing normative gap for protecting the IDPs

IDPs are *bona fide* citizens or habitual residents within their own countries with a legitimate claim to all existing rights/protection provided for by the international

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4   Charter of the United Nations, 1 UNTS XVI, 24 October 1945 (UN Charter).
5   *Ibid.*, Art. 2. See, generally, Paul M. Powers, "Unilateral Humanitarian Intervention and Reform of the United Nations Veto: A Pilot Program Aimed towards International Peace and Increased Security Worldwide", *Homeland & National Security Law Review*, Vol. 4, No. 1, 2016. See also James Crawford, *The Creation of States in International Law*, 2nd ed., Oxford University Press, Oxford, 2007; Christine Chinkin, "Peace and Force in International Law", *Studies in Transnational Legal Policy*, Vol. 25, 1993, pp. 203–204.
6   Noële Crossley, *Evaluating the Responsibility to Protect: Mass Atrocity Prevention as a Consolidating Norm in International Society*, Routledge, New York, 2016. See also Roland Paris, "The 'Responsibility to Protect' and the Structural Problems of Preventive Humanitarian Intervention", *International Peacekeeping*, Vol. 21, No. 5, 2014; Eric Heinze, *Waging Humanitarian War: The Ethics, Law, and Politics of Humanitarian Intervention*, State University of New York Press, Albany, NY, 2009.

human rights law (IHRL) and, in situations of armed conflict, international humanitarian law (IHL) treaties to which their countries may be party.[7] The claim that IDPs are protected under the IHRL regime is concretized by the fact that human rights norms and values apply to all individuals without distinction and in almost all circumstances.[8] The argument regarding the lack of an international legal protection regime for IDPs is premised on the fact that despite being in their own countries, IDPs hardly enjoy these rights as spelled out in IHRL or IHL instruments precisely because of their displacement and inadequate State protection. In other words, when people are on the move, it is difficult to ensure that their rights are protected, hence necessitating a specific legal framework to protect them.[9]

The absence and impact of an internationally binding legal regime for the protection of IDPs was apparent despite widely held views that as long as persons are exposed to humanitarian crisis or the risk of human rights atrocities, even within their own countries, they should be a legitimate concern of the international community.[10] Unlike refugees, who are provided with a special protection regime under the 1951 Convention relating to the Status of Refugees[11] and its subsequent Protocol[12] (including the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention),[13] which provides a minimum "safety net" for refugees), IDPs do not have any legal framework dedicated to their protection. This directly imperils their chances of attracting international protection and assistance.[14] Closer examination reveals that IDPs, despite their non-recognition under international law as a legitimate concern that would warrant the creation of a humanitarian organization like the Office of the UN High Commissioner for Refugees (UNHCR), experience tragedy similar to refugees.

The negative impacts of the lack of a specific institution or convention with a global mandate to address the challenge of IDPs have been significant.[15] As part of its humanitarian reforms, the UN made efforts through the "cluster approach" to

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7   Elizabeth Ferris, "International Responsibility, Protection and Displacement: Exploring the Connections between R2P, Refugees and Internally Displaced Persons", *Global Responsibility to Protect*, Vol. 8, No. 4, 2016. See also Catherine Phuong, *The International Protection of the Internally Displaced Persons*, Cambridge University Press, Cambridge, 2006, p. 39; Addis Barega Birganie, "An African Initiative for the Protection of the Rights of the Internally Displaced Persons", *Human Rights Law Review*, Vol. 10, No. 1, 2010.

8   E. Ferris, above note 7.

9   C. Phuong, above note 7, p. 43.

10   Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, Brookings Institution Press, Washington, DC, 2008, p. 52.

11   Convention relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entered into force 22 April 1954).

12   Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967).

13   OAU, Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, 10 September 1969 (entered into force 20 June 1974).

14   Francis M. Deng, "The Global Challenge of Internal Displacement", *Washington University Journal of Law and Policy*, Vol. 5, No. 141, 2001.

15   Roberta Cohen and Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, Brookings Institution Press, Washington, DC, 1998, pp. 1–8.

enhance assistance and protection for IDPs. Under this approach, three clusters were established. UNHCR was tasked with overseeing protection, camp management, camp coordination and emergency shelter, the UN International Children's Emergency Fund was tasked with water, sanitation and nutrition, the World Food Programme focused on logistics, and the UN Development Programme dealt with recovery.[16] The allocation of responsibilities among these organizations was closely aligned to their core mandates, such that they would not have to deviate or seek new mandates to perform these responsibilities. By adopting this approach, it was hoped that IDPs would receive necessary assistance and that existing protection lacunae would be addressed.

However, this approach did not yield the envisaged outcome. Key flaws were seen in having a lesser role for non-governmental organizations that tend to do the "actual" work in the field, and in the tendency to focus on emergent crises giving less attention to protracted crises. In the words of one former senior Western diplomat commenting on the role of the cluster approach: "Agencies are supposed to act as 'co-heads'. In practice, however, 'co-heads' means 'no-heads'."[17]

While, in general, international law recognizes the sovereign right and responsibility of States to protect citizens within their own borders, political, economic and social realities have inhibited this capability. In some cases, while a government may be in power, its ability to protect its citizens and exercise sovereign authority across its entire territory is constrained by political instabilities and, especially, various armed groups that equally control some parts of the territory. As a consequence, millions of citizens in some countries have found themselves trapped between rebels or militias and government forces fighting against each other, ultimately depriving civilians – in need of protection – of their safety and well-being. It has been argued that an international treaty to address the challenges of IDPs would be an infringement on State sovereignty, whereby rich and powerful States would have an excuse to intervene in the domestic affairs of weaker countries.[18] Indeed, it is on the basis of the sovereign equality of States and non-intervention – principles traditionally adhered to by all countries – that some countries have on different occasions rejected international assistance, even to the potential detriment of millions of their citizens.[19]

International law has reaffirmed that States have certain obligations towards their citizens and that they cannot treat their populations as they wish

16 Dennis McNamara, "Humanitarian Reform and New Institutional Responses", *Forced Migration Review*/Brookings-Bern Special Issue, 2006.
17 See, generally, Marina Mattiolo, "Protection of IDPs in Armed Conflict in 2014", in Annyssa Bellal (ed.), *The War Report: Armed Conflict in 2014*, Oxford University Press, Oxford, 2015.
18 For the possible tension between civilian protection and IDPs, see Roberta Cohen, "Reconciling R2P with IDP Protection", *Global Responsibility to Protect*, Vol. 2, No. 1, 2010.
19 Jurgen Haacke, "Myanmar, the Responsibility to Protect, and the Need for Practical Assistance", *Global Responsibility to Protect*, Vol. 1, No. 2, 2009. See also Stuart Ford, "Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity: The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis", *Denver Journal of International Law and Policy*, Vol. 38, No. 2, 2009–10; Alison McCormick, "From Sovereignty to Responsibility: An Emerging International Norm and its Call to Action in Burma", *Indiana Journal of Global Legal Studies*, Vol. 18, No. 1, 2011.

with impunity in the name of sovereignty.[20] States are required to extend protection to such vulnerable groups of people displaced within their countries without discrimination.[21] Indeed, it is on the basis of this recognition of State obligation that the doctrine of responsibility to protect has emerged.[22] The doctrine essentially compels States to take measures to guarantee the protection of their populations against war crimes, crimes against humanity and genocide.[23] This is an obligation that also extends to the protection of IDPs from human rights violations and atrocities.

The 1998 Guiding Principles on Internal Displacement

In 1998, recognizing the growing challenge of IDPs worldwide and the lack of a comprehensive legal protection mechanism, the UN Human Rights Commission, a subsidiary organ of the General Assembly, adopted the Guiding Principles on Internal Displacement.[24] These principles were also noted by the General Assembly in its resolution supporting the work of UNHCR.[25] Essentially, the Guiding Principles identify and reinforce the intersection of specific IHRL and IHL guarantees for IDPs.[26] They explicitly recognize the right not to be arbitrarily displaced and spell out in detail the rights of those who are displaced. They further reaffirm that a government cannot deny access to international humanitarian organizations providing assistance to IDPs if it is unable or unwilling to provide the necessary assistance itself, and underline the right of IDPs to either return voluntarily to their homes or places of habitual residence or to resettle voluntarily in another part of the country. As Roberta Cohen has noted:

> While acknowledging that primary responsibility rests with national authorities, the Guiding Principles recast sovereignty as a form of national responsibility toward one's vulnerable population with a role provided for the international

20 Francis M. Deng, "From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'", *Global Responsibility to Protect*, Vol. 2, No. 4, 2010. See also Francis M. Deng, "The Evolution of the Idea of 'Sovereignty as Responsibility'", in Adekeye Adebajo (ed.), *From Global Apartheid to Global Village: Africa and the United Nations*, University of KwaZulu-Natal Press, Scotsville, 2009; Luke Glanville, "The Antecedents of 'Sovereignty as Responsibility'", *European Journal of International Relations*, Vol. 17, No. 2, 2011.
21 Tom J. Farer, "Humanitarian Intervention before and after 9/11: Legality and Legitimacy", in J. L. Holzgrefe and Robert O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge University Press, Cambridge, 2007, pp. 55–56.
22 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Ottawa, December 2001.
23 For extensive discussion on this see, Sarah Teitt, "Sovereignty as Responsibility", in Tim Dunne and Christian Reus-Smit (eds), *The Globalization of International Society*, Oxford University Press, Oxford, 2017.
24 UN Human Rights Commission, Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998.
25 UNGA Res. 53/125, 12 February 1999, para. 16.
26 Walter Kälin, "Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond", in Erika Feller *et al.* (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, p. 634.

community when governments [do] not have the capacity or willingness to protect their uprooted populations.[27]

While the Guiding Principles do not constitute a legally binding multilateral treaty, they have informed national and regional normative frameworks, the Kampala Convention being among the most significant.[28]

Today, it is widely accepted that the Guiding Principles remain the major international legal protection regime for IDPs at the global level.[29] The greatest achievement underscored by the Guiding Principles is the internationalization of the internal situation of displaced persons by bringing together the broad principles of IHRL and IHL applicable especially to persons displaced within States.[30] The Principles have been widely acknowledged by different countries and institutions as the legitimate basis for advancing the protection of IDPs.

For example, the UN General Assembly sees the protection of IDPs as having been strengthened by identifying, reaffirming and consolidating specific standards, in particular through the Guiding Principles. The General Assembly has further recognized the Principles as an important international framework for the protection of IDPs.[31] In the World Summit Outcome Document, the Principles were recognized as an important international framework for the protection of IDPs, and members resolved to take effective measures to increase protection of and assistance for IDPs.[32] The UN Human Rights Commission has termed the Guiding Principles as "an important tool for dealing with situations of internal displacement". Indeed, the Commission commended States, UN agencies and regional organizations for applying the Principles as standard norms.[33]

While it is clear that the Guiding Principles have gained wide recognition by different international institutions involved in the protection of IDPs, it is argued that they do not constitute a binding legal instrument. This argument is made in light of the fact that, unlike treaties or soft-law instruments (such as declarations, resolutions or recommendations by international organizations such as the General Assembly), they were not negotiated by States, but were rather prepared by a team of experts who were not representing sovereign States that are normally the principle subject of negotiating and complying with international law.[34] As such, the implementation and observance of the Guiding

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27 Roberta Cohen, "The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting", *Global Governance*, Vol. 10, No. 4, 2004.
28 Susan Martin, "New Models of International Agreement for Refugee Protection", *Journal on Migration and Human Security*, Vol. 4, No. 3, 2016. See also C. Ache and C. R. Majinge, above note 1, pp. 427–431.
29 Chaloka Beyani, "The Elaboration of a Legal Framework for the Protection of Internally Displaced Persons in Africa", *Journal of African Law,* Vol. 50, No. 2, 2006.
30 *Ibid.*
31 See UNGA Res. 60/168, "Protection of and Assistance to Internally Displaced Persons", 7 March 2006, para. 8.
32 UN General Assembly, 2005 World Summit Outcome Document, UNGA Res. A/RES/60/1, 24 October 2005, para. 132.
33 UN Human Rights Commission Res. 2003/51, E/CN.4/RES/2003/51, para. 7.
34 Phil Orchard, "Protection of Internally Displaced Persons: Soft Law as a Norm-Generating Mechanism", *Review of International Studies*, Vol. 36, No. 2, 2010.

Principles rests on the goodwill of States within whose borders IDPs are found. Yet, despite their non-binding nature, the Guiding Principles were drafted in a way that carefully restates existing international law with a view to making more general norms applicable to the specific situation of internal displacement.[35] On the basis of this fact, they can be considered to constitute minimum international standards for the protection of IDPs.[36]

Refugees benefit from an established international legal regime providing for their protection, and an international agency to advocate for and advance their interests. IDPs, on the other hand, do not have such an agency. The Guiding Principles do not provide for the establishment of an agency to cater for IDPs, leaving them at the centre of a protection vacuum. Indeed, this protection gap was identified earlier by Dr Francis Deng, the first UN Special Representative of the Secretary-General for IDPs at the beginning of his mandate in 1992. In his first report, he suggested the creation of a specialized agency for IDPs or designation of an existing agency to assume full responsibility for IDPs. Concerning both ideas, Dr Deng contended that a broader consensus within the UN member States had emerged, to the effect that the problem is too big for one agency and requires the collaborative capacities of the international system.[37] Explaining the reluctance of the international community to consider his proposal, Dr Deng contended that the overriding reason was the lack of political will within the international community to create an agency for IDPs.[38] This lack of political will can be attributed to the unwillingness of countries to allow interference in matters they consider domestic. Additionally, the acceptance of this proposal would have compelled countries to provide additional resources to fund this institution.

The road to the Kampala Convention

Despite the provision in the 1969 OAU Convention which categorically prevented member States from interfering in domestic affairs of other countries,[39] the OAU demonstrated over time its commitment to addressing the question of internal displacement on the continent.[40] Against this recognition, the OAU and its successor the AU progressively adopted ambitious strategies to address the protection and assistance challenges facing IDPs in Africa. For example, in the

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35   Walter Kälin, "The Role of the Guiding Principles on Internal Displacement", *Forced Migration Review*, Supplement, October 2005. See also Roberta Cohen, "Lessons from the Development of the Guiding Principles on Internal Displacement", *Forced Migration Review*, No. 45, 2014.

36   *Ibid.*

37   R. Cohen and F. M. Deng, above note 15.

38   *Ibid.*

39   Ben Kioko, "The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention", *International Review of the Red Cross,* Vol. 85, No. 852, 2003, pp. 813–815.

40   Patrick Tigere and Rita Amukhobu, "The African Union's Institutional Framework for Responding to Forced Displacement in Africa", *Conflict Trends*, Vol. 2005, No. 3, 2005.

early 1990s, the African Commission on Human and Peoples' Rights (ACHPR) organized a seminar on the protection of African refugees and IDPs in Harare, Zimbabwe.[41] The conclusion of this seminar recognized *inter alia* that the plight of African refugees and IDPs is a flagrant violation of human dignity and basic human rights, and that such violations constituted a permanent threat to the orderly and peaceful development of Africa. The ACHPR called upon the international community to extend its wholehearted solidarity in order to help African States assume their responsibility to address the root causes and find durable solutions for the plight of refugees and IDPs.[42] This conclusion demonstrates two crucial aspects: the recognition that the challenge of forced displacement constituted a threat to the peace and development of the continent, and the responsibility of African countries to address this challenge, either on their own or with assistance from the international community.

It is on the basis of this recognition that the Constitutive Act of the AU (AU Constitutive Act)[43] categorically recognizes the responsibility of States to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.[44] The AU Constitutive Act also requires member States to promote cooperation in all fields of human activity in order to raise the living standards of the African people. All these provisions are relevant to the protection and assistance of IDPs precisely because they reaffirm IDPs' status as citizens in their respective countries, with the attending rights and obligations of citizenship.

The resolve of African countries to address the challenge of IDPs through policy and institutional measures at the highest level of the AU was reflected in the appointment of ACHPR Commissioner Bahame Nyanduga as a Special Rapporteur on Refugees, Asylum Seekers and IDPs in Africa.[45] Commissioner Nyanduga was tasked with a specific mandate.[46] Concretizing the efforts of Commissioner

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41 Conclusion of the Seminar on Protection of African Refugees and IDPs, Harare, February 1994, reprinted in *7th Annual Activity Report of the African Commission on Human and Peoples' Rights*, ACHPR/RPT/ 7th, 1993–94.

42 *Ibid.*

43 OAU, Constitutive Act of the African Union, 1 July 2000.

44 See Bahame Nyanduga, "Addressing IDP Protection in Africa", *Forced Migration Review*, Supplement, October 2005.

45 ACHPR Res. 72(XXXV)04, providing for the establishment of the mechanism of Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa.

46 ACHPR Res. 72(XXXVI)04, adopted at Dakar during the 36th Ordinary Session of the Commission, 2004. Nyanduga's tasks included seeking, receiving, examining and acting upon information on the situation of refugees, asylum-seekers and IDPs in Africa; helping member States of the AU to develop appropriate policies, regulations and laws for the effective protection of refugees, asylum-seekers and IDPs in Africa; and engaging in dialogue with member States, national human rights institutions, relevant intergovernmental and non-governmental bodies, and international and regional mechanisms involved in the promotion and protection of the rights of refugees, asylum-seekers and IDPs. He was also required to submit reports on the situation of refugees, asylum-seekers and IDPs in Africa at every Ordinary Session of the ACHPR. See, for instance, the reports submitted to the 44th and 45th Sessions of the Commission in Abuja (2008) and Banjul (2009). For extensive coverage of the OAU's role in the protection of the displaced, see Bahame Nyanduga, "Refugee Protection under the 1969 OAU Convention Governing Specific Aspects of Refugee Problem in Africa", *German Yearbook of International Law*, Vol. 47, 2004.

Nyanduga to tackle the growing challenge of internal displacement, the AU Executive Council adopted a decision requesting the ACHPR to work with its partners and stakeholders, to ensure that IDPs would be provided with an appropriate legal framework which would guarantee their adequate protection and assistance.[47] This was followed by other decisions in Addis Ababa, Ethiopia,[48] and in Banjul, Gambia, in June 2006, which called for "the Commission to expedite efforts at finalizing the Draft legal Framework on the Protection and Assistance of Internally Displaced Persons".[49] These efforts not only recognized the non-binding nature of the Guiding Principles but also reaffirmed the political will and commitment of African countries to negotiate and adopt specific instrument to address the challenge of displacement in Africa. The Guiding Principles were considered insufficient not only because of their non-binding nature but also because they did not provide solutions and accountability for IDP challenges on the continent.

In a broader context it can be argued that the road to Kampala, leading to the adoption of a fully fledged African instrument for the protection of IDPs, was fraught with many challenges. Chief among them was the reluctance of some States to adopt an instrument which they considered unnecessary, as these States felt that the IDP challenge was an exclusive internal issue and that any attempt to adopt legislation to provide for the protection of IDPs would violate the sovereign right of non-interference in domestic affairs. However, many reasons militated in favour of the adoption of the continent-wide instrument. Unlike before, when States were protective of their internal affairs, a progressively significant number of them, especially those hosting large numbers of IDPs, recognized that international cooperation was critical in addressing the IDP challenge, and this contributed to their willingness to participate in multilateral efforts to resolve the matter.[50] Additionally, the vulnerability of IDPs opens them to manipulation and possible recruitment by armed groups fighting against States;[51] as such, it was seen as being primarily within the interests of States to exercise protective oversight over such groups of people and to prevent them from falling prey to the whims of ever-proliferating armed groups within their countries.

Nevertheless, it can generally be argued that the AU process which resulted in the adoption of the first binding convention to protect and assist IDPs was a trend-setter not only for demonstrating the full commitment of African States to address the challenge of internal displacement, but also in defining the contours of the international protection regime for IDPs. Despite the fact that the AU instrument adopted and refined some provisions within the 1998 Guiding Principles, the process reaffirmed the widely held belief by the AU that universal

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47 ACHPR, Decision EX.CL/Dec. 127(V), July 2004.
48 ACHPR, Decision EX.CL/Dec. 284(IX), in Addis Ababa.
49 ACHPR, Decision EX.CL/Dec 289.
50 C. Beyani, above note 29.
51 *Ibid.*, p. 192.

standards developed under the auspices of the UN have to be enriched by an African understanding of basic rights and protection of IDPs.[52]

Salient features of the 2009 Kampala Convention

Various efforts – including ministerial declarations, resolutions and Executive Council decisions undertaken and pronounced both at the regional and continental levels by the OAU, the AU and its associated bodies – culminated in the eventual adoption of the AU instrument for the protection of IDPs in Kampala in October 2009.[53] The Kampala Convention transformed what had remained "soft law" for more than a decade into "hard law" by clearly articulating the rights and obligations of duty bearers and right holders.[54] The Kampala Convention treats IDPs as subjects of rights rather than victims of circumstance, while at the same time spelling out the obligations of States as primary duty bearers and identifying roles for other relevant responders.[55] This Convention is not only the first legally binding instrument at the continental level, but is also the first one that succinctly articulates the rights and duties of IDPs and States. It articulates the general obligations of States relating to the protection and assistance of IDPs, and the obligations of the AU itself, international organizations, armed groups, non-State actors and States Parties, during and after displacement. The Convention further imposes obligations on States to ensure durable solutions for IDPs through sustainable return, local integration or relocation, and to provide compensation as well as ensuring registration and access to personal documentation for all IDPs. The Convention construes sovereignty as a positive obligation, entailing responsibility for the protection and general welfare of citizens and of those falling under the State's jurisdiction. The casting of sovereignty as a State obligation is significant because it means that States cannot abdicate their primary responsibility towards their citizens while hiding under the veil of sovereignty and non-interference in internal matters.

Who, then, is considered an IDP within the meaning of the Kampala Convention? From the outset it should be noted that previous instruments, such as the 1998 Guiding Principles, do not provide a legal definition of an IDP, but

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52 P. Tigere and R. Amukhobu, above note 40, p. 49. However, it is important to recall that the first binding IDP instrument was the International Conference of the Great Lakes Region Protocol on the Protection and Assistance to Internally Displaced Persons, 30 November 2006, available at: www.refworld.org/pdfid/52384fe44.pdf. This was the first regional step (binding for the twelve States that ratified it) towards the protection and assistance of IDPs. Also, it required member States (at the subregional level) to incorporate the Guiding Principles into their national legislation.

53 Kampala Summit for the African Heads of States and Governments, October 2009. See UNHCR, "African Union Summit", available at: www.unhcr.org/african-union-summit.html.

54 W. Kidane, above note 3, p. 53.

55 See Chaloka Beyani, "The Politics of International Law: Transformation of the Guiding Principles on Internal Displacement from Soft Law into Hard Law", *Proceedings of the ASIL Annual Meeting*, Vol. 102, 2008, pp. 194–195.

rather a description of who may be considered as one.[56] This is because, unlike the case of refugees, the notion of IDPs should not be construed as a legal status.[57] Adopting the same language as the Guiding Principles, the Kampala Convention therefore defines 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, situation of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.[58]

The Convention provides four conditions to merit an individual as an IDP. The person must be fleeing to avoid the effects of armed conflict, situations of generalized violence, violations of human rights, and/or natural or human-made disasters. More crucially, such persons should not have crossed an internationally recognized State border. The Convention neither articulates the status of an individual IDP, nor answers the question of the end of displacement. The non-inclusion of a clause which would signify the end of displacement may be attributed to the reluctance of States to commit themselves to something they consider impractical and unnecessary precisely because IDPs are within their own territories.[59] On the other hand, the Guiding Principles do not define or give circumstances that merit an individual as an IDP; they rather prohibit displacement and spell out State obligations in the event that displacement occurs.

The Kampala Convention goes beyond the traditional causes of displacement such as armed conflicts and human rights violations by recognizing other causes of displacement, such as climate change and project-induced displacement.[60] This aspect is significant as it is a recognition that with the growing quest for economic and social development, some countries have been willing to displace the population in order to pave way for projects undertaken by multinational corporations and local governments. This provision builds upon the Guiding Principles, which do not go far enough to ensure that there is not only full consultation with people likely to be displaced, but also comprehensive consideration of the social and economic impact of such projects on the well-being of the communities concerned.

The Kampala Convention is envisaged to serve as a basis for solidarity, cooperation, the promotion of durable solutions and mutual support between States in order to combat displacement and its consequences, prevent conflict and promote peace and security.[61] It also provides the obligations and responsibilities

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56 Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, Studies in Transnational Legal Policy No. 38, American Society of International Law, Washington, DC, 2000.
57 *Ibid.*
58 Kampala Convention, Art. 1(k).
59 Allehone Abebe, "The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope and Enforcement Challenges", *Refugee Quarterly Survey*, Vol. 29, No. 3, 2010, p. 51.
60 Kampala Convention, Arts 5(4), 10.
61 *Ibid.*, Art. 2(c).

of States Parties with respect to the prevention of displacement and assistance of the displaced.[62] By examining these objectives, it becomes clear that the Convention places a higher premium on solidarity and State cooperation as a basis for addressing the challenge of displacement, and it can be argued this is a recognition that the challenge of IDPs is too huge and complex to be addressed by one country. This reality is reinforced by the fact that most countries experiencing internal displacement, especially in Africa, are politically unstable and are characterized by extreme poverty and weak governance structures, which greatly inhibits their ability to respond to the needs of their populations.

Unlike the Guiding Principles, which approach displacement from the perspective of the rights of IDPs, the Kampala Convention approaches the problem from a State perspective and is intended as a tool for duty bearers, reaffirming the primary role of the State to address the IDP challenge and the complementary roles of other actors. The Guiding Principles reaffirm that IDPs should be treated equally to all other citizens, and prohibit discrimination on the basis of their being internally displaced. The Kampala Convention, for its part, restates the same ethos, but differently. It mandates States to refrain from, prohibit and prevent arbitrary displacement of their populations while at the same time reaffirming the right of IDPs not to be arbitrarily displaced.[63] In other words, the primacy is put on the duty of States to prevent displacement rather than the right of the population not to be displaced.

The Kampala Convention prohibits arbitrary displacement by specifically listing forms of displacement which may be considered arbitrary. It prohibits displacement based on policies of racial discrimination aimed at or resulting in altering the ethnic, religious or racial composition of the population, and individual or mass displacement of civilians in situations of armed conflict unless there is a need to do so in accordance with IHL.[64] It also considers displacement intentionally used as a method of warfare caused by generalized violence or violations of IHRL. In what may be viewed as the desire of the negotiators to enrich the Convention with specific cultures and customs practiced on the continent, it recognizes displacement which may occur as a result of "harmful practices".[65] This refers to practices such as forced circumcision, female genital mutilation and forced marriages, leading individuals fleeing such practices to be recognized as internally displaced and hence in a position to avail themselves of protection and assistance under the Convention.

The Convention also obliges States to prevent political, social, cultural and economic exclusion and marginalization, which are considered to be major causes of

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62 *Ibid.*, Art. 2(d).
63 W. Kidane, above note 3, p. 57.
64 Kampala Convention, Art. 4(4).
65 *Ibid.*, Art. 1(j). It may also be argued that the term "harmful practices" mirrors the definition in Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and expands it to cover "all persons" – therefore representing a positive development. This concept is also referred to in Article 21 of the African Charter of the Rights and Welfare of the Child.

displacement.[66] The significance of this provision lies in the recognition that more often than not, displacement has been the result of State failure and a breakdown of the rule of law. In contrast to other international instruments dealing with displacement, the Kampala Convention provides for accountability for those who cause displacement.[67] It is worth noting that some of the responsibilities enshrined in the Convention are owed jointly by States and non-State actors. However, it is also worth asking why the negotiators were keen to impose obligations on non-State actors such as rebel movements or multinational corporations instead of dealing with governments as the primary subjects of international law-making. It can be argued that this decision stemmed from the reality that increasingly, non-State actors such as armed groups play a vital role in the governance of territories to the extent that they perform most functions which are traditionally attributable to States, such as controlling a population in a sovereign State and the imposition and collection of taxes.[68] It is therefore evident that the provisions were adopted with an objective of ensuring that the protection of IDPs is guaranteed regardless of which actors may be involved in the acts of displacement.

Accountability of non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement is also enshrined in the Kampala Convention.[69] The Convention defines armed groups as "dissident armed forces or other organized armed groups that are distinct from the armed forces of the state", while it defines non-State actors as "private actors who are not public officials of the State, including other armed groups … whose acts cannot be officially attributed to the State".[70] Armed groups are prohibited from carrying out arbitrary displacement, hindering assistance to the displaced, restricting freedom of movement of IDPs within and outside their area of residence, and impeding humanitarian assistance.[71] This aspect is critical especially because the 1998 Guiding Principles did not address the issue of accountability for those responsible for causing displacement. Further, the fact that the Guiding Principles were not binding meant that they could not legitimately serve as a framework of accountability for those responsible for causing displacement.

The Kampala Convention designates States as having a primary duty and responsibility to provide protection and humanitarian assistance to IDPs.[72] Cooperation and solidarity among States may be invoked at the request of the concerned State Party or the Conference of States Parties. The implication of this arrangement is that the Convention does not give exclusive powers to the State

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66 Kampala Convention, Art. 3(1)(b).
67 Mike Asplet and Megan Bradley, "Strengthened Protection for Internally Displaced Persons in Africa: The Kampala Convention Comes into Force", *ASIL Insights*, Vol. 16, No. 36, 2012.
68 See, generally, Allehone Abebe, *The Emerging Law of Forced Displacement in Africa: Development and Implementation of the Kampala Convention on Internal Displacement*, Routledge, London, 2016.
69 Kampala Convention, Arts 3(1)(h)–(i).
70 *Ibid.*, Arts 1(e), 1(n).
71 *Ibid.*, Art. 7.
72 *Ibid.*, Art. 5(1).

experiencing displacement to determine whether other countries should be involved in what is essentially a domestic affair. Rather, it empowers the Conference of States Parties to seek such assistance on behalf of the State Party concerned.[73] This can be distinguished from the Guiding Principles, which, while recognizing the primary role of States to provide protection and humanitarian assistance to IDPs, do not explicitly recognize an obligation of other States to provide humanitarian assistance to IDPs not in their own countries. This can be attributed to the long-held and well-recognized principle of non-interference in the domestic affairs of States. It is therefore evident that the Kampala Convention has enriched the provision to ensure that the IDP challenge is addressed on the basis of international solidarity and cooperation.[74]

It is worth noting that the Convention reaffirms the fundamental principles of humanitarian assistance. This argument is made in light of the fact that States Parties have an obligation to ensure that the humanitarian principles of humanity, neutrality, impartiality and independence are observed and respected. In other words, States are required to refrain from politicizing humanitarian assistance.[75] International organizations are required to be neutral and independent and to respect the laws of the country in which they are operating.[76] This requirement is significant given the fact that most organizations, especially those working in areas of human rights, may take it upon themselves to criticize governments if they are responsible for causing displacement. Admittedly, governments are not beyond the confines of international scrutiny when it comes to human rights violations, but humanitarian actors must ensure that they do not condemn States at the expense of IDPs. Ultimately, States can take actions which may directly or indirectly endanger the lives and well-being of the displaced, leaving them in a protection vacuum or at risk of physical harm.[77]

What can be considered as an innovation in the Kampala Convention are special provisions for the protection and assistance of vulnerable groups. These provisions require States Parties to provide special protection for and assistance to IDPs with special needs, including separated and unaccompanied children, female heads of households, expectant mothers, mothers with young children, the elderly, persons with disabilities and those with communicable diseases.[78] While the Guiding Principles recognize the importance and obligation of providing support to the most vulnerable groups, such as women, the elderly or persons with disabilities, they do not go far enough in imposing these obligations on specific group of actors as has been provided for in the Kampala Convention.[79] Further, States have an obligation to consult IDPs and to allow them to

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73 *Ibid.*, Art. 5(2).
74 Guiding Principles, Principle 25.
75 Kampala Convention, Art. 5(8).
76 *Ibid.*, Arts 6(1), 6(3).
77 Miriam Bradley, *Protecting Civilians in War: The ICRC, UNHCR, and Their Limitations in Internal Armed Conflicts*, Oxford University Press, Oxford, 2016, pp. 130–136.
78 Kampala Convention, Art. 9(2)(c).
79 *Ibid.*, Art. 9(3).

participate in decisions relating to their protection and assistance. In other words, the Convention recognizes the right of IDPs to be as fully involved as any other citizen and to exercise their civil and political rights such as the right to vote and the right to be elected to public office. The notion of public participation is cardinal, especially taking into account the fact that in most cases IDPs are excluded from enjoying their constitutional rights and duties within their home countries precisely because they are placed in camps where their treatment is similar to that afforded to refugees.[80]

The right of voluntary return, local integration or relocation on a sustainable basis, as part of a comprehensive, durable solution, is guaranteed by the Kampala Convention.[81] To achieve this objective, States are obliged to ensure that they seek lasting solutions to the problem of IDPs by creating conditions for voluntary return or integrating the displaced with the local population. This aspect of the Convention can be distinguished from the Guiding Principles, which, while recognizing the right to return and reintegration of IDPs, impose the obligation to facilitate the realization of this objective on "competent authorities".[82] The Kampala Convention, for its part, categorically imposes this obligation on member States working closely with the AU, international organizations and civil society organizations.[83] It is therefore evident that the Convention has gone the extra mile to identify duty bearers who should facilitate sustainable return and local integration of IDPs. It is also worth mentioning that the Convention establishes a mechanism, through the Conference of States Parties, dedicated to monitoring and reviewing the implementation of its objectives.[84]

The Kampala Convention as a possible model for developing an international legal framework for the protection and assistance of IDPs

Upon examining the Kampala Convention, it can be argued that the document includes several elements which seem to be groundbreaking in advancing the international protection of IDPs. Specifically, the Convention recognizes the central obligation of States to provide protection and assistance to those displaced

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80 M. Rafiqul Islam, "The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable", *International Journal of Refugee Law*, Vol. 18, No. 2, 2006, p. 357. See also Ronan McDermott and Pat Gibbons, "Human Rights and Proactive Displacement: Determining the Appropriate Balance between the Duty to Protect and the Right to Remain", *Disasters*, Vol. 41, No. 3, 2016.

81 Kampala Convention, Art. 11(1).

82 Guiding Principles, Principle 28.

83 Kampala Convention, Art. 11(3).

84 *Ibid.*, Art. 14. The first Conference of States Parties took place in April 2017, in Harare. For details, see "Plan of Action for the Implementation of the Kampala Convention Adopted by Conference of States Parties", press release, 5 April 2017, available at: au.int/en/newsevents/20170403/1st-meeting-conference-states-parties-kampala-convention.

within their own borders. This recognition is not only essential as a reassurance for States that their sovereignty is respected, but also serves as a reaffirmation that States are the primary duty bearers when it comes to the responsibility of protecting their citizens. International assistance may therefore be sought only when States are unable or unwilling to discharge this role. Despite the fact that a significant part of the international community has endorsed and accepted the persuasive authority of the Guiding Principles, these principles are not legally binding. This reinforces the argument that the international community should explore the option of adopting an international legally binding treaty to address the plight of IDPs. This could be undertaken by refining the current Guiding Principles and enriching them with additional rights and duties to make them conform to new realities and developments in international law, which would reflect the current trends of forced displacement. The process would be enriched by ensuring that it is State-led and that the final document is subject to ratification.

Another reason that supports the adoption of an international legally binding instrument stems from the reality that the number of IDPs has, astonishingly, surpassed that of conventional refugees recognized under international law and under the care of UNHCR.[85] In some countries, like Syria, Yemen, Somalia and Afghanistan, a majority of people have been displaced by armed conflicts between various militias and government forces, with no possibility of enjoying protection without international assistance. In such situations, it is no longer feasible to consider the challenge of internal displacement as an internal matter that can be addressed on an *ad hoc* basis by applying the 1998 Guiding Principles. Some proponents have argued that creating a new international legally binding instrument on IDPs could lead to the erosion of the existing refugee protection regime. However, it may be argued, this position ignores the fact that despite the view that refugees and IDPs share the same predicament, refugees can be considered a privileged category compared to IDPs. Indeed, once the latter cross the border, they become the responsibility of the international community, such as States that guarantee their safety and agencies like UNHCR which ensure their international protection and search for durable solutions. The situation is different for IDPs – while States are expected to guarantee their protection and safety, it may be the case that those very States are responsible for their predicament in the first place.

Further, the Kampala Convention has dispelled the long-held concern that any new instrument tailored specifically to the needs of IDPs would encounter difficulties in reaching a consensus. The Kampala Convention has proved that it is possible and desirable to have separate instruments addressing different categories of displacement. Having separate instruments for refugees and IDPs recognizes the fundamental difference between the two groups. While refugees have crossed an international border and as such fall under the jurisdiction of a

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85 UNHCR estimates that currently there are over 65 million people displaced from their homes. Among this number, more than 40 million are IDPs. See UNHCR, "Figures at a Glance", available at: www.unhcr.org/figures-at-a-glance.html.

separate international regime, IDPs are still subject to the laws and protection of their own countries. As such, proponents of having a single instrument for both categories[86] of displacement conveniently ignore the reality that international attempts to provide protection to IDPs fundamentally challenges States' authority, especially their territorial integrity. As the Kampala Convention has shown, separate instruments that would address two distinct groups can expedite international assistance to both, by clearly allocating the State's obligations towards both refugees and IDPs. In addition, having an international binding IDP instrument would ensure that States bear their share of the burden in the protection of IDPs. As it currently stands, while African countries have adopted a legally binding instrument, most members are not only in a poor economic position to contribute meaningfully towards this objective, but also have significant numbers of IDPs within their countries. It is therefore crucial that the IDP problem is addressed on a basis of solidarity among the international community in order to help lessen the economic and social burden, especially on poor countries.

One must identify the needs of IDPs in order to determine how the law should respond to these needs. Having a universal legally binding instrument for IDPs heralds a sense of responsibility and, significantly, compels States not only to extend international protection to IDPs but also to provide the requisite resources to help alleviate their suffering within their own countries. In other words, having a binding treaty requires compliance by the parties to such instruments. The element of financial assistance is crucial, given the economic and social challenges that characterize the majority of IDP-hosting countries. Indeed, this would also enable even organizations bestowed with a mandate to address the IDP situation to legitimately seek more resources from the international community in order to discharge that mandate. Admittedly, the nexus between resources and mandate has always been a contentious subject because even refugees, whose protection mandate is internationally sanctioned, have had problems attracting the requisite resources. Nevertheless, having an instrument apportioning clear obligations upon States can go the extra mile towards ensuring that countries feel obligated to provide more resources instead of relegating the internal displacement issue to the domestic agenda of concerned countries.

The Kampala Convention compels States to address the problem of internal displacement through solidarity and burden sharing. Clearly, this concept of solidarity and burden sharing can positively contribute to the global view of internal displacement as a challenge whose solution lies in the ability of countries to address the root causes of displacement, which are more often than not economic, social and political. This recognition and acknowledgement would require the international community to extend assistance to address such problems. Also worth noting is that the Convention is substantially innovative in that it recognizes causes of displacement beyond armed conflicts and human

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86   C. Phuong, above note 7, p. 26.

rights atrocities – it also recognizes climate change, natural disasters and development-induced projects as legitimate bases for displacement. In the wake of Cyclone Nargis and a dithering and intransigent attitude by countries like Myanmar towards accepting international aid,[87] the presence of a binding international instrument would significantly compel States to honour their international obligations.

Another important element within the Kampala Convention is the question of accountability for those who cause displacement. The Convention acknowledges and recognizes the possibility of holding non-State actors accountable for human rights violations. It requires States Parties to exercise criminal accountability for those who cause displacement. This is a notable achievement in the general development of accountability in international law.[88] Admittedly, this nature of accountability would be difficult to realize in some cases where States are unable or unwilling to undertake such a role. Nevertheless, the Convention recognizes this gap and makes a provision to the effect that accountability may also be undertaken at the international level. This means that when States are unable or unwilling to exercise criminal accountability domestically, they may ask the International Criminal Court to intervene when and if the Court finds it within its jurisdiction to do so.[89] This development on the accountability front is a welcome evolution, mainly because private and multinational companies involved in the exploitation of natural resources, especially in conflict-ridden countries, have in some cases caused massive displacement to pave the way for their investment activities, with little scrutiny at either the domestic or international levels. Similarly, the fact that States Parties are required to provide compensation and reparation[90] for displacement caused could contribute to the need for both State and non-State actors to take into account the plight of those likely to be displaced by involving them in decision-making before undertaking projects that are likely to displace them.

Conclusion

The Kampala Convention is a ground-breaking instrument. It is the first[91] binding instrument of its kind at the regional level negotiated and adopted within a multilateral framework of international law-making to address the challenge of internal displacement. It has recognized and broadened varied causes of internal displacement such as natural disasters, armed conflicts, development-induced projects and internal strife, to mention a few. It further recognizes the role of

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87   See, generally, A. McCormick, above note 19, pp. 563–565.
88   Phil Orchard, "Regionalizing Protection: AU and ASEAN Responses to Mass Atrocity Crimes against Internally Displaced Persons", *Global Responsibility to Protect*, Vol. 8, No. 2–3, 2016.
89   See, generally, Kampala Convention, Arts 7(4), 7(5).
90   See, generally, *ibid.*, Art. 12.
91   Note that the first binding subregional instrument on IDPs was the International Conference on the Great Lakes Protocol on IDPs. See above note 52.

non-State actors, such as armed groups, as the source of displacement without giving these groups any kind of legitimacy for their activities in challenging State authorities in their respective countries. This recognition is made for the purposes of holding these actors individually criminally liable for activities that may breach obligations enshrined in the Convention.

It has also been shown that despite weaknesses and gaps identified within the Convention itself, the Kampala Convention does address the challenges of displacement and provides for the discharge of obligations of all concerned parties including States, IDPs and the international community. This is a welcome development in international law precisely because it demonstrates the willingness of countries to collectively address the challenge of forced displacement by clearly articulating and reaffirming their primary role of preventing displacement of their own citizens. It is argued that the Convention can serve as the basis of a more comprehensive international instrument to address the challenge of IDPs which continues to affect the lives of millions of people across the world.

The ongoing conflicts in Yemen, Syria and elsewhere, and the unprecedented exploitation of natural resources in countries such as the Democratic Republic of the Congo,[92] continue to significantly contribute to a wave of displacement globally. Based on this reality, the international community should build on regional and international efforts like the Kampala Convention to negotiate a comprehensive legal protection framework for IDPs. This argument is made in light of the fact that, increasingly, countries have recognized that the displacement challenge is no longer a temporary situation – rather, it is a growing problem which requires a permanent solution. Adopting a global legal instrument would be a positive start towards a comprehensive legal and institutional solution to this challenge.

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92 See, for instance, International Center for Transitional Justice, "The Democratic Republic of Congo (DRC)", available at: www.ictj.org/our-work/regions-and-countries/democratic-republic-congo-drc.

INTERNATIONAL
REVIEW
of the Red Cross

Specificities and challenges of responding to internal displacement in urban settings

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Abstract

The world is rapidly urbanizing, and so is internal displacement. However, knowledge about the specific situation of internally displaced persons (IDPs) in urban settings and how it differs from, and impacts on, their host communities is still limited, and responses continue to be inadequate. This article analyzes the particular needs of urban IDPs by taking into account how the various contexts and patterns of urban internal displacement contribute to shaping people's experience. It discusses

three key challenges that humanitarian actors are faced with in developing effective responses: identifying and reaching IDPs in urban settings, addressing their urgent protection concerns, and supporting their local integration. It concludes by pointing out the need for methodological and operational guidance on how to bring together area-based approaches that account for the impact of displacement on entire urban communities, and tailored approaches addressing IDPs' specific needs in urban settings. The need for stocktaking exercises and more effective sharing of experiences among practitioners, municipal authorities and policy-makers is also underlined.

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Urban internal displacement: A growing and multifaceted phenomenon

Internal displacement is increasingly urban. This is in line with a global trend of rapid urbanization and reflects the fact that armed conflict and other situations of violence,[1] as well as disasters, often play out in cities.[2] A significant and growing proportion of internally displaced persons (IDPs) flee to, between or within

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1   The term "other situations of violence" is used in this article to refer to situations of collective violence, perpetrated by one or several groups, which do not reach the threshold of an armed conflict but may have significant humanitarian consequences such as, notably, internal displacement. In the same sense, see International Committee of the Red Cross (ICRC), "The International Committee of the Red Cross's (ICRC's) Role in Situations of Violence below the Threshold of Armed Conflict", *International Review of the Red Cross*, Vol. 96, No. 893, 2014, available at: www.icrc.org/en/international-review/article/international-committee-red-crosss-icrcs-role-situations-violence-below (all internet references were accessed in January 2018).

2   The number of people living in cities worldwide grew from 746 million in 1950 to 3.9 billion in 2014, or from 30% to 54% of the global population. This figure is projected to reach 66% by 2050. See United Nations (UN) Department of Economic and Social Affairs, *World Urbanization Prospects, the 2014 Revision: Highlights*, 2014, available at: https://esa.un.org/unpd/wup/publications/files/wup2014-highlights.pdf. Africa and Asia are less urbanized than other regions, but are also urbanizing faster: see Paul Knox Clarke and Ben Ramalingam, *Meeting the Urban Challenges: Adapting Humanitarian Efforts to an Urban World*, Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP) Meeting Paper, ALNAP and Overseas Development Institute (ODI), London, 2012, available at: www.alnap.org/system/files/content/resource/files/main/meeting-paper-final-web-ok.pdf. Furthermore, it is estimated that almost 50 million people today are affected by conflict in urban areas: see ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, Geneva, 2015, available at: www.icrc.org/eng/assets/files/publications/icrc-002-4249.pdf. In this article, the term "city" is used to refer to any urban settlement, regardless of its scale or population size. As such, the terms "cities", "urban areas" and "urban settings" are used interchangeably. Distinct features of urban settings are examined in the section below.

urban areas,[3] where many of them live with host families or in other types of accommodation – such as private houses or damaged or unfinished buildings, sometimes in informal settlements – dispersed among the resident population, rather than in camps. They decide to settle in cities for various reasons, including the prospect of security, anonymity, better economic or educational opportunities and humanitarian assistance.[4] Oftentimes, however, these are war-torn cities or fragile cities in developing and middle-income countries[5] that fail to provide IDPs with safety and adequate access to livelihoods and reliable services. Instead, IDPs end up facing destitution, insecurity, chronic urban violence and the risk of secondary displacement.

Humanitarian responses to displacement situations have also needed to shift from rural and camp settings to urban areas. For humanitarian actors, this means working outside of their traditional comfort zone and having to adapt their mindset, toolbox and approaches to a different and more complex operating environment, where authorities tend to be more present and play a bigger role.[6] There is growing awareness among practitioners as well as governments and

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3   Chaloka Beyani, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons*, UN Doc. A/HRC/19/54, 26 December 2011, p. 11, available at: www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-54_en.pdf. Although urban IDP situations are considered the new norm, the exact scale of urban internal displacement globally has not yet been quantified. On selected estimates for populations of urban IDPs, see Internal Displacement Monitoring Centre (IDMC), *Leaving No One Behind: Internal Displacement and the New Urban Agenda*, Geneva, 11 October 2016, pp. 3–4.

4   As per the internationally recognized definition contained in the 1998 UN Guiding Principles on Internal Displacement (Guiding Principles), IDPs are described as persons who are "*forced or obliged* to flee or to leave their homes or places of habitual residence and who have not crossed an internationally recognized State border" (emphasis added), meaning that their movement is always of an involuntary nature. Within the framework of the compelling external circumstances causing their displacement, however, people have agency and still make choices regarding whether to stay or flee and where to go, based on a range of different considerations. Those who are displaced from the countryside sometimes move to urban areas in stages, as they settle first in the closest urban centre, which they may already know or where they may have relatives or friends, and later move on to larger cities. See Maria Aysa-Lastra, "Integration of Internally Displaced Persons in Urban Labour Markets: A Case Study of the IDP Population in Soacha, Colombia", *Journal of Refugee Studies*, Vol. 24, No. 2, 2011, pp. 280–282; Angela Consuelo Carrillo, "Internal Displacement in Colombia: Humanitarian, Economic and Social Consequences in Urban Settings and Current Challenges", *International Review of the Red Cross*, Vol. 91, No. 875, 2009, pp. 529–530. On the various considerations influencing IDPs' choice to settle in cities, see also Brookings–LSE Project on Internal Displacement, *Under the Radar: Internally Displaced Persons in Non-Camp Settings*, Brookings Institution, Washington, DC, October 2013, p. 3; Jeff Crisp, Tim Morris and Hilde Refstie, "Displacement in Urban Areas: New Challenges, New Partnerships", *Disasters*, Vol. 36, Supp. 1, 2012, p. 24.

5   Robert Muggah and Kevin Savage, "Urban Violence and Humanitarian Action: Engaging the Fragile City", *Journal of Humanitarian Assistance*, 19 January 2012, available at: sites.tufts.edu/jha/archives/1524.

6   With a view to better analyzing and responding to crises in urban areas, many have voiced the need to overcome the "'rural' or 'camp' bias" – see Elizabeth Ferris and Sara Ferro-Ribeiro, "Protecting People in Cities: The Disturbing Case of Haiti", *Disasters*, Vol. 36, Supp. 1, 2012, p. 542; to "think differently" – see Paul Currion, *Rapid Humanitarian Assessment in Urban Settings*, Assessment Capacities Project, Geneva, April 2015, p. 5, available at: www.alnap.org/help-library/rapid-humanitarian-assessment-in-urban-settings; to "adapt policy and practice" – see Leah Campbell, *Stepping Back: Understanding Cities and their Systems*, ALNAP Working Paper, ALNAP and ODI, London, 2016, p. 8; and to develop "urban-specific operational strategies and tools" – see Inter-Agency Standing Committee (IASC), *IASC Strategy for Meeting Humanitarian Challenges in Urban Areas*, 2010, p. 7.

academics that "urban problems require urban solutions".[7] However, there is a paucity of best practices in this domain and significant gaps exist in dealing with humanitarian crises in cities.[8] This is particularly true when it comes to addressing urban internal displacement, as reliable data on the specific circumstances of IDPs in urban settings are lacking, and it remains difficult to properly define what constitutes an effective response.[9]

Urban internal displacement has a multifaceted nature. First, it occurs in different contexts, depending on whether cities are, alternatively or simultaneously, the scenes of armed conflict or other situations of violence or natural disaster, and/or sites where people seek refuge. For example, IDPs can be found in cities where hostilities are ongoing, in more stable cities in a country at war, or in cities affected by violence perpetrated by criminal groups (e.g. gangs, drug traffickers) in otherwise peaceful countries.[10] Second, urban internal displacement follows different patterns, as people move from rural to urban areas, between cities (inter-urban displacement) or between neighbourhoods of the same city (intra-urban displacement). There is a need to unpack the phenomenon

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7   François Grünewald, "Aid in a City at War: The Case of Mogadishu, Somalia", *Disasters*, Vol. 36, Supp. 1, 2012, p. 1.

8   In recognition of those gaps and the critical need to address the urban challenge, a number of initiatives have emerged in recent years: for instance, the launch of the Global Alliance for Urban Crises at the 2016 World Humanitarian Summit; the adoption of the New Urban Agenda at the Habitat III Conference in October 2016; the creation of the Urban Response Community of Practice and the Urban Humanitarian Response Portal, by ALNAP and UN-Habitat, to share knowledge and experiences about urban responses (see the Urban Humanitarian Response portal, available at: www.urban-response.org/); and the revision of the *Sphere Handbook* from an urban perspective (see Ben Mountfield, *Using the Sphere Standards in Urban Settings: Guidance for Humanitarian Practitioners*, Sphere Project, Geneva, 1 December 2016). The need for humanitarian actors to better adapt and refine assessment methodologies and tools traditionally used for rural settings is also widely underscored. The Stronger Cities Initiative (for more information, see International Institute for Environment and Development (IIED), "Stronger Cities Initiative", available at: www.iied.org/stronger-cities-initiative), a consortium of the International Rescue Committee (IRC), the Norwegian Refugee Council (NRC) and World Vision International, has developed context analysis and needs assessment tools for urban humanitarian response in armed conflict, displacement and disaster settings. See, for instance, Lili Mohiddin and Gabrielle Smith, *A Review of Needs Assessment Tools, Response Analysis Frameworks, and Targeting Guidance for Urban Humanitarian Response*, IIED Working Paper, London, November 2016, available at: pubs.iied.org/10796IIED/?a=L+Mohiddin. On the need for adapted tools and approaches, see also a recent study published by the European Commission's Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO), *The Urban Amplifier: Adapting to Urban Specificities: Report on Humanitarian Action in Urban Crises*, 1 January 2018, available at: drive.google.com/file/d/1UZvPvtWC_wD7xjbEr3Syo-lwRuwXi4zP/view.

9   Internal displacement data classified as either urban or rural were available only in a small fraction of the countries covered by the IDMC for the period January to December 2016. See IDMC, *Global Report on Internal Displacement*, 2017, pp. 78, 108–109. Elizabeth Ferris, *Ten Years after Humanitarian Reform: How Have IDPs Fared?*, Brookings–LSE Project on Internal Displacement, December 2014, p. 26, available at: www.brookings.edu/wp-content/uploads/2016/06/Introduction-to-final-report-IDP-Study-FINAL.pdf, highlights that the current lack of accurate data on IDPs' numbers, needs and capacities, particularly in urban settings, undermines the ability to tailor adequate responses. On the tendency of urban internal displacement to be less visible, which partly explains current knowledge gaps, see below in this article.

10   On the phenomena of urban gangs, gang violence and organized crime, see, most recently, Ana Balcazar Moreno, Ximena Mercedes Galvez Lima, Julie Lambin and Lina Rodriguez, *The War Report 2017: Gang Violence in Colombia, Mexico and El Salvador*, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, December 2017.

in order to better grasp the differences and commonalities in the situation of IDPs across the various contexts and patterns of urban internal displacement.[11]

This article aims to contribute to ongoing reflections about the specificities of urban displacement and how best to respond to it, with a focus on internal displacement induced by armed conflict and other situations of violence. It argues that the context and the pattern in which urban internal displacement occurs shape the interaction between displacement, vulnerability and resilience,[12] translating into specific needs, concerns and capacities of IDPs in urban areas. The distinct features of cities compared to rural settings also play a role in this process. After analyzing the ramifications of displacement for urban IDPs and their host communities, the article discusses three key challenges faced by humanitarian actors in their efforts to develop adequate responses: identifying and reaching IDPs in urban settings, addressing their urgent protection concerns, and supporting their local integration. In doing so, it presents some possible approaches to deal with these challenges, drawing particularly from the experiences of the International Committee of the Red Cross (ICRC). The article focuses mainly on the situation of urban IDPs living outside camps, as less attention has been devoted to them and their merging within dispersed host communities poses particular challenges to an effective response to their needs.[13] Some of the concerns and challenges identified with regards to this group, however, may apply *mutatis mutandis* to urban IDPs in camps and camp-like settings.[14]

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11 Existing literature on urban displacement mostly focuses on refugees, rather than IDPs. The literature that deals with IDPs often considers both populations together without clearly distinguishing the differences and similarities, or does not explore the full range of contexts and patterns of urban internal displacement. See, for instance, Sara Pantuliano, Victoria Metcalfe, Simone Haysom and Eleanor Davey, "Urban Vulnerability and Displacement: A Review of Current Issues", *Disasters*, Vol. 36, Supp. 1, 2012; Amy Kirbyshire, Emily Wilkinson, Virginie Le Masson and Pandora Batra, *Mass Displacement and the Challenge for Urban Resilience*, ODI, London, 2017; J. Crisp, T. Morris and H. Refstie, above note 4; M. Aysa-Lastra, above note 4.

12 Various definitions have been given to the term "resilience" by humanitarian agencies, development institutions and donors: see, for example, UK Department for International Development (DFID), *Defining Disaster Resilience: A DFID Approach Paper*, November 2011, pp. 6–9; UN International Strategy on Disaster Reduction, *Terminology on Disaster Risk Reduction*, Geneva, May 2009, p. 24; International Federation of Red Cross and Red Crescent Societies (IFRC), *The Road to Resilience: Bridging Relief and Development for a More Sustainable Future*, June 2012; European Commission, *The EU Approach to Resilience: Learning from Food Security Crises*, COM (2012) 586, Communication from the Commission to the European Parliament and the Council, Brussels, 3 October 2012, p. 5, available at: ec.europa.eu/echo/files/policies/resilience/com_2012_586_resilience_en.pdf. In this article, "resilience" is meant to indicate the capacity of individuals and communities to resist and recover from the impact of threats and/or to deal with the consequences of shocks or stressful events. People are "resilient" when they are able to protect themselves from possible threats and to cope with stressful events by adopting coping strategies that are not harmful to themselves or their family members and do not impact negatively on their livelihoods. The resilience of a community is measured by its ability to preserve its members from harm.

13 On the need to study the situation of IDPs living outside of camps, in urban as well as rural settings, see C. Beyani, above note 3.

14 For example, the need to integrate the city, with its interconnected systems and wide range of stakeholders, into the way humanitarian responses are designed and implemented emerges both in camps and in non-camp situations.

Some distinct features of urban settings

There is no single commonly agreed definition of "urban area". Government definitions and academic classifications differ in terms of scale, population size, shape and other factors. Furthermore, distinguishing "urban" from "rural" areas is not always feasible: for instance, in many rapidly growing middle-sized to small cities, the borders between the two are often blurred.[15] That said, a number of characteristics have been identified as being typical of cities as opposed to rural settings.[16] This section focuses on three characteristics that play a part in shaping the specific experience of IDPs in cities and make cities a more challenging environment for humanitarian actors to work in.

The first characteristic is the density and diversity of the population. This offers better conditions for anonymity to those who seek to maintain a low profile because of security concerns, as opposed to rural areas where people usually know each other. However, it also increases the likelihood that the most vulnerable will fall under the radar screen of authorities and humanitarian organizations. Furthermore, integration into the city can be more difficult for newcomers, as social cohesion tends to be weaker than in rural areas.[17] Density amplifies the impact of hostilities or disasters occurring in cities, as more people can be affected at once, thus requiring a larger-scale response.[18] Diversity makes it harder for humanitarian actors to define the "community" to work with. In rural areas, a village can be approached as one community, given that the population tends to be more homogeneous. In cities, not only do people's situations differ widely from neighbourhood to neighbourhood, but urban dwellers often identify with various social, ethnic, religious, professional or other groups. This leads to multiple communities coexisting in the same area (or to put it differently, to a fragmented community consisting of different sub-groups). As a result, identifying commonalities of needs and vulnerability for the purpose of defining the beneficiaries of humanitarian interventions becomes an intricate task.[19]

15 World Bank, *World Development Report 2009: Reshaping Economic Geography*, Washington, DC, 2009, p. 51, available at: openknowledge.worldbank.org/handle/10986/5991. P. Knox Clarke and B. Ramalingam, above note 2, p. 4, emphasize that "cities differ in important ways from rural environments, but there is no 'one size fits all' definition of a city, and in most cases the boundary between urban and rural is porous and indistinct". Within the context of its activities to support urban services, the ICRC has adopted a definition of the urban context as "the area within which civilians vulnerable to disruptions in essential services reside and the network of components supporting those services". See ICRC, above note 2, p. 17. This definition conveys a distinction between urban and rural, but not along the traditional lines based on population density and/or a geographic area defined by municipal authorities. On the city and its relationship with the countryside, see also Marion Harroff-Tavel, "Violence and Humanitarian Action in Urban Areas: New Challenges, New Approaches", *International Review of the Red Cross*, Vol. 92, No. 878, 2010, pp. 331–332.

16 L. Campbell, above note 6, pp. 12–17; B. Mountfield, above note 8, pp. 6–8.

17 IFRC, *Integrating Climate Change and Urban Risks into the VCA*, Geneva, 2014, p. 52.

18 *Ibid.*, p. 49; IASC, above note 6, pp. 10–11 (emphasizing a related need for urban preparedness planning and strategies).

19 Elena Lucchi, *Humanitarian Interventions in Situations of Urban Violence*, ALNAP Lesson Paper, ALNAP and ODI, London, 2013, p. 7; L. Campbell, above note 6, pp. 6, 9–10; B. Mountfield, above note 8, p. 7.

The second characteristic common to urban areas is their reliance on cash-based economies and on complex and interconnected systems of public basic services (e.g. health care, water, sanitation and electricity).[20] This is different from rural areas, where there are more opportunities for production and self-consumption of food and other goods and people organize themselves around less sophisticated services. As a result, urban dwellers are highly vulnerable to the disruption of markets and services caused by armed conflict.[21] Additionally, if prior to the conflict access to public services was not equitably distributed across the urban landscape and in an inclusive way, resulting in varying degrees of service provision quality, it is highly probable as the crisis unfolds that this situation will continue and become exacerbated with time. Furthermore, life in cities is more expensive – commodity prices are usually higher, and people who come from the countryside have to buy food that some of them may have previously produced themselves, and pay for services that are provided by public or private companies.[22] At the same time, cities can offer more opportunities for income generation and employment, as well as education. However, people need to have adapted skills and valid documentation in order to take advantage of those opportunities – which is often not the case for IDPs.[23]

The third characteristic of urban settings is the presence of a wide range of governmental and non-governmental actors operating at various levels (municipal, district and national) and with different roles and responsibilities that may not always be clearly defined.[24] For humanitarian organizations, this increases opportunities to build collaboration and partnerships, but poses challenges in terms of coordination and engagement with multiple urban stakeholders.[25] It also implies that humanitarian organizations working in cities tend to be subject to more control and regulation by authorities, and have less freedom to manoeuvre

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20 On cities as complex and multi-layered systems, see A. Kirbyshire *et al.*, above note 11, p. 11; P. Currion, above note 6, pp. 11–12; Lucy Earle, "Addressing Urban Crises: Bridging the Humanitarian–Development Divide", *International Review of the Red Cross*, Vol. 98, No. 901, 2016, p. 219.

21 On the multifaceted and interconnected nature of essential urban services, and the cumulative negative impact of protracted armed conflict on their quality and availability, see ICRC, above note 2.

22 B. Mountfield, above note 8, p. 8.

23 This is further discussed below when examining the obstacles to IDPs' access to basic services and their access to livelihoods and employment.

24 Geographical distances, lack of infrastructure, insecurity and the presence of armed groups in rural areas, with related access challenges, are often among the factors that explain the concentration of authorities and other actors in urban centres. Furthermore, cities are typically characterized by vibrant networks of civil society organizations (e.g. non-governmental organizations, associations, unions, societies, clubs, faith groups) representing the various interests of the multiple communities coexisting in the same urban area. This is the case in most government-held areas, but might be different in urban areas held by non-State armed groups.

25 E. Ferris and S. Ferro-Ribeiro, above note 6, p. 47; B. Mountfield, above note 8, p. 8. The IRC, in its "Principles of Urban Humanitarian Response", speaks of cities as being "shaped by a multitude of international, national and local actors from multiple sectors … who possess valuable knowledge of and influence over how the city functions", underscoring the need for humanitarian actors to "leverage" such networks in order "to inform effective and inclusive responses". See IRC, *Violence in the City: A Systematic Review of the Drivers of Violence against Displaced Populations in Urban Crisis and Post-Crisis Settings*, January 2017, p. 6, available at: www.rescue-uk.org/report/violence-city-systematic-review-drivers-violence-against-displaced-populations-urban-crisis.

than in rural settings. They need to be conversant with existing institutional, normative and policy frameworks, including on complex issues of land tenure, tenancy, housing rights and property.[26] At the same time, those regulations can present a whole raft of bureaucratic obstacles for IDPs as they seek to access services and rebuild shattered lives.

The specific needs of IDPs in urban settings

IDPs tend to have particular needs stemming from their displacement, which often exacerbates the difficulties people already experience as a result of armed conflict or other situations of violence. Those needs are multifaceted and often interconnected, and tend to evolve over time. Newly displaced persons often face physical insecurity, lack basic necessities and need emergency assistance to survive. Those in protracted internal displacement need to access livelihoods, health, education and adequate housing in order to regain some normality in their lives, recover their independence and make progress towards a durable solution.[27] Furthermore, IDPs are not a homogeneous and faceless group: individual characteristics such as gender, age and disability influence the way people are affected by internal displacement and their capacity to cope with it.[28]

　　　　Although the situation of IDPs in cities may look similar to that of their non-displaced neighbours, internal displacement remains a key factor of

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26　Marion Harroff-Tavel, "Humanitarian Response Toward Urban Violence", in Pierre Apraxine, Anne Duquenne, Sabine Fetta and Damien Helly (eds), *Urban Violence and Humanitarian Challenges*, Joint Report from the Colloquium Organized by the ICRC and the European Union Institute for Security Studies, Brussels, 19 January 2012, p. 33; B. Mountfield, above note 8, p. 8; IDMC and MIT Displacement Research and Action Network (MIT DRAN), *Home Sweet Home: Housing Practices and Tools that Support Durable Solutions for Urban IDPs*, March 2015, p. 15.

27　On the notion of protracted internal displacement as a situation that is beyond the initial emergency phase and where no durable solution is in sight, see Gil Loescher and James Milner, "Understanding the Challenge", *Forced Migration Review*, No. 33, September 2009, p. 9, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/protracted/loescher-milner.pdf; and, more recently, Walter Kälin and Hannah Entwisle Chapuisat, *Breaking the Impasse: Reducing Protracted Internal Displacement as a Collective Outcome*, UN Office for the Coordination of Humanitarian Affairs (OCHA), June 2017. The issue of durable solutions is addressed in Section V of the Guiding Principles, which recognize the "primary duty and responsibility" of the authorities "to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country" (Principle 28, § 1). According to the IASC Framework on Durable Solutions for Internally Displaced Persons, a durable solution is achieved when IDPs no longer have any specific assistance or protection needs linked to their displacement and can enjoy their human rights in a non-discriminatory manner. The Framework identifies three routes to durable solutions – return and reintegration at the place of origin, local integration at the place of displacement, or relocation and settlement in another part of the country – and provides for criteria to evaluate progress toward achieving solutions. See Brookings Institution–University of Bern Project on Internal Displacement, *IASC Framework on Durable Solutions for Internally Displaced Persons*, Washington, DC, 2010, available at: www.unhcr.org/50f94cd49.pdf.

28　Jakob Kellenberger, "The ICRC's Response to Internal Displacement: Strengths, Challenges and Constraints", *International Review of the Red Cross*, Vol. 91, No. 875, 2009, p. 476. See also Nina M. Birkeland, "Internal Displacement: Global Trends in Conflict-Induced Displacement", *International Review of the Red Cross*, Vol. 91, No. 875, 2009, pp. 501–504.

vulnerability for urban populations affected by armed conflict and violence.[29] This section explains why urban IDPs are often worse off than the resident population and examines their specific needs. Consideration is given to how different contexts and patterns of urban internal displacement shape people's experience.

Concerns related to safety and security

IDPs in urban settings, just like those in rural areas, may have serious concerns for their safety and physical security. These concerns can be linked to the circumstances in which people flee or to the conditions they face in the new location. During armed conflict, displacement is often a survival mechanism. People leave their homes as they lose access to basic necessities in their place of residence, because they fear the approaching of military operations or after experiencing their destructive impact, notably as a consequence of violations of international humanitarian law (IHL).[30] When cities become battlefields, the effects of the hostilities on the civilian population and urban infrastructure and services can be devastating.[31] Yet, fleeing within or from a city at war is also dangerous. People risk being killed on the way by bombing and shelling, caught in crossfire or hit by sniper fire or landmines. They may face harassment by weapon-bearers or be arrested at checkpoints due to the perception that they support or are affiliated to an adverse party to the conflict. Additionally, because of rapidly changing conflict dynamics, those who managed to reach a more secure neighbourhood or another city relatively spared by the fighting may be confronted again with potential death and injury from military operations, and be uprooted for a second time.[32]

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29 S. Pantuliano *et al.*, above note 11, p. 2; Anne Davies and Karen Jacobsen, "Profiling Urban IDPs", *Forced Migration Review*, No. 34, February 2010, p. 13, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/urban-displacement/davies-jacobsen.pdf. On the particular needs of IDPs in urban settings, see C. Beyani, above note 3, pp. 11–13.

30 On the role of IHL as a critical legal framework, in situations of armed conflict, in preventing displacement from occurring in the first place and protecting IDPs during displacement, see, *inter alia*, ICRC Advisory Service, "Internally Displaced Persons and International Humanitarian Law – Factsheet", available at: www.icrc.org/en/document/internally-displaced-persons-and-international-humanitarian-law-factsheet. See also Veronika Talviste, Jamie A Williamson and Anne Zeidan, "The ICRC Approach in Situations of Pre-Displacement", *Forced Migration Review*, No. 41, December 2012, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/preventing/talviste-et-al.pdf (both on violations of IHL as one of the main causes of displacement during armed conflict and on displacement as a self-protection strategy).

31 For a discussion of the challenges posed by the conduct of hostilities in urban areas, particularly with regard to the protection of civilians and civilian infrastructure (i.e., compliance with IHL principles of distinction, proportionality and precaution in attacks and against the effects of attacks) and minimizing collateral damage, see several articles published in the thematic issue on "War in Cities" of the *International Review of the Red Cross*, Vol. 98, No. 901, April 2016. See also InterAction and ICRC, *When War Moves to Cities: Protection of Civilians in Urban Areas*, Outcome Report of an ICRC and InterAction Roundtable, May 2017, available at: www.interaction.org/article/new-interaction-and-international-committee-red-cross-and-report-examines-challenges. For an example of the devastation produced by urban warfare, leading to mass displacement, see Chaloka Beyani, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on His Mission to the Syrian Arab Republic*, UN Doc. A/HRC/32/35/Add.2, 5 April 2016, particularly p. 6, § 17, available at: reliefweb.int/report/syrian-arab-republic/report-special-rapporteur-human-rights-internally-displaced-persons-his.

32 ICRC, *"I Saw My City Die": Voices from the Front Lines of Urban Conflict in Iraq, Syria and Yemen*, Geneva, June 2017.

In Latin American cities affected by criminal violence, some people make the pre-emptive decision to leave because of the general insecurity and the erosion of the quality of life and livelihood opportunities generated by the violence, afraid of becoming the next victims and in search of better access to education, health care and/or employment.[33] Others, however, leave because they or their family members are under direct threat or have been victims of forced recruitment, sexual violence, extortion, murder or disappearance, perpetrated by gang members as a means of control.[34] Their displacement takes place in extreme circumstances and is accompanied by high vulnerability. They have acute protection concerns that often persist post-flight, as armed group members may seek to pursue them across the city or even between cities.[35] Despite restricting their own movements and remaining hidden to avoid detection,[36] they may face renewed threats and be forced to flee again.

IDPs who have moved to cities outside the conflict zone, or in areas not controlled by gangs involved in organized crime, may also face specific challenges related to safety and security. These often emanate from the fact that authorities view them as having links with rebel, "terrorist" or otherwise criminal groups merely due to their ethnicity, religion, political beliefs or place of origin. Tensions with host communities for similar reasons, or because of competition over access to resources, jobs and services, are another possible source of violence against IDPs. For women displaced without their partners, being alone in unfamiliar urban surroundings can increase vulnerability to sexual violence, especially when combined with economic stress and overcrowded living spaces.[37] Additionally,

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33 Sebastián Albuja, "Criminal Violence and Displacement in Mexico", *Forced Migration Review*, No. 45, February 2014, p. 29. On urban violence and its humanitarian consequences, see, *inter alia*, P. Apraxine *et al.* (eds), above note 26; Olivier Bangarter, "Territorial Gangs and Their Consequences for Humanitarian Players", *International Review of the Red Cross*, Vol. 92, No. 878, 2010, pp. 398–399; E. Lucchi, above note 19, pp. 5–6; Sarnata Reynolds, *"It's a Suicide Act to Leave or Stay": Internal Displacement in El Salvador*, Field Report, Refugees International, Washington, DC, 30 July 2015, p. 6.

34 In some cases, gangs order families out of their homes, which are situated in strategic locations, in order to be able to use the buildings as bases for their illegal activities. S. Reynolds, above note 33, p. 4.

35 This is especially the case when the victims are considered "traitors" or "enemies" by the group, for example, because they are accused of being informants, have reported a crime to the police or were previously associated with the group and left it without permission. For a detailed typology of forms and patterns of displacement generated by organized criminal violence in Central America's Northern Triangle and Mexico, see David James Cantor, "The New Wave: Forced Displacement Caused by Organized Crime in Central America and Mexico", *Refugee Survey Quarterly*, Vol. 3, No. 3, 1 September 2014, pp. 45–46, available at: academic.oup.com/rsq/article/33/3/34/2797909?searchresult=1. Internal displacement originating from direct threats or acts of violence by armed groups involved in organized crime is also increasingly observed in some Colombian cities like Medellín and Cali, where these cases have been adding to, or replacing, those linked to the urbanization of the armed conflict. See Agnès De Geoffroy, "Fleeing War and Relocating to the Urban Fringe – Issues and Actors: The Cases of Khartoum and Bogotá", *International Review of the Red Cross*, Vol. 91, No. 875, 2009, pp. 519–520; ICRC, *Retos humanitarios 2017. Informe Colombia: Resultados y perspectivas*, Bogotà, March 2017, pp. 14–17.

36 This behaviour is referred to by some as "confinement": Noah Bullock, "Towards a Response: Addressing Forced Displacement by Violence in El Salvador", *Humanitarian Exchange*, No. 69, June 2017, p. 14, available at: https://odihpn.org/magazine/towards-response-addressing-forced-displacement-violence-el-salvador/.

37 IRC, above note 25, p. 20.

the lack of access to adequate shelter – a recurrent problem for urban IDPs[38] – means that internally displaced individuals and families end up living in precarious conditions in the outskirts of the city, often in poorly serviced and hazard-prone areas.[39] They build makeshift houses on "invaded" public or private land,[40] occupy abandoned houses, unfinished buildings or public buildings such as schools without permission, or rent private accommodation informally, oftentimes at inflated prices and with no security of tenure. This expose them to the risk of forced eviction and a host of other abusive behaviours, and they may be compelled to return to unsafe conditions as a result.[41]

In view of the foregoing risks for their safety and security, IDPs living in cities may fall into a vicious spiral of multiple displacements and increasing vulnerability. For some, internal displacement becomes the first step on an

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38   For a thorough analysis of the housing needs of urban IDPs and a review of practical approaches that can be adopted to overcome the challenges to adequate housing in urban displacement situations, see IDMC and MIT DRAN, above note 26.

39   Brookings–LSE Project on Internal Displacement, above note 4, p. 7. For example, in Honduras, a profiling assessment conducted with support from the Joint IDP Profiling Service (JIPS) found that the situation of displaced households was more precarious in relation to access to housing than the rest of the population, with more families currently renting their homes with no rental contract or living in improvised houses, and finding themselves in, or near to, at-risk areas. See Inter-Agency Commission for the Protection of Persons Displaced by Violence, *Characterization of Internal Displacement in Honduras*, November 2015 (Honduras Profile Assessment), pp. 53–55, available at: www.jips.org/system/cms/attachments/1050/original_Profiling_ACNUR_ENG.pdf.

40   Sebastián Albuja and Marcella Ceballos, "Urban Displacement and Migration in Colombia", *Forced Migration Review*, No. 34, February 2010.

41   For example, three profiling assessments carried out in Iraq's Kurdistan region between December 2015 and June 2016 found significantly higher eviction rates among IDPs compared to the resident population, mainly linked to the inability to pay rent and the lack of written rental contracts. See Profiling Steering Committee for the Kurdistan Region of Iraq (with support from JIPS), *Displacement as Challenge and Opportunity. Urban Profile: Refugees, Internally Displaced Persons and Host Community, Erbil Governorate, Kurdistan Region of Iraq*, April 2016 (Erbil Urban Profile Assessment), pp. 21–22, available at: www.jips.org/system/cms/attachments/1130/original_ErbilUrbanProfilingApril2016English.pdf; *Displacement as Challenge and Opportunity. Urban Profile: Refugees, Internally Displaced Persons and Host Community, Sulaymaniyah Governorate and Garmian Administration, Kurdistan Region of Iraq*, August 2016 (Sulaymaniyah Urban Profile Assessment), p. 20, available at: www.jips.org/system/cms/attachments/1245/original_KRI-Sulaymaniyah-Urban-Profiling.pdf; *Displacement as Challenge and Opportunity. Urban Profile: Refugees, Internally Displaced Persons and Host Community, Duhok Governorate, Kurdistan Region of Iraq*, August 2016 (Duhok Urban Profile Assessment), p. 16, available at: www.jips.org/system/cms/attachments/1243/original_KRI-Duhok-Urban-Profiling.pdf. Another profiling assessment conducted in Mogadishu raised the lack of secure land and housing tenure for IDPs as a critical issue. Data showed a trend of moving from inner-city areas to settlements in the outskirts of the city as a result of evictions, which not only affected IDPs' livelihood opportunities but was also an impediment to humanitarian and longer-term development interventions in the districts most affected by evictions. See Office of the UN High Commissioner for Refugees (UNHCR) and Protection Cluster's Profiling Working Group (with support from JIPS), *Internal Displacement Profiling in Mogadishu*, report, April 2016, available at: www.jips.org/system/cms/attachments/1120/original_Mogadishu_Profiling_Report_2016.pdf. On tenure insecurity and the risk of forced eviction affecting urban IDPs, see IDMC and MIT DRAN, above note 26, and NRC, *Security of Tenure in Urban Areas: Guidance Note for Humanitarian Practitioners*, IIED, London, 2017.

arduous journey as they end up crossing borders to seek safety, protection and durable solutions abroad, after failing to find them in their own country.[42]

A limited access to basic services

IDPs living in urban areas and host communities often encounter similar problems in accessing basic services such as clean water and sanitation, electricity, housing, primary health care and education. Armed conflict in cities can cause the complex fabric of interconnected urban services to collapse, particularly when hostilities are protracted and characterized by siege warfare and the use of explosive weapons, notably those with a wide impact area, in densely populated areas. This has serious humanitarian consequences for the entire city's population, displaced people and residents alike.[43] Similarly, when IDPs settle in cities outside warzones, they tend to live next to the urban poor, in overcrowded and low-income suburbs, informal settlements and shanty towns, where service provision is typically weak. Their arrival often adds pressure on already limited services.[44] In contexts of urban violence, gang activities contribute to disrupting people's access to the (few) services that may exist in the neighbourhood, by imposing restrictions of movement on the population based on "invisible borders" or by causing the displacement of service provider staff (e.g. teachers, medical doctors, engineers).[45]

However, IDPs in cities often face specific obstacles preventing their access to public services that are available to their non-displaced neighbours. The most

42 For instance, a study conducted among Syrian refugees in Jordan revealed a pattern of multiple internal displacements owing to the effects of the armed conflict, with families moving inside Syria from two to twenty-five times before fleeing to Jordan: Handicap International, *Qasef: Escaping the Bombing. The Use of Explosive Weapons in Populated Areas and Forced Displacement: Perspectives from Syrian Refugees*, September 2016, in particular pp. 23–24, available at: www.hi-us.org/new_report_violent_ attacks_forcing_millions_of_syrians_to_flee. C. Beyani, above note 31, p. 19, § 81, describes internal displacement in Syria as "a staging-post to a wider refugee crisis of immense proportions", as the lack of effective internal protection and durable solutions leads IDPs to seek refuge in neighbouring countries and Europe. Another study on migrants returned from the United States and Mexico to El Salvador, Guatemala and Honduras found that half of the interviewees had been displaced internally before deciding to leave their home country in search of protection: Center for Migration Studies and Cristosal, *Point of No Return: The Fear and Criminalization of Central American Refugees*, New York and San Salvador, June 2017, p. 14, available at: cmsny.org/publications/cms-cristosal-report. Similarly, a report about female asylum-seekers coming from Central America to the United States concluded that more than two thirds of the interviewees had previously tried to find safety by fleeing elsewhere in their own country: UNHCR, *Women on the Run*, 2015, pp. 4, 41, available at: www.unhcr.org/ publications/operations/5630f24c6/women-run.html. See also Giovanni Bassu, "Strengthening State and Regional Responses to Central America's Forced Displacement Crisis", *Humanitarian Exchange*, No. 69, June 2017, p. 21, available at: https://odihpn.org/magazine/strengthening-state-regional-responses-central-americas-forced-displacement-crisis/. In general, on the possible interrelation between internal displacement and cross-border movements, see IDMC, above note 9, pp. 49–67.
43 ICRC, *Explosive Weapons in Populated Areas: Humanitarian, Legal, Technical and Military Aspects*, Expert Meeting Report, Geneva, June 2015, available at: www.icrc.org/en/document/explosive-weapons-populated-areas-humanitarian-legal-technical-and-military-aspects. See also Simon Bagshaw, "Driving Displacement: Explosive Weapons in Populated Areas", *Forced Migration Review*, No. 41, December 2012, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/preventing/bagshaw.pdf.
44 On this aspect, see more in the section below on the impact of urban internal displacement on host communities.
45 O. Bangarter, above note 33, pp. 398–399.

common are lack of information and lack of documentation. IDPs find themselves outside of their familiar environment and deprived of their community support networks. Newcomers with no relatives or friends in the city often know little of their new location and lack information regarding where to seek help or how to access housing or other social benefits for which they might qualify.[46] This is particularly true for people displaced from rural areas, who are not accustomed to life in cities and its bureaucratic hurdles and may have limited awareness of their rights. In some cases, they may be illiterate or may not speak the official language (for instance, if they belong to indigenous communities), so they may not understand the information available. Furthermore, IDPs tend to have difficulties obtaining official documents or replacing those lost during flight or those to which they no longer have access (e.g. passports, identity cards, birth and marriage certificates, school records), either because they are not aware of the procedure or because no such procedure exists.[47] Some of the procedures require IDPs to travel back to their places of origin to obtain new documentation. Such a requirement is oblivious to the fact that it is not safe for IDPs to go back to their places of origin and they may put themselves in danger by doing so.[48] Lack of documentation sometimes means that parents cannot enrol their children in school, and older and sick people cannot receive medical treatment.[49] Problems related to documentation can be more acute for IDPs originating from relatively remote rural areas. Some of them may simply not have had, or not have sought

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46 See, for instance, M. Harroff-Tavel, above note 15, pp. 337–338.

47 See, for example, C. Beyani, above note 31, p. 9, §§ 32–34, highlighting the significant implications of the loss of their personal documents, in particular identification documents, for IDPs' access to services, as well as for their security, assistance and employment, and the problems faced by IDPs seeking to replace documents. It is worth noting that the Guiding Principles require authorities, based on every individual's right to recognition of legal personality, to facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, in order for IDPs to be able to exercise their rights (Principle 20, § 2). In so doing, the Guiding Principles go beyond what is expressly provided under IHL (which only addresses certain aspects of the question of documentation, in particular with regard to children in occupied territories, and with respect to interned civilians in situations of international armed conflict) and human rights law (as only a few human rights treaties contain explicit provisions on the issue of identity documents). See Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, revised ed., American Society of International Law and Brookings Institution, Studies in Transnational Legal Policy No. 38, Washington, DC, 2008, pp. 92–94.

48 See, for example, "End of Mission Statement by the United Nations Special Rapporteur on the Human Rights of Internally Displaced Persons, Mr. Chaloka Beyani, on His Visit to the Islamic Republic of Afghanistan – 11 to 20 October 2016", 20 October 2016, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20712&LangID=E.

49 The lack of official documents, particularly identity documents and birth certificates, can also lead to protection concerns such as the risk of being arbitrarily arrested and of becoming stateless. On the impact of the lack of documentations on IDPs' access to services, see W. Kälin and H. Entwisle Chapuisat, above note 27, pp. 36–37. Particularly on contexts of urban violence, see Mesa de Sociedad Civil Contra el Desplazamiento Forzado por Violencia Generalizada y Crimen Organizado en El Salvador, *Informe sobre situación de desplazamiento forzado por violencia generalizada en El Salvador*, January 2016, p. 19; S. Reynolds, above note 33, p. 10. Reynolds reports that of all cases of IDPs documented or supported by civil society organizations in El Salvador between early 2014 and mid-2015, not one child was in school; she expressly mentions the lack of a school certificate from the child's previous school as a barrier.

to obtain, any identification or other official documents previously, but find themselves in need of such documents in order to be able to settle in the city.

Discrimination and security concerns can also play a role in limiting access to services for IDPs in cities.[50] For instance, internally displaced children in contexts of armed conflict may be excluded from education not only because schools are already overcrowded and there are not enough classrooms or teachers, but also based on ethnic or other differences. If they belong to a different ethnic group than the host population, they may also find it hard to access education which is culturally appropriate and in their own language.[51] Furthermore, in contexts of urban violence, internally displaced children and adolescents who are compelled to hide because of gang threats directed against them or their families are often unable to go to school and have to interrupt their education.[52]

Lack of livelihood and employment opportunities

IDPs are often poorer than the rest of the urban population.[53] This is due partly to the fact that they arrive in their new location already with few or no possessions, and partly to their difficulty in accessing livelihoods and employment, which results in their becoming more destitute over time.[54] This is frequently the case for rural-to-urban IDPs, but those displaced from other urban areas can also be affected.

Internal displacement often entails the loss of productive assets and patrimony, resulting in a major economic shock from which people may not recover. Additionally, for people displaced from rural to urban areas, this can

50 C. Beyani, above note 3, p. 16, § 47; A. C. Carrillo, above note 4, p. 538; W. Kälin and H. Entwisle Chapuisat, above note 27, p. 48 (on discriminatory practices of local authorities).
51 More broadly on the barriers faced by IDPs in accessing education, see Elizabeth Ferris and Rebecca Winthrop, *Education and Displacement: Assessing Conditions for Refugees and Internally Displaced Persons Affected by Conflict*, paper commissioned for the Education for All (EFA) *Global Monitoring Report 2011: The Hidden Crisis: Armed Conflict and Education*, 2010, available at: unesdoc.unesco.org/images/0019/001907/190715e.pdf; Sarah Dryden-Peterson, "Conflict, Education and Displacement", *Conflict & Education*, Vol. 1, No. 1, January 2011, available at: wcfia.harvard.edu/files/wcfia/files/sdryden-peterson_conflict_education_and_displacement.pdf; W. Kälin and H. Entwisle Chapuisat, above note 27, p. 34.
52 S. Reynolds, above note 33, p. 8.
53 For example, in Colombia, according to a 2014 survey by the Administrative Department of National Statistics, 63.8% of IDPs, the large majority of whom lived in cities, were under the poverty line, while 33% of them lived in extreme poverty; those shares amounted to, respectively, 25% and 7.4% of the general population. See: www.dane.gov.co/files/investigaciones/EGED/Presentacion_EDGE_2013_14.pdf. See also ICRC and World Food Programme (WFP), *A Review of the Displaced Population in Eight Cities of Colombia: Local Institutional Response, Living Conditions and Recommendations for Their Assistance: Summary of Results, General Reflections and Recommendations*, Bogotá, November 2007, pp. 26–27. According to more recent figures, the percentage of IDPs in extreme poverty in Colombia is around 2.5 times higher than that of the general population: see W. Kälin and H. Entwisle Chapuisat, above note 27, p. 35.
54 See, among others, Brookings–LSE Project on Internal Displacement, above note 4, p. 7; A. Davies and K. Jacobsen, above note 29, pp. 13–14; Karen Jacobsen, "Profiling Urban IDPs: How IDPs Differ from Their Non-IDP Neighbours in Three Cities", in Khalid Koser and Susan Martin (eds), *The Migration-Displacement Nexus: Patterns, Processes, and Policies*, Berghahn Books, New York, 2011, p. 92; Ana María Ibañez, *El desplazamiento forzoso en Colombia: Un camino sin retorno a la pobreza*, Universidad de los Andes, Facultad de Economia, Bogotá, 2008.

be compounded by the fact that the human capital acquired prior to displacement is not easily transferrable for productive use into urban contexts. Urban displacement particularly affects them: they lose access to their land and livestock, which would often be their main source of food and income back home, and their farming skills are not applicable to secure other livelihood options in cities.[55] Besides lacking adapted skills, they often have a lower level of formal education than the urban resident population, are less familiar with the recruitment and job search system, and have no social ties.[56] These factors, sometimes combined with discriminatory hiring practices,[57] make it hard for them to find employment.[58] Even when IDPs possess skills that are relevant to secure employment or start a small business in their new urban location (e.g. carpentry, tailoring, cooking, selling/trading), they often lack official documents or accreditation, do not have sufficient means to acquire the necessary equipment and have only limited access to formal or informal credit.[59]

People who are displaced within the same city or between cities may be less affected insofar as they are more likely to keep their jobs or to access similar employment,[60] although this does not necessarily mean that they will not face economic problems.[61] Some may find it impossible to continue the same or similar employment due to security concerns related, for instance, to the risks of travelling regularly through checkpoints and across parts of a city at war, or the need to live in hiding to escape from direct death threats.[62] Furthermore, some people who are displaced between urban areas multiple times (for example,

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55 Similar challenges are faced, for example, by IDPs in Colombia, see A. C. Carrillo, above note 4, p. 538. To mention just another example, in Nigeria and Cameroon, small farmers and fishermen internally displaced by the conflict in the Lake Chad region struggle to find alternative means to make a living in urban areas.

56 See Carolien Jacobs and Antea Paviotti, *The Right to Work in a Context of Urban Displacement*, Van Vollenhoven Institute for Law, Governance and Society (VVI), University of Leiden and Groupe Jérémie, Policy Brief No. 2, 2017. Exploring some of the strategies used by urban IDPs in Bukavo, Democratic Republic of the Congo, to find a job, the authors conclude that the lack of a social network is the prime barrier limiting IDPs' access to work.

57 A. De Geoffroy, above note 35, p. 517. Principle 22 of the Guiding Principles stipulates that IDPs shall not be discriminated against in the enjoyment of their "right to seek freely opportunities for employment and to participate in economic activities".

58 Women often find employment easier as they have abilities that are transferable to an urban environment, e.g. domestic work. However, this may imply a change of social roles within the family, especially for IDPs from rural areas, where men are traditionally the breadwinners. This in turn leads to tensions between partners, domestic violence and family breakdown. See A. C. Carrillo, above note 4, pp. 541–542, on the experience of IDP women in urban Colombia; and IRC, above note 25, pp. 15–16, mentioning examples of IDPs in Abidjan and Kampala, as well as Colombia.

59 W. Kälin and H. Entwisle Chapuisat, above note 27, pp. 35, 46–47.

60 This is often an important consideration that influences the choice of IDPs to relocate within the same city or to another city. People with an urban profile who become internally displaced tend to prefer to settle in urban areas or to remain in large cities that they know, in order to maintain their family ties, their social networks and, when possible, their job. Chaloka Beyani, *Report of the Special Rapporteur on the Human Rights of Internally Displace Persons on His Mission to Honduras*, UN Doc. A/HRC/32/35/Add.4, 5 April 2016, p. 8, § 22, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/G1606868.pdf.

61 For instance, if they are not staying with host families and need to pay rent in the new location, these IDPs may still see their economic situation worsen and may face difficulties in making ends meet.

62 See above note 36.

because of repeated threats from gangs) may find it increasingly difficult to restart their small business each time owing to the depletion of their resources.

As a result, unemployment can be significantly higher among economically active IDPs than urban residents.[63] Those who have a job tend to work in the informal sector, for example as daily workers, in less protected and more exploitative conditions.[64] They often perform casual activities with no guarantee of regular income. Because of the lack of adequate economic opportunities, in order to cover their most basic needs, IDPs have to rely on solidarity and the generous support of relatives and friends (if they are present and as long as they can help). They become dependent on humanitarian aid to the extent that this is provided. The inability to improve livelihoods over time may push some IDPs to adopt harmful coping strategies, such as child labour, prostitution, early marriage or criminality, in order to have sufficient income to cover the costs of food, accommodation and/or health care.[65] Particularly in contexts of urban violence, because of poverty, social exclusion and lack of opportunities, young IDPs become vulnerable to the influence of crime and are at risk of being lured into joining a gang, thereby contributing to a vicious cycle of violence and displacement.[66]

Need for psychosocial support

Being forced to leave behind one's home, relationships, assets and work is a stressful experience. It is even more so when people have to flee unexpectedly, prompted by

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63 A. Kirbyshire *et al.*, above note 11, pp. 15–16. The findings of a profiling assessment in Erbil Governorate in Iraq showed that IDP households had relatively lower employment rates and a higher number of people searching for jobs, compared to their non-displaced neighbours: see Erbil Urban Profile Assessment, above note 41, pp. 30–31. In Honduras, the unemployment rate among the displaced economically active population has been found to be greater than that of the resident population: see Honduras Profile Assessment, above note 39, pp. 58–60.

64 See M. Aysa Lastra, above note 4, for a comparative analysis of the labour adaptation of IDPs into formal and informal labour markets in Colombia. The analysis shows that IDPs are more likely than the rest of the population to be unemployed or, when they have a job, to be employed in the informal sector of the economy, and that their probability of employment in formal sectors decreases over time. On the case of Colombia, see also A. M. Ibañez, above note 54, p. 151; Rubén Darío Guevara Corral and Diego Andrés Guevara Flétcher, "The Journey Towards Social Exclusion in Colombia", *Forced Migration Review*, No. 34, February 2010, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/urban-displacement/corral-fletcher.pdf; A. C. Carrillo, above note 4, p. 538. In Honduras, it has been found that IDPs hold more unstable and informal jobs than the resident population, and experience significant economic insecurity as a result. See Honduras Profile Assessment, above note 39, pp. 60–61.

65 A community-based protection workshop carried out by the ICRC with a group of internally displaced women in Maroua town, in the conflict-affected Far North region of Cameroon, in April 2017, showed that the women – many of them displaced with children and without their partners, and living in rented accommodation – had adopted desperate measures in order to survive, including prostitution and forced marriage. Workshop results on file with the author. IRC, above note 25, pp. 15, 21, identifies economic strain as a driver of violence and sexual exploitation against IDP women in urban areas, specifically mentioning a number of studies where poverty has emerged as factor leading to sex work/transactional sex (Colombia, Nairobi, Abidjan) and early/forced marriage (Afghanistan, Abidjan). On the risk of resorting to harmful coping mechanisms, see also W. Kälin and H. Entwisle Chapuisat, above note 27, p. 36.

66 A. De Geoffroy, above note 35, p. 518, reports that internally displaced youths in Bogotá are the main "recruits for the local underworld".

violent events, and the trauma of displacement compounds the suffering caused by the death or disappearance of a family member, or by other abuses that people endured or witnessed prior to flight.[67] If they continue to face insecurity and violence in their displacement location – for example, because they remain in the conflict zone, exposed to the effects of military operations, or due to direct threats against them – this can further undermine their mental well-being. The circumstances of those individuals and families forcibly displaced by gangs in contexts of urban violence, who remain concealed in constant fear for their personal safety, are of particular concern.

For those who are newly displaced, the fact of being in an unfamiliar environment, unable to satisfy their basic needs in a predictable way and facing an uncertain future, can be a source of constant worry. In protracted internal displacement situations, the lack of prospects for a durable solution perpetuates the uncertainty and can cause feelings of frustration.[68] Additionally, having to rely on external help to survive undermines people's self-esteem and sense of dignity, especially if they used to be economically independent before displacement. In turn, the psychological effects of displacement can hamper people's ability to adapt to the new situation and regain self-sufficiency.[69] This particularly affects IDPs with rural origins, for whom displacement to cities often implies abandoning their way of life, customs and culture – even more so if they are from indigenous communities.[70] The lack of strong social support networks is often part of the problem.[71] Stigma and discrimination can make things worse, as IDPs may find themselves marginalized and neglected in their efforts to rebuild their lives. This often happens because they belong to an ethnic or religious minority,[72] or because host communities and authorities view them as a burden

67 *Ibid.*, p. 517; S. Reynolds, above note 33, p. 10. On the psychological distress faced by urban IDPs due to conflict-related experiences of past violence, as well as the severe hardship of their present situation, see Paulina Wyrzykowski and Benard Okot Kasozi, *Violence, Exile and Transitional Justice: Perspectives of Urban IDPs in Kampala*, Refugee Law Project Briefing Note No. 3, August 2009, available at: reliefweb. int/report/uganda/uganda-violence-exile-and-transitional-justice-perspectives-urban-idps-kampala.

68 José Ramón Cossío Díaz, "Public Policy to Address Displacement in Mexico", *Forced Migration Review*, No. 48, November 2014, p. 79, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/faith/cossio.pdf.

69 A. Kirbyshire *et al.*, above note 11, p. 13; W. Kälin and H. Entwisle Chapuisat, above note 27, p. 48; World Bank Group, *Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and their Hosts*, 2017, pp. 61–62; IDMC and MIT DRAN, above note 26, p. 10.

70 Carlos Emilio Ibarra Montero, "De la inseguridad a la incertidumbre: El desplazamiento forzado interno en el noroeste de México", *Revista Trabajo Social*, No. 16, 2014.

71 On the importance of social support systems for the mental health, livelihoods and overall well-being of IDPs, and the weakness of these systems in urban internal displacement situations, see Namrita Singh and Courtland Robinson, "Support Systems among Urban IDPs in Georgia", *Forced Migration Review*, No. 34, February 2010, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/urban-displacement/singh-robinson.pdf.

72 On discrimination against IDPs by host communities, see, for example, IRC, above note 25, p. 18 (mentioning in particular the case of IDPs in Nairobi, facing prejudice and discrimination as a result of ethnic tensions following election violence in Kenya).

or a potential security threat.[73] In contexts of urban violence, due to the generalized climate of fear, IDPs may face distrust from the host community, particularly when they are from other gang-controlled neighbourhoods.[74]

The impact of urban internal displacement on host communities

The impact of internal displacement normally extends well beyond the people who are directly affected by it. Other parts of the population, notably the families hosting IDPs and the wider communities within which they live, are also affected. This speaks to the importance of adopting a holistic approach in responding to internal displacement, informed by a comprehensive analysis of the population needs that includes host populations, as opposed to considering the needs of IDPs in isolation.[75] It is also a matter of recognizing the important part that the solidarity of host communities often plays in providing a critical life-support system for IDPs, notably in situations of urban displacement, where the government's response may be delayed or insufficient and humanitarian actors may tend to focus on assisting those displaced in camps or collective shelters.

As they settle within the host community in disadvantaged suburbs and slum neighbourhoods,[76] spreading the city's poverty belt, IDPs end up competing with the urban local population for limited resources and often already weak and overburdened services. This generates tensions between IDPs and their hosts, which can be exacerbated if humanitarian assistance and social programmes only benefit IDPs or are perceived as prioritizing their needs over those of residents.

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73 For example, IDPs settling in Khartoum or Bogotá have been regarded as exporting the rebellion or facilitating the infiltration of armed groups and the proliferation of gangs in the capital: see A. De Geoffroy, above note 35, pp. 518–519. A similar pattern is observed in the context of the armed conflicts in Nigeria and Iraq, where IDPs are often viewed as having ties with the same armed groups of whom they are victims. This increases the risk of segregation and discriminatory measures against IDPs.

74 Information provided by civil society organizations during the author's mission to Honduras in March 2016. On file with the author.

75 On the need for comprehensive responses that also address the impact of urban displacement on host communities, see below, in the section on local integration of IDPs.

76 According to UN-Habitat, around 33% of the urban population in the developing world in 2012, or about 863 million people, lived in slums. See UN-Habitat, *State of the World's Cities Report 2012/2013: Prosperity of Cities*, Nairobi, 2012, available at: sustainabledevelopment.un.org/content/documents/745habitat.pdf.

Such tensions can translate into protection problems for IDPs and undermine their social integration.[77]

Although competition for resources and services may also characterize the relationship between IDPs and host communities in rural areas, the strong reliance on public services that is typical of urban dwellers makes this feature more prevalent in situations of urban internal displacement. The arrival of large numbers of IDPs in "dysfunctional" cities that are already struggling to cope with the impacts of protracted armed conflict or rapid growth and are suffering from inadequate housing, insufficient and/or poorly maintained basic services, weak institutions and insecurity "adds an extra layer of stress to an already fragile system", stretching it to breaking point.[78] The more urban services and infrastructure (e.g. water supply, electricity, waste management, hospitals and schools) have been deteriorated by the direct and/or indirect impacts of the ongoing violence, the higher the pressure exerted by the influx of IDPs is, and the more likely tensions are to arise.[79] The length of displacement also plays a part – the generosity of host families, who are often at the forefront of the response, can fade over time, as resources tend to get

77   For example, a profiling assessment conducted in the urban areas of Sulaymaniyah Governorate of Iraq's Kurdistan region in June 2016 showed that the host community had developed negative feelings toward IDPs, whose arrival was associated with the deterioration of public services and increased competition for housing and employment, as well as much-feared demographic change. There was also a prevalent perception of unfairness whereby IDPs were regarded as more privileged than residents. This led the host community to evoke drastic measures such as imposing restrictions on the movement and rights of IDPs. See Sulaymaniyah Urban Profile Assessment, above note 41, pp. 19–28. Another profiling assessment conducted in December 2015 in Erbil Governorate found a similar situation: see Erbil Urban Profile Assessment, above note 41, pp. 26–29. See also IRC, above note 25, p. 19, referring to the situation in Kabul, where the influx of IDPs led to conflicts over land and water resources. A study conducted in 2011 in two urban neighbourhoods of Bogotá also showed the existence of tensions between IDPs and host communities due to perceptions that IDPs received preferential treatment in a context of pervasive urban poverty: see Clara Inés Atehortûa Arredondo, Jorge Salcedo and Roberto Carlos Vidal Lopez, *The Effects of Internal Displacement on Host Communities: A Case Study of Suba and Ciudad Bolivar Localities in Bogotá*, Brookings–LSE Project on Internal Displacement and ICRC, Colombia, 2011.

78   A. Kirbyshire *et al.*, above note 11, p. 10. See also, for a concrete example, Chaloka Beyani, *Protection of and Assistance to Internally Displaced Persons: Situation of Internally Displaced Persons in the Syrian Arab Republic*, UN Doc. A/67/931, 15 July 2013, p. 7, §15, highlighting that the influx of IDPs into urban centres in Syria "has overstretched life-sustaining urban services to the point of potential or actual collapse, raising risks for the entire local population".

79   On the indirect impact of a large influx of people displaced by conflict on essential urban services and the potential for both social tensions and mounting grievances toward the local or national authorities responsible for providing those services, see ICRC, above note 2, pp. 30–31. See also Roger Zetter and George Deikun, "Meeting Humanitarian Challenges in Urban Areas", *Forced Migration Review*, No. 34, February 2010, p. 4, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/urban-displacement/zetter-deikun.pdf; in explaining the deterioration of already precarious existing conditions in urban areas receiving large population influxes, the authors note that displacement "places extra stress on urban services and resources with forced migrants and existing urban dwellers sharing densely populated and poorly serviced environments". Specifically on Colombia, see C. I. A. Arredondo, J. Salcedo and A. Lopez, above note 77.

more strained and the burden of hosting IDPs becomes heavier.[80] Fatigue and resentment may develop among the local population upon the realization that IDPs are not temporary and will not return home in the near future, particularly if their presence is believed to be the cause of worsening living conditions and insecurity.[81]

Displacement into an urban area can create a strong pressure on the rental market, particularly where IDPs tend to become tenants as opposed to being hosted by others. This translates into higher rent for all households living in neighbourhoods where the influx of IDPs is larger.[82] Furthermore, the arrival of IDPs from rural areas increases the offer of unqualified workforce in the urban labour market, particularly in the informal sector, which may cause an increase in unemployment in those specific labour niches and a stagnation or, in some cases, a drop in wages. This may affect the resident poor, who compete with IDPs for fewer and/or lower-paying manual jobs.[83] In addition to contributing to rapid urban expansion, displacement can also change existing demographic balances, notably when newcomers are of different ethnic origin than the majority of the host community.[84] This can cause further tensions, as residents may feel

80 Host families are often poor themselves and are also affected by the surrounding armed conflict/violence. As such, they may see their economic conditions further worsen as a result of supporting IDPs, particularly as they rarely receive assistance themselves: see W. Kälin and H. Entwisle Chapuisat, above note 27, p. 38. In some cases, newly displaced people are hosted by or among IDPs who had arrived previously and are already struggling economically: in this respect, see Brookings–LSE Project on Internal Displacement, above note 4, p. 12. Thus, tensions may arise with time if hosted IDPs are unable to contribute to housing and food costs: see IDMC and MIT DRAN, above note 26, p. 17. On identifying the need to share resources and the length of stay as factors shaping the hosting experience and as a possible source of tension, see also Cynthia Caron, "Hosting the Displaced – and Being Hosted", *Forced Migration Review*, No. 55, June 2017, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/shelter/caron.pdf. On hosting arrangements for urban IDPs in Bukavu, Democratic Republic of the Congo, see Carolien Jacobs and Antea Paviotti, *The Right to Decent Housing in a Context of Urban Displacement and Fragility*, VVI, University of Leiden and Groupe Jérémie, Policy Brief No. 3, 2017.

81 For example, the results of three profiling assessments conducted in Erbil, Duhok and Sulaymaniyah, in the Kurdistan region of Iraq, showed that the increase in the urban population caused by the influx of IDPs across the three governorates had led to increasing competition over resources and distrust and tensions between host communities and the displaced populations: see JIPS, *At a Glance: The Use of Profiling in the Kurdistan Region of Iraq – Erbil, Duhok and Sulaymaniyah*, Geneva, 2016, p. 16, available at: www.jips.org/system/cms/attachments/1320/original_JIPS-Iraq-KRI-AtaGlance-web.pdf. For reference to the three reports, see above note 41. According to the ICRC, the degree of acceptance of IDPs by host communities is influenced by the quality of services prior to, immediately after and long after the influx of IDPs into the city: see ICRC, above note 2, p. 31. On the relationship between IDPs and host communities, see C. Beyani, above note 3, pp. 13–14, §§ 37–40.

82 For example, see the findings of the profiling assessments conducted in Sulaymaniah and Erbil governorates in Iraq: Sulaymaniyah Urban Profile Assessment, above note 41, p. 25; Erbil Urban Profile Assessment, above note 41, pp. 14–20. While inflationary effects created by IDPs' presence have a negative impact on urban low-income residents, a portion of the host community financially benefits from this situation by gaining an income from renting property. Some members of the host community may in fact move out of their apartments in order to rent it for above market value to IDPs. See IDMC and MIT DRAN, above note 26, p. 17.

83 A. M. Ibañez, above note 54.

84 J. Crisp, T. Morris and H. Refstie, above note 4, p. 28.

threatened by IDPs bringing a different language, religion or culture into their communities.[85] The perception that IDPs cause insecurity and a raise in criminality can aggravate hostility toward them.[86]

Challenges in responding to urban internal displacement

This section examines three challenges faced by humanitarian actors as they strive to provide effective responses to IDPs in cities: identifying and engaging with IDPs dispersed in urban areas; addressing their protection needs during flight and in the early phase of displacement; and helping IDPs to establish a life in the new location through comprehensive strategies that factor in host communities, build upon local partnerships and maximize coordination and complementarity with development actors. These challenges emanate from the need to tailor humanitarian approaches and interventions to urban contexts as well as to the specific characteristics of the internally displaced populations.

Reaching out to the invisible

Urban internal displacement can be difficult to identify and monitor as it tends to be an "invisible" phenomenon. IDPs are, in many cases, widely scattered across urban areas, rather than clustered in camps. They are merged within host communities, as opposed to being physically separated from the resident population. As a result, they are often "lost in the urban multitude and dissolved into the surrounding poverty".[87] This is compounded by the fact that some IDPs keep a low profile due to concerns for their personal safety. Either because they view the authorities (who may have contributed to their displacement) as a threat or because they are pursued by armed actors, they avoid registration, conceal their situation and sometimes are even obliged to hide in secrecy.[88] Furthermore, particularly in contexts of urban violence, internal displacement tends to occur in a gradual and

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85   For example, A. De Geoffroy, above note 35, p. 518, calls Khartoum a "besieged city" to illustrate the feelings of its residents vis-à-vis the tens of thousands of IDPs whose arrival transformed the ethnic composition of the capital.

86   A. Kirbyshire *et al.*, above note 11, p. 16. For example, a profiling assessment in Erbil identified that residents associated the arrival of IDPs in their neighbourhoods with a perceived increase in insecurity and tension: see Erbil Urban Profile Assessment, above note 41, p. 26. In Bukavo, Democratic Republic of the Congo, research found that the influx of IDPs into the city has impacted the residents' perception of security, with IDPs being often the first ones to be suspected of theft and banditry: see Carolien Jacobs and Antea Paviotti, *Social Integration of Internally Displaced People in Urban Settings*, VVI, University of Leiden and Groupe Jérémie, Policy Brief No. 4, 2017, p. 6.

87   A. De Geoffroy, above note 35, p. 510.

88   A. Davies and K. Jacobsen, above note 29, p. 13; N. Bullock, above note 36, p. 11. On the "invisibility" of internal displacement in the Northern Triangle of Central America, and the related need to improve identification of IDPs and their protection needs, particularly in Honduras, see also, more recently, Suzanna Nelson-Pollard, "Criminal Violence in Honduras as a Driver of Displacement", *Forced Migration Review*, No. 56, October 2017, pp. 15–16, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/latinamerica-caribbean/nelsonpollard.pdf.

less obvious fashion.[89] The lack of official recognition of the phenomenon may further contribute to its low visibility.[90] Intra-urban displacement can go even more unnoticed as it is frequently perceived as voluntary movement. The shorter the physical distance between people's place of habitual residence and their displacement location, the more it can be misreported as ordinary movement from one place to another within the same city, except when it occurs on a large scale.[91]

One of the main challenges for humanitarian actors, therefore, is to be able to identify and reach IDPs for the purpose of assessing their needs, in comparison to those of the host populations, and engaging with them to ensure their participation

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89   In the Northern Triangle of Central America, *gota-a-gota* (person-by-person) displacements tend to be more common than mass displacements: see David James Cantor and Malte Plewa, "Forced Displacement and Violent Crime: A Humanitarian Crisis in Central America?", *Humanitarian Exchange*, No. 69, 2017, p. 14, available at: https://odihpn.org/magazine/forced-displacement-violent-crime/. See also the findings of the profiling exercise conducted in Honduras with support from JIPS, in Honduras Profile Assessment, above note 39, p. 22. In Mexico, according to, J. R. Cossío Díaz, above note 68, p. 80, internal displacement is a "slow, silent and incremental" phenomenon. According to the IDMC, there is much less data on people who flee organized criminal violence than on those internally displaced by armed conflict, which means that there are probably many more people affected globally by this phenomenon than the current figures reflect: IDMC, above note 9, p. 21.
90   In Colombia, people internally displaced by the criminal groups known as *bandas criminales emergentes* – which have emerged since 2005, following the demobilization of paramilitary forces – were initially not recognized as falling within the scope of Law 1448 (the Victim Law). It was only through a ruling of the Constitutional Court that they started to be considered as entitled to compensation and assistance from the government under the law. See Constitutional Court, Sentencia C-280/13: Medidas de Atencion, Asistencia y Reparacion Integral a las Victimas del Conflicto Armado Interno, 15 May 2013, available at: www.corteconstitucional.gov.co/relatoria/2013/C-280-13.htm. In Central America, where internal displacement related to organized criminal violence is thought to be on the rise, only the Honduran government has officially acknowledged the phenomenon. Because of the lack of recognition in other countries in the region, there is no official register of IDPs, little or no accurate census data, and no comprehensive institutional response by the authorities. See Mesa de Sociedad Civil Contra el Desplazamiento Forzado, above note 49, p. 17.
91   In Colombia, for example, intra-urban displacement was not considered as giving entitlement to being registered as a victim within the framework of the Victim Law. People who were forced to move within the same city by armed actors were granted assistance by the government only if they could report having been directly affected by other violent acts (e.g. sexual violence, homicide or disappearance of a close family member). Although the Constitutional Court later recognized the obligation of the State to assist people affected by intra-urban displacement, there remain cases where legal recognition is not accorded and others where people are simply too afraid of taking their plight to court and remain unattended. Luz Amparo Sánchez Medina, "Displacement within the City: Colombia", *Forced Migration Review*, No. 34, February 2010. For a study on intra-urban displacement in Colombia, see Gabriel Rojas Andrade, Marcos Fabián Oyaga Moncada, Ingrid Paola Hurtado Sánchez and Juan Sebastián Silva, *Desplazamiento forzado intraurbano y soluciones duraderas: Una aproximación desde los casos de Buenaventura, Tumaco y Soacha*, Consultoría para los Derechos Humanos y el Desplazamiento (CODHES), Bogotá, 2012; Gabriel Rojas Andrade, Marcos Fabián Oyaga Moncada, Ingrid Paola Hurtado Sánchez and Ida Hennestad, *Desplazamiento forzado intraurbano y soluciones duraderas*, Vol. 2: *Bogotá, Cúcuta y Quibdó*, CODHES, Bogotá, 2014. Intra-urban displacement has been found to be a recurrent pattern in Honduras, where over 80% of IDPs in the Central District (Tegucigalpa) and San Pedro (which together host the majority of the displaced population in the country) have moved within the same town: see Honduras Profile Assessment, above note 39, pp. 40–44.

in the design and implementation of responses.[92] Part of the challenge remains ensuring that the safety of the IDPs, as well as the security of the staff who work with them, is not undermined throughout the process. This is especially the case in urban contexts, where IDPs face individual threats to their security and count on dispersion into host communities and anonymity as a self-protection strategy. It requires mainstreaming protection considerations in any mechanism that is established to engage with IDPs and host communities and taking all possible precautions to avoid putting them in danger ("do no harm").[93]

Being able to count on reliable local partners as entry points to identifying and engaging with IDPs is often crucial.[94] The ICRC, for example, works in partnership with National Red Cross and Red Crescent Societies (National Societies), which have their roots and members in the affected communities and possess a keen understanding of local dynamics. This has allowed the ICRC, in places like Maiduguri, Nigeria, to monitor the arrival of newcomers into urban communities outside of camps, at the earlier stages of the displacement crisis, with a view to reaching them with emergency humanitarian assistance through the network of Red Cross volunteers. In contexts of urban violence in Latin America, the ICRC jointly with National Societies implements community-based projects aimed at mitigating some of the humanitarian consequences of the violence on the population in highly affected neighbourhoods.[95] The potential of these projects in terms of engaging with IDPs who are hosted in the community and who have specific protection concerns is being explored in some of those

92   E. Ferris, above note 9, p. 26. On the importance of effective consultation and meaningful participation of IDPs in all aspects of programmes and decision-making processes that affect them, see Roberta Cohen, *Listening to the Voices of the Displaced: Lessons Learned*, Brookings–Bern Project on Internal Displacement, September 2008; Brookings–Bern Project on Internal Displacement, *Moving Beyond Rhetoric: Consultation and Participation with Populations Displaced by Conflict or Natural Disasters*, October 2008, available at: www.brookings.edu/research/moving-beyond-rhetoric-consultation-and-participation-with-populations-displaced-by-conflict-or-natural-disasters/; Cecilia Jimenez-Damary, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons*, UN Doc. A/72/202, 24 July 2017. On the ICRC's experience with community-based protection approaches to engaging with IDPs and ensuring that humanitarian interventions are built upon their capacities and resilience, see Angela Cotroneo and Marta Pawlak, "Community-Based Protection: The ICRC Approach", *Forced Migration Review*, No. 53, October 2016, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/community-protection/cotroneo-pawlak.pdf.
93   See E. Lucchi, above note 19, p. 8; Chaloka Beyani, Natalia Krynsky Baal and Martina Caterina, "Conceptual Challenges and Practical Solutions in Situations of Internal Displacement", *Forced Migration Review*, No. 52, May 2016, p. 42, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/solutions/beyani-baal-caterina.pdf, emphasizing the "ethical challenges related to invisible populations and the protection concerns of urban IDPs"; and P. Currion, above, note 6, p. 15, on the need to develop alternative strategies for accessing specific vulnerable groups in urban contexts.
94   Brookings–LSE Project on Internal Displacement, above note 4, p. 8.
95   These projects seek to facilitate safer access to basic services for the community, to contribute to reducing social risk factors and marginalization of youths, and to promote responsible participation of community members in the life of their neighbourhood. They include activities such as vocational training, health, education or other social activities (e.g. promoting life skills and safe behaviours) and psychosocial support. Civil society organizations, local service providers and local authorities are often partners in such endeavours. On the ICRC's work in situations of urban violence, see ICRC, "Urban Violence and the ICRC's Humanitarian Response", 14 October 2016, available at: www.icrc.org/en/document/urban-violence-and-icrc-humanitarian-response.

contexts. Referral of cases of vulnerable IDPs by civil society and community-based organizations provides another means for outreach.

Similarly, collaborative approaches for profiling IDP situations (such as the collaborative work of the inter-agency Joint Internal Displacement Profiling Service (JIPS)) in urban settings capitalize on collaboration with local partners (e.g. national institutes of statistics) to design and tailor methodologies to the local contexts in order to identify where IDPs are located and what their main characteristics and specificities are, compared to the host population, through qualitative and quantitative methods (including household surveys). The different tools for profiling, including qualitative and quantitative questionnaires used for the profiling exercise, are also elaborated jointly with those partners. This ensures that questions are formulated and data are collected in a protection-sensitive manner, taking into account the specificities of the context and the potential threats to which IDPs might be exposed. This approach has proven effective for enhancing the ability to identify IDPs in multiple settings, including urban violence settings, where the involvement of local actors who not only know the communities but are also known and trusted by them helps to mitigate protection risks and to encourage people to reveal their current situation. Data analysis is also done collaboratively with the purpose of validating the findings and ensuring the use of the information by all the partners involved.[96]

People in urban areas normally have easy access to information and communication technologies. This creates opportunities to establish multiple channels for sharing and receiving information, with a view to reaching the maximum number of people.[97] Mobile phones and electronic media, as well as broadcast media, can be used to disseminate information on legal rights and humanitarian services available for IDPs or to convey life-saving messages (e.g. on safe behaviour to reduce risk exposure related to the presence of mines and unexploded ordnances in areas to which people may be moving or returning). Mobile phones can also help to collect real-time information on needs, monitor population movements (through geo-referenced phone call data) or receive feedback and complaints on programmes that have been carried out, when direct access to internally displaced communities is not, or is no longer, possible, or

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96 For more information on urban profiling, including on methodological aspects, see Karen Jacobsen and Ivan Cardona, *Guidance for Profiling Urban Displacement Situations: Challenges and Solutions*, JIPS, Geneva, June 2014, available at: www.jips.org/system/cms/attachments/818/original_GuidanceUrban Profiling_JIPS.pdf. For some recent examples of collaborative urban profiling assessments supported by JIPS, see Honduras Profile Assessment, above note 39, and the three reports on Iraq's Kurdistan region cited in above note 41. For detailed explanations on the collaborative profiling process, see: jet. jips.org/; and for more information on the work carried out by JIPS, see: www.jips.org/en/about/about-jips.

97 The wider use of information communications technology to reach people displaced in urban areas has been proposed, for instance, in IRC, *Using ICT to Facilitate Access to Information and Accountability to Affected Populations in Urban Areas*, 28 June 2017, available at: www.rescue.org/report/using-ict-facilitate-access-information-and-accountability-affected-populations-urban-areas.

when physically locating them is problematic.[98] The ICRC uses telephone hotlines to help families re-establish contact with separated family members or as part of monitoring and evaluating the implementation of its economic security programmes on behalf of conflict-affected people, including IDPs. It has been testing the establishment of "multi-programme" hotlines to channel all types of requests from actual or potential beneficiaries and use them to establish a first contact with IDPs and other people in need of support, including on protection matters.[99]

Churches, mosques and other public spaces, such as hospitals or schools, in neighbourhoods of a city where IDPs may be present can be used as points for information dissemination, e.g. through posters, leaflets, public announcements or information sessions. Establishing safe places where IDPs can meet with service providers in relative security and receive specialized support is also crucial.[100] In Colombia, for example, the ICRC helped the government set up units tasked with providing comprehensive support and orientation to the internally displaced population. These units, whose offices are present in various cities of the country, bring together in one place the full range of public services available for internally displaced individuals and families. They allow IDPs to engage with staff from various public entities in a protected environment, where they can find help to deal with their specific situation (e.g. possibility to apply for inclusion in the official register, information about social benefits, legal advice and psychological support).[101] This limits the need for IDPs to move around the city in order to reach different offices for orientation and support, which involves transportation costs, can be time-consuming and is even considered dangerous by

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98 A volatile security situation and the high mobility of IDPs in urban areas, particularly in contexts of ongoing armed conflict, may reduce access to some communities or impede direct contact with beneficiaries in some stages of the project cycle. On connectivity and how it can be used to support assessments and improve accountability, see P. Currion, above note 6, p. 14. For a practitioner's guide on community engagement through social media in times of armed conflict and disasters (although not specific to urban settings), see Timo Lüge, *How to Use Social Media to Better Engage People Affected by Crisis: A Brief Guide for Those Using Social Media in Humanitarian Organizations*, ICRC, IFRC and OCHA, September 2017. On using telephone and other communications and social media technology as a means for engaging with IDPs living outside camps in urban areas, see in particular C. Jimenez-Damary, above note 92, pp. 19–20, §§ 69–74.

99 For example, the ICRC has set up a telephone hotline to receive feedback and complaints on its cash assistance programme for IDPs in Ukraine. UNHCR has also used hotlines, operated by implementing partners (such as in Ukraine and Iraq), to enable displaced individuals and communities to share their concerns and feedback. The creation of hotlines as a first means of interaction between IDPs and authorities was part of the recommendations addressed to the Government of Honduras by the UN Special Rapporteur on the Human Rights of IDPs following his mission to the country in 2015 (C. Beyani, above note 60, p. 20, § 91).

100 N. Bullock, above note 36, p. 12.

101 Originally established as UAOs (*Unidades de Atención y Orientación a Población Desplazada*, Assistance and Orientation Units for the Displaced Population), they became UARIVs (*Unidades de Atención y Reparación a las Víctimas*, Assistance and Reparation Units for Victims) with the adoption of the Victim Law. However, their function has not substantially changed, as 98% of the persons that are registered in the central registry for victims in the country to date are internally displaced. The ICRC's support has consisted of capacity-building of staff and provision of technical advice and some equipment (e.g. computers) to these units, as well as feedback to the authorities on their effective functioning.

some people. In some situations, humanitarian actors will have to find suitable places where they can hold meetings with IDPs in a way that ensures safety and confidentiality, especially for discussions about protection issues.[102]

Addressing urgent protection needs

The flight and the early phase of displacement upon people's arrival in a new locality can be life-threatening in cities devastated by warfare or grappling with criminal violence. Addressing people's urgent protection concerns in these situations is therefore particularly challenging. In a war-torn city, it requires engaging with all parties to the conflict to ensure that, while doing everything possible to protect and spare the civilian population and prevent forced displacement in violation of IHL,[103] they also allow civilians who run for their lives to leave the zone of active hostilities.[104] For instance, on the eve of the battle for Iraq's second-largest city Mosul, and when military operations were intensifying inside the city, the ICRC

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102 IFRC, above note 17, p. 56; P. Currion, above, note 6, p. 15.

103 In both international and non-international armed conflicts, IHL prohibits the forced displacement of civilians for reasons related to the conflict. Exceptionally, parties to the conflict may temporarily evacuate the civilian population if this is required for the security of the civilians involved or for imperative military reasons (e.g. for clearing a combat zone). In cases of displacement, all possible measures must be taken so that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition, and so that members of the same family are not separated. See Geneva Convention IV, Arts 49, 147; Additional Protocol I, Art. 85(4)(a); Additional Protocol II, Art. 17; ICRC, Customary IHL Database, Rules 129–131, available at: https://ihl-databases. icrc.org/customary-ihl/eng/docs/v1. The Guiding Principles contain the prohibition on "arbitrary" displacement of persons, which is defined as also including displacement in situations of armed conflict, "unless the security of civilians involved or imperative military reasons so demand" (Principle 6, § 2). Violations of the rule prohibiting the forced displacement of the civilian population are war crimes under the Statute of the International Criminal Court in both international and non-international armed conflicts (see Article 8(2)(a)(vii) and 8(2)(e)(viii)). In addition to the express prohibition against forced displacement, respect for other rules of IHL, in particular those which aim to spare civilians from the effects of hostilities, is key to preventing displacement, as it is often violations of these rules which trigger displacement: see ICRC Advisory Service, above note 30. Accordingly, parties to the armed conflict have a duty to prevent displacement caused by their own acts, at least those acts which are prohibited in and of themselves (e.g. terrorizing the civilian population or carrying out indiscriminate attacks). See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Commentary to Rule 129, p. 461. Under Principle 5 of the Guiding Principles, "[a]ll authorities and international actors shall 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".

104 IHL does not contain a general right to freedom of movement, and the Geneva Conventions and Additional Protocols are silent concerning a right to leave one's place of residence or to move to another part of the country. Yet, allowing people to flee combat zones is essential for their protection. A "right to flee" to seek safety in another part of the country can be seen as implicit in the right to freedom of movement as recognized by international human rights law (e.g. Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights), which is applicable to IDPs and entails "the right and ability to move and choose one's residence freely and in safety within the territory of the State, regardless of the purpose of the move": see Global Protection Cluster, *Handbook for the Protection of Internally Displaced Persons*, June 2010, p. 195, available at: www.refworld.org/docid/4790cbc02.html. In the same sense, see C. Beyani, above note 31, p. 14, § 58, stressing that "[i]t is a fundamental right of civilians to seek safety and to flee conflict zones without restriction".

repeatedly called on all parties to the conflict to do their outmost to protect civilians and to allow them safe passage out of the area.[105] The ICRC also monitored the conditions of those fleeing Mosul who were screened, questioned or detained by the Iraqi authorities for possible links with the Islamic State, with the aim of preventing ill-treatment and disappearances and ensuring that family members stayed in contact.[106] Efforts by humanitarian organizations to ensure that people fleeing conflict can move safely and reach more stable locations may also include securing a humanitarian corridor to facilitate people's movement and carrying out their evacuation from a besieged city, with the agreement of all parties involved.[107] Such efforts can be hampered by access and security issues, the fragmented nature of armed groups, ongoing military operations and the presence of mines, improvised explosive devices and unexploded ordnance. Becoming involved in the evacuation of parts of the civilian population is, furthermore, a complex decision for humanitarian actors. It entails carefully evaluating the possible threats to the safety and well-being of both the evacuees and the people who may stay behind, as well as the risks of being instrumentalized to support the implementation of harmful policies (as would be the case, for instance, if the attacks from which civilians needed to be evacuated were intended to cleanse them out of an area, and evacuations might thus facilitate that objective).[108]

The situation faced by individuals and families directly targeted by armed actors is sometimes so critical that they may require immediate help to leave and find refuge elsewhere. In Colombia, for example, the ICRC has assisted victims of repeated threats and abuses by armed group members with transportation costs and some emergency provisions, so that they could move to another part of the country where they could be safer. Some of them were already displaced, having been compelled to leave the countryside or another city because of the same or similar threats, and found themselves again at great risk.[109] Likewise, in Honduras, the ICRC, jointly with the Honduran Red Cross and in coordination

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105 See, for example, ICRC, "Mosul: People Have the Right to Flee", video, 17 October 2016, available at: www. icrc.org/en/document/mosul-iraq-people-have-right-flee-and-seek-safety; ICRC, "Mosul: Civilians Fleeing the Fighting Must be Protected", *Storify*, 2017, available at: storify.com/ICRC/mosul.
106 Stephanie Nebehay, "Up to One Million People could Flee Battle for Iraq's Mosul: ICRC", *Reuters*, 29 July 2016, available at: www.reuters.com/article/us-mideast-crisis-iraq-redcross-idUSKCN1090TL?il=0.
107 Commenting about plans to create humanitarian corridors around Aleppo, Syria, the ICRC took the position that, although they may serve to alleviate the suffering of the conflict-affected civilian population, humanitarian corridors are not an ideal solution insofar as their geographical scope is limited by definition. A humanitarian pause in all areas of the city affected by the armed conflict was invoked by the ICRC as an urgently needed measure. The ICRC also reminded that in all circumstances, those involved in the hostilities must ensure that all necessary measures and precautions are taken to protect civilians, regardless of whether they decide to leave their homes or to stay, and humanitarian aid must be allowed to reach all those in need. See ICRC, "'This Has to Stop' – ICRC Says Indiscriminate Fighting in Syria's Aleppo Taking Heavy Toll on Civilians", *Intercross Blog*, 4 August 2016, available at: intercrossblog.icrc.org/blog/this-has-to-stop-icrc-says-indiscriminate-fighting-in-syrias-aleppo-taking-heavy-toll-on-civilians.
108 On the stakes and dilemmas that are likely to be confronted when carrying out evacuations, see NRC, *Considerations for Planning Mass Evacuations of Civilians in Conflict Settings*, Geneva, 2016, available at: www.nrc.no/resources/reports/planning-mass-evacuations-in-conflict-settings/.
109 ICRC, *Annual Report 2016*, Geneva, 2017, p. 279.

with the authorities and other actors, helps highly vulnerable returnees from Mexico who cannot go back to their homes and become IDPs because of critical protection concerns related to the violence, to relocate elsewhere within the country. Besides transport, the ICRC provides them with emergency assistance to cover their basic necessities when no other actor is in a position to do so.[110] The ICRC is currently strengthening its outreach in order to be able to offer similar support to people at high risk who flee from their places of residence and move within Honduras. At the same time, the ICRC works in close coordination with the United Nations High Commissioner for Refugees, the Norwegian Refugee Council (NRC) and local civil society organizations, within the framework of Honduras's Inter-Institutional Commission for the Protection of Persons Displaced by Violence, to support the authorities in adopting a legal framework and establishing a comprehensive protocol on victim support and assistance, including special protection measures for IDPs at risk.[111]

As the example of Honduras suggests, ensuring an adequate State response to the acute protection needs of persons internally displaced by criminal violence requires multiple coordinated and complementary efforts. Obtaining recognition of arbitrary displacement as a crime and of the related responsibility of the authorities to protect and assist victims is just one step,[112] once the problem has been publicly acknowledged. Support from humanitarian actors is needed for the adoption of specialized legislation and specific protection programmes targeting IDPs, and for their implementation. Protective measures must be tailored to the needs of IDPs and must avoid exposing them to added risk. Witness protection programmes are usually not sufficient, notably as IDPs tend not to report crimes against them due

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110 The ICRC and the Honduran Red Cross jointly provide a range of services – e.g. free phone calls to re-establish contact with relatives, water, food and hygiene kits – to all newly returned migrants who pass through the centre for returned migrants established by the authorities in Omoa, on the Honduran side of the border with Guatemala, for basic processing and assessment. Many of the returnees have experienced deportation before, and some were internally displaced prior to embarking on a journey across the region to Mexico or the United States. In Omoa, the ICRC and the Honduran Red Cross have come across cases of particularly vulnerable returnees who are afraid of returning to their places of origin – on account of ongoing serious threats to their life and physical and mental integrity – and who seek help to relocate elsewhere in Honduras. These cases are followed up by the ICRC. On the support provided by National Societies and the ICRC at centres for returnee migrants in Central America, including Honduras, see ICRC, "Migration: Our Work in the Americas", factsheet, Geneva, December 2017, p. 2, available at: www.icrc.org/en/document/migration-our-work-americas.

111 For more information on the work of the Commission, notably regarding the support provided by the ICRC and other organizations on the elaboration of a national law on internal displacement, see: www.cippd.gob.hn/la-comision/ and www.cippd.gob.hn/construccion-de-una-ley-para-prevenir-atender-y-proteger-a-las-personas-desplazadas-internamente/.

112 In 2015, Honduras's Inter-Institutional Commission, in coordination with different public prosecutors, made progress in defining the crime of forced displacement with a view to including it in a new criminal code: see Honduras Profile Assessment, above note 39, p. 22; see also: www.cippd.gob.hn/category/la-comision/antecedentes/. A recommendation in this regard was also addressed to the authorities by the Special Rapporteur on the Human Rights of IDPs: see C. Beyani, above note 60, p. 20, § 90. On States' obligations related to the prosecution and punishment of forced displacement as a violation of IHL, see ICRC Advisory Service, above note 30.

to fear of retribution and lack of faith in the police and the justice system.[113] In parallel to the legislative and institutional strengthening process, support to civil society organization networks can serve to provide IDPs with more immediate protection options (while building local capacity for a sustainable response).[114] Particular efforts are required in this regard to identify relocation sites and develop safe shelter options. These can consist of suitable hotels, private apartments or safe houses established for the purpose of hosting IDPs facing a high level of risks – depending on available options and on considerations related to the particular situation of the persons concerned, including the likelihood (which may be higher in cases of intra-urban displacement) that their persecutors manage to find them and that they find themselves again in danger.[115] Temporary safe shelters should be places where internally displaced individuals and families can find humanitarian assistance, psychosocial support and legal counselling as they take the time to reflect on their next steps, to help them make an informed decision concerning their future despite the dire circumstances.[116] Options should be made available for members of the same family to be accommodated together in the same shelter.[117]

Supporting integration in urban areas

Although return tends to be the preferred durable solution for many in a large number of internal displacement situations, IDPs in relatively stable urban areas often prefer to stay and integrate locally.[118] As a result of the complex interplay between urbanization and displacement, people displaced from rural to urban areas are more likely to choose not to go back home even when security seems to

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113 Considerations on the inadequacy of witness protection programmes as a general framework for IDP protection are made by D. J. Cantor, above note 35, p. 29. Specifically on El Salvador's Victims and Witnesses Law, see "Statement on the Conclusion of the Visit of the United Nations Special Rapporteur on the Human Rights of Internally Displaced Persons, Cecilia Jimenez-Damary, to El Salvador – 14 to 18 August 2017", available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21984&LangID=E.

114 G. Bassu, above note 42, p. 14.

115 G. Rojas Andrade *et al.*, above note 91, p. 152. In small countries like El Salvador, both intra-urban and inter-urban displacement may become ineffective as self-protection mechanisms, so some people may have to opt for moving across borders in search for safety in the absence of other protection options.

116 S. Reynolds, above note 33, pp. 7–9. For some IDPs, temporary shelters will become places where they wait for the necessary papers to be ready in order to relocate and resettle in another country.

117 *Ibid.*, p. 8 (discussing the situation in El Salvador, where there are no government shelters for internally displaced families and the latter have to split up, as existing women's shelters do not accept boys over the age of 12 and children's shelters are not meant to accommodate children with parents or caretakers).

118 On durable solutions to internal displacement, see above note 27. Specifically on the challenge of achieving durable solutions for IDPs in urban settings, see Chaloka Beyani, *Report of the Special Rapporteur on the Human Rights of Internally Displaced People to the UN General Assembly*, UN. Doc. A/69/295, 11 April 2014, available at: ap.ohchr.org/documents/dpage_e.aspx?si=A/69/295. This report focuses particularly on local integration, acknowledging that "[t]he very nature of urban displacement … tends to lend weight to local integration as the viable choice preferred by internally displaced persons in urban areas." *Ibid.*, p. 19, § 61.

have improved, or may decide to relocate to another, larger city.[119] Women often prefer to stay in cities as they feel that their family and community status and their income-generating ability are better there. Young people tend overwhelmingly to prefer urban life.[120] In general, the longer displacement lasts, the more return becomes a remote option.[121] Even when return remains someone's desired objective, supporting their social and economic integration in the place of displacement is crucial to enabling them to establish as normal a life as possible, while waiting for conditions at the place of origin to become conducive to their safe and sustainable return. It avoids their prolonged dependence on humanitarian assistance and allows IDPs to progressively reduce their displacement-related needs and vulnerabilities.[122]

Whether it amounts to a durable solution in itself or to a temporary solution until return or relocation elsewhere are possible, promoting IDPs' self-reliance and their access to basic services is a key part of the pathway to local integration into cities. Enhancing income-generating opportunities for IDPs entails helping them to gain appropriate urban livelihood skills (if they originate from rural areas) in order to find a job, and/or helping them to start a business, while also ensuring their inclusion in public programmes and development plans

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119 A. Kirbyshire *et al.*, above note 11, p. 18; J. Crisp, T. Morris and H. Refstie, above note 4, p. 25. Internal displacement from rural to urban areas often becomes "urbanization under duress", and once individuals and families are urbanized, return to rural areas becomes less feasible. C. Beyani, N. Krynsky Baal and M. Caterina, above note 93, p. 40. Internal displacement to cities contributes dynamically to their growth, but rapid urbanization, when poorly planned and uncontrolled, can result in more poverty, exclusion, social inequality and fragmentation, which in turn can lead to crime, violence and displacement. Rapid and poorly planned urbanization is also driving disaster risk and associated displacement. On internal displacement as a driver of urbanization and *vice versa*, see IDMC, above note 3, p. 2.

120 For example, research has found that in Bukavu, Democratic Republic of the Congo, younger IDPs are more inclined to stay in the city than older people, as for them "the city represents a new world with more opportunities than the rural area has to offer": see C. Jacobs and A. Paviotti, above note 86, p. 5.

121 Brookings–LSE Project on Internal Displacement, above note 4, p. 20. In Colombia, for example, according to a national survey conducted in 2015, 93% of IDPs, many of whom were once rural dwellers and currently live in cities, have very little or no interest in returning home: see "'Tres de cada diez desplazados estàn en pobreza extrema': Contraloría", *El Tiempo*, 16 February 2015, available at: www.eltiempo.com/politica/justicia/porcentaje-de-desplazados-que-son-pobres-/15255916. This includes an entire generation of IDPs who have fully adapted to urban lifestyles and who consider the lack of opportunities (especially for the children) back home as an important factor in the decision to stay or return.

122 W. Kälin and H. Entwisle Chapuisat, above note 27, pp. 17–20, advocate for the need to take measures to improve IDPs' living conditions and enhance their self-sufficiency in the place where they are staying, as quickly as possible and pending achievable, durable solutions for those who plan to return, as the most effective way to prevent and address protracted internal displacement. The authors define protracted internal displacement "as a situation where the process towards durable solutions is stalled, as IDPs are prevented from reducing, or are unable to progressively reduce, their displacement-induced vulnerabilities, impoverishment and marginalization": *ibid.*, p. 11.

aimed at boosting employment and reducing poverty.[123] Facilitating IDPs' access to urban services such as housing, water, health care and education involves, at a minimum, providing them with information on how these services are delivered (this is particularly useful for people displaced from rural areas, who may not be familiar with the relevant procedures) and helping them obtain the necessary documents (for example, by removing existing legal or administrative obstacles). In cities affected by armed conflict or other situations of violence, where inadequate infrastructure and overstretched services are further strained by the presence of IDPs, it requires first of all improving infrastructure and services for the entire population in host areas, while ensuring that IDPs can benefit from those on par with their non-displaced neighbours, based on a comprehensive analysis of the impact of displacement on IDPs and urban service provision at the city and sub-city levels.[124] The inclusion of IDPs into city-wide urban and development planning is key in this regard.[125]

This underscores the need for integrated approaches combining blanket, area-based interventions in order to respond to the structural challenges that internal displacement typically poses to cities, with tailored measures to address the specific needs of urban IDPs in terms of access to employment, documentation, housing, awareness of rights and legal counselling (e.g. for eviction cases), as well as their protection concerns.[126] Implementing such approaches demands complementary and coordinated efforts by humanitarian and development actors in support of the authorities at the central and local levels, the latter having the primary responsibility for protection of and assistance

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123 M. Aysa-Lastra, above note 4, p. 300. The author emphasizes that the participation of IDPs in the urban labour market is not only instrumental to their local integration, but also prevents them from incorporating into illicit activities. More generally on the need to move from a model of humanitarian assistance focused on aid and maintenance to one that encourages self-reliance and sustainable livelihoods for displaced people, with a view to their positive economic integration, see Nicholas Crawford, John Cosgrave, Simone Haysom and Nadine Walicki, *Protracted Displacement: Uncertain Paths to Self-Reliance in Exile*, Humanitarian Policy Group and ODI, London, September 2015.

124 A. Davies and K. Jacobsen, above note 29, p. 14.

125 On the critical importance of more flexible and comprehensive urban planning informed by internal displacement dynamics in order to achieve durable solutions for IDPs in urban settings, see C. Beyani, above note 118, p. 10, § 33, and related recommendations, pp. 18–21. Acknowledging the intersection between urbanization and displacement, the Global Alliance for Urban Crises has also called for "inclusive models of urbanization" that plan for and manage displacement in towns and cities. See the Alliance's report *Forced Displacement: What Needs to Be Done*, October 2016, available at: www.rescue. org/report/forced-displacement-urban-areas-what-needs-be-done. See also: unhabitat.org/…/Global-Alliance-for-Urban-Crises-Overview-25-March-2016.pdf.

126 C. Beyani, above note 3, p. 12, § 33 (emphasizing that "a combined approach, which includes community-based approaches and punctual IDP specific interventions, is necessary in most contexts"); Brookings–LSE Project on Internal Displacement, above note 4, p. 24 (recommending that support systems to host communities to enhance their absorption capacity and resilience be combined with targeted IDP-specific interventions); IDMC and MIT DRAN, above note 26, pp. 64–67; W. Kälin and H. Entwisle Chapuisat, above note 27, p. 58. On "area-based approaches", see, for example, B. Mountfield, above note 8, pp. 11–12.

to IDPs.[127] There is also a need for strategies that leverage the opportunities offered by existing urban capacities and response networks through developing partnerships and making constructive linkages between the diversity of actors and the diversity of needs.[128]

The ICRC's programme on facilitating access to official employment for IDPs in various cities of Colombia, through partnerships with private and semi-private companies, is an example of how humanitarian actors, by providing tailored support to IDPs in finding sustainable livelihood options in the city, are able to integrate longer-term considerations related to recovery, resilience and

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127 Under Principle 3 of the Guiding Principles, "[n]ational authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction". Such responsibility is a reflection of States' sovereignty. In order to be able to fulfil their obligations toward IDPs and manage internal displacement effectively, governments need to develop adequate legal, policy and institutional frameworks as a basis for their response and to foresee the necessary resources for their implementation. International actors often have a vital role to play in this regard, through persuasion/advocacy and technical, legal and/or financial support in the adoption and operationalization of those frameworks. Local authorities are on the forefront of the response, yet they may be left without the necessary institutional recognition, capacity or resources to cope with the situation. International actors can assist local authorities in carrying out their crucial role, including by raising awareness of the importance of, and facilitating, effective coordination between the different levels of the State response to IDPs. On the role of local authorities in the protection, assistance and provision of durable solutions to IDPs, notably in urban areas, see Brookings–LSE Project on Internal Displacement, above note 4, pp. 16–21; E. Ferris, above note 9, pp. 15–16 (highlighting the "need to work much more intentionally with governmental authorities at the sub-national levels"). On the gaps that may exist between how responses are planned at the central level and their implementation at the local level, focusing on Colombia's experience, see Elizabeth Ferris, "The Role of Municipal Authorities", *Forced Migration Review*, No. 34, February 2010, p. 39, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/urban-displacement/ferris.pdf.
128 On the importance of tapping into local capacities and resources and developing local partnerships to address the needs of urban IDPs and their host communities, see Anna Tibaijuka, "Adapting to Urban Displacement", *Forced Migration Review*, No. 34, February 2010, p. 4, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/urban-displacement/tibaijuka.pdf; R. Zetter and G. Deikun, above note 79, p. 6; J. Crisp, T. Morris and H. Refstie, above note 4, pp. 26, 39; Elena Lucchi, "Moving from the 'Why' to the 'How': Reflections on Humanitarian Response in Urban Settings", *Disasters*, Vol. 36, Supp. 1, July 2012, pp. 95–96; A. Kirbyshire *et al.*, above note 11, p. 20; L. Earle, above note 20, pp. 219–221; Robert Muggah, "A Humanitarian Response to Central America's Fragile Cities", *Humanitarian Exchange*, No. 69, June 2017, p. 20, available at: https://odihpn.org/magazine/humanitarian-response-central-americas-fragile-cities/ speaks about the need to invest in partnerships to deal with the humanitarian consequences of urban violence, including displacement. The IASC Strategy for Meeting Humanitarian Challenges in Urban Areas recommends that humanitarian organizations be able to use the potential for partnerships with municipal and national governments, civil society and communities – which is stronger in urban settings compared to rural areas (IASC, above note 6, pp. 2, 4–5). See also, most recently, IRC, *Public Service Delivery in Contexts of Urban Displacement. A Discussion Paper on the Importance of Strengthening Public Service Delivery in Urban Humanitarian Contexts*, December 2017, available at: www.rescue.org/sites/default/files/document/2334/publicservicedeliveryincontextsofurbandisplacementweb.pdf.

local integration into their response.[129] In doing so, humanitarian actors can complement the efforts of development actors, who are better placed to work with public authorities on broader and structural issues of unemployment and poverty reduction, but are usually not in a position to address specific vulnerabilities at the individual and household levels.[130] The programme also speaks to the value of working in partnership with the private sector, in an enabling policy environment and within an established formal labour market, to increase employment opportunities for urban IDPs, while also raising the awareness of industry in terms of social responsibility towards IDPs.[131]

In various countries, the ICRC has increasingly been involved in the rehabilitation, upgrading and/or construction of essential water or other public infrastructure (e.g. sanitation and electrical installations, primary health-care centres, hospitals and schools) in urban areas affected by protracted armed conflict and internal displacement. The urban services approach implemented by the ICRC consists of building sustainable strategies into emergency responses. It is based on a shift from a solely "reactive" mode to one that bridges short-term (emergency "quick-fix") measures with more medium- to long-term structural responses. It is about incorporating existing city systems from the outset by working with local actors in order to support those systems, so that they can cope with increased demand now and in the future. In doing so, responses take into account the impact of internal displacement on the city as a whole and assist host communities and IDPs in tandem. This approach strives to prevent development

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129 Within the framework of the Access to Employment programme, the ICRC identifies candidates for final selection by participating companies and helps them to acquire vocational training, including on "soft skills" to enable them to function in employment (e.g. how to interact with a superior, the importance of complying with working schedules, the need to justify absences). The ICRC also covers a portion of the beneficiaries' salaries for the agreed minimum duration of their contract (six months), ensures that they are registered in the national social security system, and ensures that they receive a labour certificate at the end of their contract. Since starting the programme in 2013, the ICRC has signed agreements with more than 120 companies working in a wide range of sectors (e.g. restaurants and hospitality, construction, textiles and packaging) in eleven cities of Colombia. For information on the programme, see ICRC, *ECOSEC Executive Brief. Colombia: Access to Employment Programme 2013*, 14 May 2014; ICRC, "How Does the Corporate Sector Contribute to Humanitarian Activities in Colombia? The Access to Employment Example", *ICRC Blog*, 24 August 2016, available at: http://blogs.icrc.org/gphi2/2016/08/24/corporate-sector-contribute-humanitarian-activities-colombia-access-employment-example/.

130 On the need to include development perspectives in humanitarian responses and to align "the imperative to save lives … with the fast-tracking of recovery and strengthening of resilience", see L. Earle, above note 20, p. 221. According to the former Special Rapporteur on the Human Rights of IDPs, "cooperation between humanitarian and development actors is necessary since the earliest phase of displacement, to ensure relief to development continuity and favour resilience building and self-reliance, which are essential elements of durable solutions": see Chaloka Beyani, *Progress and Challenges Relating to the Human Rights of IDPs. Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons*, UN Doc. A/HRC/32/35, 29 April 2016, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/G1608880.pdf. The need for authorities in Colombia to shift the focus from purely humanitarian assistance to promoting IDPs' economic stability is highlighted in W. Kälin and H. Entwisle Chapuisat, above note 27, pp. 94–96 (also mentioning the ICRC's Access to Employment programme).

131 The findings of a joint ICRC–WFP study conducted between 2004 and 2007 highlighted the need and potential for income-generation initiatives in support of IDPs in Colombia, and the importance of involving private industry. See ICRC and WFP, above note 53, pp. 18–19, 64–65.

reversals by keeping alive critical infrastructure, but also paves the ground for further development interventions.[132] To give just one example, in the Central African Republic, after setting up an emergency response to supply water (by water-trucking) to the large IDP camp near Bangui airport, the ICRC undertook the rehabilitation of the city's water distribution network, in partnership with the local water provider. This allowed the ICRC and other actors to respond in a more sustainable manner to the needs of both internally displaced and resident populations.[133]

In supporting local integration into cities, working closely and more effectively with municipal authorities and urban service providers is crucial to ensure local ownership and a more sustainable response, informed by the solid knowledge of the urban context that local actors can bring, as well as to promote the integration of IDPs into urban planning.[134] However, it becomes a delicate issue, in view of principled action, if the authorities are associated with a party to the conflict or local actors are involved in urban violence or are pursuing a political agenda. Another difficulty arises when municipal authorities do not see their hosting role as permanent and are reluctant to allow IDPs to integrate into the city, for example, because they fear this may attract new arrivals or because they perceive IDPs as a security threat. Other factors, such as concerns about possible changes in voting patterns if IDPs stay, can also influence how municipal authorities (as well as national authorities) see local integration.[135]

Conclusion

There is a critical knowledge gap on the phenomenon of urban internal displacement. Not only are its real proportions globally unknown, but also documentation of the specific experience of IDPs in urban settings and how their situation differs from and impacts that of their non-displaced neighbours is still lacking. This article has therefore attempted to provide a more nuanced analysis of the particular needs, vulnerabilities and capacities of urban IDPs, one that takes into account how the context (city at war, city affected by urban violence or more stable city) and the pattern (rural-to-urban, inter-urban and intra-urban) in

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132 On the approach, its long-term benefits and its related challenges, see "The ICRC's Approach to Urban Services during Protracted Armed Conflict: Q & A with Evaristo de Pinho Oliveira", *International Review of the Red Cross*, Vol. 98, No. 901, 2016, pp. 206–209, available at: www.icrc.org/en/international-review/article/icrcs-approach-urban-services-during-protracted-armed-conflict-q; ICRC, above note 2.
133 Information on file with author.
134 See above note 125.
135 On the challenges of collaborating with municipalities and other local governance institutions, see C. Beyani, above note 3, p. 16, § 48 (specifically mentioning the fact that authorities may adopt an "informal 'policy' of non-assistance" based on political, demographic or ethnic factors that influence their attitude towards newcomers); Brookings–LSE Project on Internal Displacement, above note 4, pp. 17–19; R. Zetter and G. Deikun, above note 79, pp. 6–7; E. Lucchi, above note 19, p. 11; J. Crisp, T. Morris and H. Refstie, above note 4, p. 26 (speaking of "head-in-the-sand policies" whereby municipal authorities and national governments tend to neglect the situation of IDPs and refuse to help them integrate locally).

which urban internal displacement occurs contribute to shaping people's experience. It has highlighted that the context has an influence on the needs and protection profile of urban IDPs, while the pattern of displacement affects their resilience.

Urban IDPs tend to disappear into the larger population of the city, a phenomenon that increasingly represents the norm of urban displacement. Often physically accessible but difficult to identify and reach, they are at risk of falling through the protection and assistance nets.[136] It is more than just a case of being "out of sight, out of mind", as urban IDPs who stay within the host community, with relatives or in rented accommodation, are often assumed to be less in need of support than people in camps, which is not necessarily the case. Their being melded together with host communities is frequently mistaken as them having already achieved local integration.[137] Furthermore, because IDPs in cities share similar problems with the resident poor, their specific concerns may become overlooked if responses are limited to development and poverty reduction interventions – or *vice versa*, responses may fail to consider the broader impact of internal displacement on host communities and the city as a whole if they are focused exclusively on internally displaced individuals and households.

People displaced to or within cities at war are often at risk of coming under attack, either directly or as a consequence of the use of indiscriminate means or methods of warfare, and remain vulnerable to the disruption of essential services caused by the armed conflict. In cities affected by urban violence, IDPs may be pursued by armed groups who directly threaten them, and may be obliged to live in hiding. IDPs who manage to reach more stable cities may be relatively safe, but often find themselves without adequate access to housing, water and sanitation, employment, health care or education, and are obliged to resort to harmful coping mechanisms to survive. Furthermore, being displaced from rural to urban settings compounds the difficulties that IDPs typically face as part of being uprooted from their homes and placed in unfamiliar environments, lacking social and protective networks. It makes it harder for people to cope with the situation, notably as they have difficulty adapting their livelihood strategies and recovering their independence. More research is needed to sharpen our understanding of the similarities and differences in the situation of IDPs in various possible scenarios, the specificities of rural-to-urban displacement

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136 See, among others, IDMC and MIT DRAN, above note 26, p. 10; Hilde Refstie, Chris Dolan and Moses Chrispus Okello, "Urban IDPs in Uganda: Victims of Institutional Convenience", *Forced Migration Review*, No. 34, February 2010, p. 32, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/urban-displacement/refstie-dolan-okello.pdf (in which the authors identify the lack of registration and information about urban IDPs and the difficulty in distinguishing them from economic migrants as some of the main obstacles to their identification); Elisabetta Brumat, "The Poor and the Displaced in Khartoum", *Forced Migration Review*, No. 34, February 2010, available at: www.fmreview.org/sites/fmr/files/FMRdownloads/en/urban-displacement/brumat.pdf.

137 H. Refstie, C. Dolan and M. C. Okello, above note 136, pp. 32–33. The authors also argue that humanitarian actors' choice of focusing on IDPs in camps is dictated by "institutional convenience", as working with the latter poses relatively fewer challenges and provides more visibility than working with urban IDPs outside of camps.

compared to inter-urban and intra-urban displacement, and the range of experiences, needs and capacities of IDPs compared to their host families and host communities in urban settings. Profiling of urban displacement situations can be a useful tool for this, as it allows for area-based, comparative analyses between the different population groups living in one city.

When multifaceted displacement dynamics intersect with the complexity of the city, the result is a unique set of challenges confronting authorities, humanitarian actors and other actors seeking to provide protection, assistance and solutions to those affected. Today it is widely acknowledged that these unique challenges cannot be addressed by simply replicating what works in rural settings. Rather, specific multi-sector approaches are required that meet the needs of IDPs and their hosts by aligning humanitarian and development work, capitalizing on local partnerships and resources, and effectively engaging with communities. However, there is still a need to develop methodologies that bring together area-based approaches and diversity in urban settings, as well as operational guidance on how best to articulate the two levels of the response – i.e., blanket interventions addressing the developmental needs of entire urban communities and targeted measures addressing IDPs' specific needs and vulnerabilities – in order to ensure the continuity and coherence of short- and long-term efforts, as well as a protection-oriented response to IDPs. There is also limited knowledge, both within and across the different organizations, of lessons learned and good operational practices as regards responding to IDPs and host communities in urban settings. This is a domain where stocktaking exercises and more effective sharing of experiences among practitioners, municipal authorities and policy-makers would be particularly beneficial.[138]

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138 In the same sense, see J. Crisp, T. Morris and H. Refstie, above note 4, p. 39. Recommendations with regard to the need for documenting and analyzing good practices in responding to IDPs outside of camps, including in urban areas and particularly in situations of intra-city displacement, were made by the former Special Rapporteur on the Human Rights of IDPs: see C. Beyani, above note 3, p. 20, under points C and D.

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Do no harm: A taxonomy of the challenges of humanitarian experimentation

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Abstract

This article aims to acknowledge and articulate the notion of "humanitarian experimentation". Whether through innovation or uncertain contexts, managing risk is a core component of the humanitarian initiative – but all risk is not created equal. There is a stark ethical and practical difference between managing risk and introducing it, which is mitigated in other fields through experimentation and regulation. This article identifies and historically contextualizes the concept of humanitarian experimentation, which is increasingly prescient, as a range of humanitarian subfields embark on projects of digitization and privatization. This trend is illustrated here through three contemporary examples of humanitarian innovations (biometrics, data modelling, cargo drones), with references to critical questions about adherence to the humanitarian "do no harm" imperative. This article outlines a broad taxonomy of harms, intended to serve as the starting point for a more comprehensive conversation about humanitarian action and the ethics of experimentation.

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Introduction

This article aims to further existing work around the notion of "humanitarian experimentation" connected to the use of new digital technology and related data production. Firstly, it does so by conceptualizing humanitarian experimentation as a form of practice that can now be identified across a range of humanitarian subfields. In these fields, the application of digital technology/data in different ways echoes experimental sentiments which the humanitarian community prefers to think of as belonging to a distant colonial/postcolonial past. With reference to three contemporary examples, it is illustrated how an experimental approach pertains, albeit in relation to new types of innovations (biometric registration of refugees, data modelling of Ebola health data and transport of blood samples and medication using drones) – and how this raises critical questions about adherence to the humanitarian "do no harm" imperative.[1] To encourage and support a

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1   The seminal contribution is Mary B. Anderson, *Do No Harm: How Aid Can Support Peace or War*, Lynne Rienner, Boulder, CO, 1999. For a recent foundational text, see Hugo Slim, *Humanitarian Ethics: A Guide to the Morality of Aid in War and Disaster*, Oxford University Press, Oxford, 2015.

more structured conversation about humanitarian experimentation, the article then develops a taxonomy of potential harms.[2]

Experimentation is a description of a defined, structured process to test and validate the effect and effectiveness of new products or approaches. Humanitarian work, due to its uncertain and often insecure context, is by nature experimental. Using well-known and tested approaches – technological, medical, nutritional or logistical, for example – in an uncertain environment does not make that practice experimental, though it may introduce risk through the variability of the context of its application. However, the use of untested approaches in uncertain environments provokes a need for more structured processes: it compounds the risk of experimental practice with the risks of unstable environments, raising the potential for experimentation to conflict with, rather than innovatively bolster, humanitarian principles and practices. At present, this type of practice can be observed with respect to many forms of humanitarian technology and humanitarian action based on the use of digital data. Yet, these practices are commonly framed in a humanitarian innovation language in which the possibility that humanitarian principles could be compromised is omitted. Nearly every other industry in the world with this kind of impact on human beings requires proof of impact and assessment of harms prior to deploying new technologies at scale. So, the more proven something is, the larger the human impact it is able to have. This is not happening with technological and data-driven approaches to humanitarian action.

This analysis is timely because we are witnessing a rapid datafication and digitization of humanitarian action. The widespread adoption of datafication significantly impacts the range and scale at which experimental "innovation" practices affect humanitarian action.[3] As part of this, the privatization and digitization of humanitarian action is on the rise, which invites a potentially adverse combination of commercial incentives, ethical standards and operational priorities into the fragile environments of humanitarian response.[4] This article is

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2   For the foundational scholarly work on this topic, see Katja Lindskov Jacobsen, "Making Design Safe for Citizens: A Hidden History of Humanitarian Experimentation", *Citizenship Studies*, Vol. 14, No. 1, 2010; Katja Lindskov Jacobsen, "Experimentation in Humanitarian Locations: UNHCR and Biometric Registration of Afghan Refugees", *Security Dialogue*, Vol. 46, No. 2, 2015; Katja Lindskov Jacobsen, *The Politics of Humanitarian Technology: Good Intentions, Unintended Consequences and Insecurity*, Routledge, London, 2015; Sean Martin McDonald, "Ebola: A Big Data Disaster: Privacy, Property, and the Law of Disaster Experimentation", CIS Paper Series, Vol. 1, Centre for Internet & Society, 1 March 2016, available at: cis-india.org/papers/ebola-a-big-data-disaster (all internet references were accessed in August 2017); Kristin Bergtora Sandvik, Maria Gabrielsen Jumbert, John Karlsrud and Mareile Kaufmann, "Humanitarian Technology: A Critical Research Agenda", *International Review of the Red Cross*, Vol. 96, No. 893, 2014.

3   The authors conceptualize datafication as the conversion and articulation of information, concepts, processes or systems in mathematical and machine-readable formats. Datafication happens at multiple levels and includes elements ranging from basic objects such as proxy indicators all the way through to complex systems like artificial intelligence. The term "datafication", however, specifically points to the practice of trying to express all factors relevant to a subject as data.

4   The authors conceptualize digitization as the conversion, articulation and management of historically analogue information, processes and actions through digital tools.

an explicit recognition that an increasingly broad range of humanitarian practices can be understood as experimental, with the important implication that this framing highlights the significance of understanding how these practices may succeed or fail in ways that can cause real human harm.

This article takes as its point of departure the authors' multidisciplinary work within law, legal anthropology and international relations. It starts from a common concern about how the contemporary humanitarian context of emergency, exceptionality and exigency is sometimes being exploited to give license to humanitarian responders, governments and private-sector interests to experiment more or less explicitly in these chaotic emergency contexts. This tendency is particularly pronounced within the current humanitarian innovation paradigm, broadly defined.[5] The objective of this article is to show how "humanitarian innovation" can be regarded as "experimental" in a problematic sense, although it is currently not recognized as such. To this end, the three cases of humanitarian innovation presented here are used to illustrate in what way these innovative practices are "experimental" and how this can have potentially harmful consequences for the implicated humanitarian subjects. What the cases suggest is that rather than belonging to a distant past, the tendency for humanitarianism to be experimental in the sense of allowing for and even encouraging the use of untested approaches has made its way into new domains; it is no longer only about more familiar examples such as the trialling of new medical inventions in various humanitarian contexts. In order to necessarily give greater priority to discussions about ethics and the "do no harm" principle, "humanitarian innovation" should give more prominence to considering these experimental tendencies. This includes conversations about how "humanitarian innovation" can conform to – rather than conflict with – humanitarian principles. It also articulates the need for conversations about humanitarian innovation to include protecting the implicated subjects from knowable harm.

The article proceeds in five main steps. The first part briefly sets out an understanding of what is at stake for the humanitarian community. The second explores how the historical and colonial legacies and contemporary social constructions of emergency and urgency shape the orthodoxies and trade-offs of contemporary humanitarian innovation practices. The third part presents three examples of experimental humanitarian innovation: biometric registration of refugees, Ebola data modelling and the use of cargo drones to transport medication and blood samples in Africa. To better understand the vulnerability and harm that

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5   As noted by Nielsen, Sandvik and Jumbert, humanitarians currently use the term "humanitarian innovation" to describe how technologies, products and services from the private sector and new collaborations can improve the delivery of humanitarian aid. This implies that humanitarian innovation can refer to anything, from product innovation (such as new water filters) to service innovation (such as cash transfers or fuel supply) and process innovation (such as new monitoring and evaluation procedures for humanitarian staff). See Brita Fladvad Nielsen, Kristin Bergtora Sandvik and Maria Gabrielsen Jumbert, "How Can Innovation Deliver Humanitarian Outcomes?", PRIO Policy Brief No. 12, PRIO, Oslo, 2016.

may arise both from and beyond these topical examples, the fourth step is to develop a two-tiered taxonomy of potential harms to beneficiaries and humanitarian organizations. These include the distribution of harm, conceptualizations of resources and resource scarcity, and legal liability and reputational damage. The fifth and final step is to measure harm against humanitarian imperatives and principles. Based on the ethical concerns drawn out from the cases and harm taxonomy, the article concludes by reflecting on the need for an ethics of humanitarian experimentation.

What is at stake?

The unique, elevated status that is often afforded to humanitarian action is commonly predicated on the belief that humanitarian practices adhere to a set of established principles, in order to aid and protect communities in need. The International Committee of the Red Cross (ICRC) protection policy emphasizes the imperative to ensure that its action does not have adverse impacts on, or create new risks for, individuals or populations.[6] This "do no harm" imperative is fleshed out in the first protection principle of the Humanitarian Charter and Minimum Standards in Humanitarian Response, emphasizing the need to "avoid exposing people to further harm as a result of your actions".[7]

Those involved in humanitarian responses must take steps to avoid or minimize any adverse effects of their intervention, in particular the risk of exposing people to increased danger or abuse of their rights. This principle includes the following three elements: that the form of humanitarian assistance and the environment in which it is provided do not further expose people to physical hazards, violence or other rights abuse; that assistance and protection efforts do not undermine the affected population's capacity for self-protection; and finally that humanitarian agencies manage sensitive information in a way that does not jeopardize the security of the informants or those who may be identifiable from the information.[8] Yet these principles conflict with innovation when innovation is carried out in an experimental manner, with potentially harmful consequences for those to whom humanitarianism claims to offer protection. In other words, it is suggested that as an indirect consequence of uncritically adopting a terminology of "humanitarian innovation", we may fail to acknowledge the experimental nature of projects and practices referred to as "innovation", thereby ignoring or undervaluing the risks posed to humanitarian subjects.

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6   ICRC, "ICRC Protection Policy", *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, p. 753, available at: www.icrc.org/en/download/file/20806/irrc-871-icrc-protection-policy.pdf.
7   Sphere Project, Humanitarian Charter and Minimum Standards in Humanitarian Response, Protection Principle 1, available at: www.spherehandbook.org/en/protection-principle-1-avoid-exposing-people-to-further-harm-as-a-result-of-your-actions/.
8   *Ibid.*

The rise of innovation: Historical legacies, constructions of emergencies

Humanitarian innovation

"Innovation" has become a significant buzzword in the humanitarian field, appearing in institutional initiatives, donor speeches, policy documents and media coverage.[9] While the discussions of the humanitarian innovation ecosystem speak to great expectations about what innovation can do for humanitarian action, so far there has been limited critical scholarly interest in the individual, organizational and systemic trade-offs and potential harms this agenda may espouse.[10] Some critical attention has been paid to whether the humanitarian innovation agenda represents a form of imperialism or a neoliberal market strategy[11] and whether the experimental nature of humanitarian innovation implies that complex political problems are reduced to matters to be fixed through technical and aesthetic solutions.[12] However, there has been little discussion that critically analyzes the relationship between "innovation" and humanitarian principles.

This article argues that there is a need to acknowledge that innovation is often used as a proxy for invention and experimentation, with more tangible, but in this context less understood and addressed, impacts on humanitarian subjects and humanitarian work. More attention must be paid to market dynamics, and how invoking "innovation" has become a competitive advantage that obviates the scrutiny which would otherwise accompany proposals. In this way, the article offers a reframing of emergent discussions about the ethics of humanitarian innovation. It is argued that the labels, actors and discourses of experimental practices have shifted to become centred on humanitarian innovation, goods and design. In the humanitarian sector, new projects and designs are construed as "innovations" with testing phases, while the notion of experimentation is usually avoided. Particular attention must be paid to the flawed nature of the data experimentation cycle in humanitarian emergency settings. While treatment,

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9   See, for example, *One Humanity: Shared Responsibility*, Report of the Secretary-General for the World Humanitarian Summit, UN Doc. A/70/709, 2 February 2016; United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Leaving No One Behind: Humanitarian Effectiveness in the Age of the Sustainable Development Goals*, OCHA Policy and Studies Series, 1 February 2016, available at: www.unocha.org/node/214196.

10 Kristin Bergtora Sandvik and Kjersti Lohne, "The Rise of the Humanitarian Drone: Giving Content to an Emerging Concept", *Millennium – Journal of International Studies*, Vol. 43, No. 1, 2014; Tom Scott-Smith, "Humanitarian Neophilia: The 'Innovation Turn' and its Implications", *Third World Quarterly*, Vol. 37, No. 12, 2016; Kristin Bergtora Sandvik, "Humanitarian Innovation, Humanitarian Renewal?", *Forced Migration Review*, September 2014.

11 Cedric Johnson, "The Urban Precariat, Neoliberalization, and the Soft Power of Humanitarian Design", *Journal of Developing Societies*, Vol. 27, No. 3–4, 2011; Anke Schwittay, "Designing Development: Humanitarian Design in the Financial Inclusion Assemblage", *PoLAR: Political and Legal Anthropology Review*, Vol. 37, No. 1, 2014.

12 Samer Abdelnour and Akbar M. Saeed, "Technologizing Humanitarian Space: Darfur Advocacy and the RapeStove Panacea", *International Political Sociology*, Vol. 8, No. 2, 2014; Peter Redfield, "Fluid Technologies: The Bush Pump, the LifeStraw® and Microworlds of Humanitarian Design", *Social Studies of Science*, Vol. 46, No. 2, 2016.

service provision and aid delivery remain key objectives of these processes, the experimental nature of these systems now commonly entails a significant element of data extraction and management.[13]

Innovation scholarship has a long historical pedigree, as innovation theory emerged as a distinct academic discipline almost a century ago.[14] This article focuses on a much narrower issue – namely, how the specific attributes of the humanitarian setting, past and present, have contributed to the rise of experimental innovation. To that end, the following sections set the stage for the three examples and harm analysis by considering the ways in which the imperial, conceptual and interest-based contexts of the humanitarian innovation paradigm help to construct the contemporary *modus operandi* of humanitarian innovation.

Colonialism, technology and science

Not only historical but also contemporary humanitarian innovation specifically, and humanitarianism more generally, cannot be understood apart from a history of experimentation in the domains of science and technology. As noted by Lock and Nguyen, the historical European and North American portrayal of technological innovation as a narrative of progress and of the betterment of individual and social life has been premised on an unreflective acceptance of technological innovation in which the relationship of humans to technology is perceived as too obvious to need examination. Indeed, technology is perceived as a powerful and autonomous agent, inherent to progress.[15] In many ways, technology – assumed to be developed apolitically – becomes the answer to political problems.[16] Technology is seen both as an unquestionable good, and as determinative of the forms that human social life will take. At the same time, material artefacts are often construed as "things", as dispassionate "means" that humans can make use of when seeking to achieve specific, predefined end goals (which for humanitarians are synonymous with benevolent protection and assistance). Put differently, material artefacts are in themselves considered ethically and morally neutral.[17]

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13 Labelling these developments "humanitarian imperialism" does little to unpack their mechanisms and politics. See Bruce Nussbaum, "Is Humanitarian Design the New Imperialism? Does Our Desire to Help Do More Harm Than Good?", *Co.Design*, 7 June 2010, available at: www.fastcodesign.com/1661859/ishumanitarian-design-the-new-imperialism.

14 John Bessant, Ben Ramalingam, Howard Rush, Nick Marshall, Kurt Hoffman and Bill Gray, *Innovation Management, Innovation Ecosystems and Humanitarian Innovation: Literature Review*, UK Department for International Development, 2014, available at: r4d.dfid.gov.uk/Output/196762/.

15 Margaret Lock and Vinh-Kim Nguyen, *An Anthropology of Biomedicine*, John Wiley & Sons, Hoboken, NJ, 2010.

16 According to Segal, "technological utopianism" is a belief in technological progress as inevitable and in technology as the vehicle for "achieving a 'perfect' society in the near future. Such a society, moreover, would not only be the culmination of the introduction of new tools and machines; it would also be modeled on those tools and machines in its institutions, values and culture." See Howard P. Segal, "The Technological Utopians", in Joseph J. Corn (ed.), *Imagining Tomorrow: History, Technology and the American Future*, MIT Press, Cambridge, MA, 1986.

17 M. Lock and V.-K. Nguyen, above note 15.

Attention must also be given to the crucial role of science in the establishment of colonial and postcolonial development regimes.[18] Scientific research and investigations were both technical and political experiments that played a role in political transformations.[19] This research was often carried out through a colonial *modus* of data extraction, where fieldwork research presupposed compliant subjects, ready to answer numerous questions and accept intrusions into their lives.[20] At the same time, experimental colonial and postcolonial endeavours in foreign territories and on foreign bodies also played a role vis-à-vis the testing of new technologies and the desire to make them safe for use by more valued citizens, often located in metropolitan States.[21] As observed by Rottenburg, "One of the significant aspects of the age of imperialism was the use of the colonies as vast experimental terrains where all kinds of unproven technologies could be tested."[22] What can be seen today is that "states of exception", which are justified with reference to the urgency of humanitarian situations, are seized on in order to "warrant political, medical and health experiments"[23] – and with this, certain "forms of domination" manifest themselves, in particular across the African continent. Additionally, whilst curing the ills of local populations was (and still is) one rationale for such medical interventions, it must also be appreciated that biomedicine was at the same time considered crucial to preserving the health of imperial armies and settlers in the face of deadly tropical diseases.

With this in mind, the argument put forth here is that the innovation trajectories of contemporary population management (through biometrics, big data and drone delivery) must be understood in relation to this historical legacy. Today, experimental populations in the global periphery can be seen as contemporary "theatres of proof" in which statistical technologies choreograph the performance.[24] The controversy over placebo use in Africa in 1994 during trials of short-course azidothymidine treatment, used to halt perinatal transmission of HIV, was a watershed in the debate over ethical standards in global clinical research, and showed how framing a problem as a public health emergency can suspend some of the normal criteria by which biomedical efficacy is judged.[25] While not driven by datafication in the sense discussed here, the ethical issues that emerged with this

18 Christophe Bonneuil, "Development as Experiment: Science and State Building in Late Colonial and Postcolonial Africa, 1930–1970", *Osiris*, Vol. 15, 2000.

19 Helen Tilley, *Africa as a Living Laboratory: Empire, Development, and the Problem of Scientific Knowledge, 1870–1950*, University of Chicago Press, Chicago, IL, 2011.

20 C. Bonneuil, above note 18.

21 K. L. Jacobsen, "Making Design Safe for Citizens", above note 2.

22 Richard Rottenburg, "Social and Public Experiments and New Figurations of Science and Politics in Postcolonial Africa", *Postcolonial Studies*, Vol. 12, No. 4, 2009.

23 Lydie Cabane and Josiane Tantchou, "Measurement Instruments and Policies in Africa", *Revue d'Anthropologie des Connaissances*, Vol. 10, No. 2, 2016.

24 M. Lock and V.-K. Nguyen, above note 15. See also Megan Vaughan, *Curing Their Ills: Colonial Power and African Illness*, Stanford University Press, Stanford, CA, 1991.

25 Adriana Petryna, *When Experiments Travel: Clinical Trials and the Global Search for Human Subjects*, Princeton University Press, Princeton, NJ, 2009; Claire L. Wendland, "Research, Therapy, and Bioethical Hegemony: The Controversy over Perinatal AZT Trials in Africa", *African Studies Review*, Vol. 51, No. 3, 2008.

controversy are highly significant as a backdrop for the present analysis. With respect to biometrics, the cradle of the modern fingerprinting system was colonial India, where British administrators were concerned with maintaining control over the native population.[26] It was in the colonies that identity cards were first designed and issued, while fingerprinting was first used in Bengal, to ensure that only certified pensioners were collecting their monthly remuneration, and only once.[27] In the present, digital biometric fingerprint technologies have been trialled in various humanitarian settings since the early 2000s. Amongst the rationales for these trials are donor concerns about "questionable refugee population figures" that biometric registration is expected to be able to curb by providing more accurate counts, which presumably would result in lower population figures and hence in smaller amounts of funding requested from donors.[28] Furthermore, historically, technological innovations that lowered the economic and human cost of penetrating, conquering and exploiting new territories and new populations were preconditions for imperialism. Air power was crucial because it offered speed, predictability and an unrivalled view from above, with minimal infrastructure needs.[29] Contemporary drone discourse mirrors previous thinking on colonial air power in significant parts, as the global South and Africa in particular are construed as a site of intervention where drones are portrayed as the solution to the problems of ill health, poverty and immature markets.[30]

The constructions of emergency and urgency

The dynamics that characterize emergency contexts and the vulnerability of affected populations must necessarily determine how humanitarians approach innovation and experimentation cycles, insofar as these characteristics distinguish humanitarian contexts from how other professions manage and regulate similar processes. In non-emergency contexts, there are structured processes for the testing, validation and application of new products. Within predetermined parameters, such processes define the nature and scope of cost-benefit considerations, including standards for preparedness, effectiveness and risk-taking. The emergency context introduces fundamentally new equations to the experimentation/innovation cycle.

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26 Simon Cole, "History of Fingerprint Pattern Recognition", in Nalini Ratha and Ruud Bolle (eds), *Automatic Fingerprint Recognition Systems*, Springer Science & Business Media, New York and London, 2007.
27 R. Rottenburg, above note 22.
28 US Embassy Rome, "WFP'S Collaboration with UNHCR in Providing Food Assistance to Refugees in Tanzania Joint Mission Assessment", 03ROME4672, 2003, available at: wikileaks.org/cable/2003/10/03ROME4672.html.
29 Daniel R Headrick, *The Tools of Empire: Technology and European Imperialism in the Nineteenth Century*, Oxford University Press, New York, 1981; David Killingray, "'A Swift Agent of Government': Air Power in British Colonial Africa, 1916–1939", *Journal of African History*, Vol. 25, No. 4, 1984; David E Omissi, *Air Power and Colonial Control: The Royal Air Force, 1919–1939*, Manchester University Press, Manchester, 1990.
30 Kristin Bergtora Sandvik, "African Drone Stories", *BEHEMOTH – A Journal on Civilisation*, Vol. 8, No. 2, 2015.

Primary among these is the notion that "something must be done", a logic that focuses on the cost of inaction. There appears to exist a perceived imperative whereby civil society continues to deploy largely untested and non-consented interventions in a host of "worst-case scenarios" because trying anything is seen as better than doing nothing.[31] As observed by Calhoun, underpinning the notion of emergency is a specific way of thinking about how the world works, including a particular, if often implicit, moral orientation. Emergency, thus, is a way of grasping problematic events, a way of imagining them in a manner that emphasizes their apparent unpredictability, abnormality and brevity, and which implies that response – intervention – is necessary. Once a humanitarian emergency is declared, it shapes not only who is supposed to act, but also what is supposed to be done, and how.[32] This, in turn, alters notions about acceptable levels of risk. The acceleration or modification of the experimentation cycle, due to the declared emergency context, could in principle be acceptable, but typically only within predefined parameters. With the rise of the humanitarian technology paradigm, this has also increasingly rendered humanitarian problems and protection gaps "technology-solvable".

What is of particular concern is a perceived license to employ lesser standards, both in pre-deployment analyses and in the after-action evaluation of effectiveness. This is not necessarily because lesser standards are required given the specific emergency context, but because of how the underpinning rationale of urgency attends the declaration of an event as an emergency. In zones of crisis and emergency, protection and safety considerations are weighed against assumptions of immediate health benefits or knowledge to be gained. Ethics and methods are often modified to fit the local context and the need for the experiment to deliver specific types of data.[33] Rottenburg suggests that "[t]he systematic link between state of exception, intervention, sovereignty, capital and global markets implies a particular change in the global entanglements of privatized science, governance and politics addressed as experimentality or government-by-exception".[34] As noted by Petryna, the most striking feature of these experimental humanitarian interventions is their urgency, as they are framed in "terms of absolute emergency and unique exceptionality".[35]

Moreover, the emergency context changes the patterns of interaction between those being experimented on and the humanitarian actors. Central here is the lack of empowerment. Critical discussions on the problem of informed consent have a long trajectory in medical trials, in discussions about data collection and in relation to humanitarian aid more generally. Critics have noted that the scale of human suffering can produce ethically questionable forms of consent – in both

31 Kristin Bergtora Sandvik and Nathaniel A. Raymond, "Beyond the Protective Effect: Towards a Theory of Harm for Information Communication Technologies in Mass Atrocity Response", *Genocide Studies and Prevention: An International Journal*, Vol. 11, No. 1, 2017, p. 16.
32 Craig Calhoun, *The Idea of Emergency: Humanitarian Action and Global (Dis)Order*, Zone Books, New York, 2010.
33 M. Lock and V.-K. Nguyen, above note 15.
34 R. Rottenburg, above note 22.
35 *Ibid.*, pp. 423–440.

analogue and digital interventions. Put differently, humanitarian crises and emergency contexts may create a space that appears to be "ethics-free" precisely because they are disastrous and beyond the reach of regulation, and consequently, there is a risk that these contexts may be regarded as offering "access to a pool of highly endangered people".[36] In short, with the sudden suspension of normalcy, whole groups of people are at risk of being considered suitable subjects of experimentation. Thus, vulnerabilities and risks arise not only from "objective" conditions of crisis, but also from the type of permissibility, urgency and suspension of normalcy that comes with the declaration of an emergency.

Experimental innovation: New orthodoxies and new trade-offs

The increasing variety of actors operating in humanitarian contexts, notably under the auspices of humanitarian innovation (vis-à-vis their experimental tendency) and humanitarian technology, brings with it a host of attendant consequences. On a general level, technology creates new settlements with respect to how humanitarian work can legitimately be organized, the effect of technology on the distribution of resources, the way in which technology is redefining relationships, and the way in which data collection creates new vulnerabilities.[37]

The notion that "communications are an important form of aid, and can be of equal importance to survivors as food, water and shelter",[38] is a mainstay of the humanitarian technology discourse – and increasingly also of the general humanitarian discourse. According to the 2013 *World Disasters Report*, "self-organization in a digital world affords opportunities unfeasible in the analogue past. Disaster-affected populations now have greater access to information, and many of their information needs during a crisis can be met by mobile technologies."[39] In essence, these kinds of statements represent a move to see value-added information as relief in itself.[40]

Furthermore, the wholesale invitation of private-sector actors, whether through grants or public–private partnerships, may result in practical and legal issues such as the "fail fast" approach to innovation and the potential for exploitation of subjects of a differential legal status in the context of humanitarian emergency. Across the humanitarian sector, relying on public–private partnerships is the "new" orthodoxy, combining humanitarian values with private-sector efficiency and responsiveness to market conditions. The rationale for including the private sector in humanitarian action is that partners can contribute to humanitarian solutions with different expertise and resources. At first glance, the

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36 A. Petryna, above note 25.

37 K. B. Sandvik and K. Lohne, above note 10, pp. 219–242.

38 GSMA, "Key Takeaways from the UN Working Group on Emergency Telecommunications", 17 April 2014, available at: www.gsma.com/mobilefordevelopment/programme/disaster-response/key-takeaways-from-the-un-working-group-on-emergency-telecommunications, cited in K. B. Sandvik and K. Lohne, above note 10.

39 International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2013*, Geneva, 2013, cited in K. B. Sandvik and K. Lohne, above note 10.

40 K. B. Sandvik and K. Lohne, above note 10.

humanitarian sector and the private sector appear to share a set of assumptions about the competence, presence and relevance of the private sector in improving humanitarian aid. The agreement of humanitarians and private-sector actors on mutual values includes consideration of the comparative advantages of each actor. Private-sector actors are able to provide resources and outsourced quality assurances, while benefiting from the license and operational projection capacity of humanitarian actors. Humanitarians are able to provide exceptional legal status, data access and moral imperatives; in return, they receive much-needed subsidies and accept marketing narratives.[41] Nevertheless, to unpack how technology engenders new partnership settlements, it is necessary to acknowledge the heterogeneous character of these partnerships within the humanitarian sector. For private-sector partners, humanitarian contexts can serve a number of commercial purposes, including public relations, testing new products or services on populations without typical recourse, and exploiting institutional disarray to enter new markets.[42]

Within the process of testing new inventions, neither the safety of the humanitarian populations involved in these experiments nor the success of the trial itself is necessarily a main objective. Even if experiments fail, they might still produce other (commercial) benefits; valuable data and knowledge will also emerge from experimental practices that unfold in other ways than expected and with other consequences for the implicated test subjects.[43] In particular, public–private partnerships can be used to dilute professional regulations or oversight. Specifically, it is worth pointing out the implications of the different legal statuses – i.e., the private sector can use the United Nations' (UN) legal immunity to test new ideas, and the UN can use the private sector to externalize research and development without direct accountability.[44]

On a related note, the current tendency for experimental innovation calls on us to consider how ethical principles in this landscape are changing, as illustrated, for example, by the idea of "failing faster" in order to "succeed sooner".[45] As observed by Betts and Bloom, private technology businesses are encouraged to "fail fast", divesting from the success of specific approaches under

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41 The idea is that humanitarian actors have more latitude to operate – often without common requirements like local registration – than corporate actors would. They are also often (either practically or actually) indemnified – i.e. the UN, is protected from litigation based on its interventions. Public–private partnerships extend the legal status of government action and parity to the work of private sector corporations.

42 K. B. Sandvik and K. Lohne, above note 10.

43 R. Rottenburg, above note 22, in P. Redfield, above note 12.

44 Broadly speaking, in public–private partnerships, companies provide data, algorithms and talent, while international NGOs and governments provide operational authority, money, and political cover. For an illustration with regard to UNICEF's partnership with IBM in the Zika response, see UNICEF, "IBM Shares Data to Further Strengthen Efforts to Fight ZIKA", 31 July 2016, available at: unicefstories.org/2016/07/31/ibm-shares-data-to-further-strengthen-efforts-to-fight-zika/.

45 On the idea of "fail faster, succeed sooner" as a core axiom in the field of innovation, see Peter Manzo, "Fail Faster, Succeed Sooner", *Stanford Social Innovation Review*, 23 September 2008, available at: ssir.org/articles/entry/fail_faster_succeed_sooner; Patrick Love, "Fail Faster, Learn Fast and Innovate", *OECD Insights*, 10 April 2014, available at: oecdinsights.org/2014/04/10/fail-fast-learn-fast-and-innovate/.

the assumption that failure will reveal successful approaches in the long run.[46] The mantra of "fail fast, fail often and fail early"[47] can be found in the literature on humanitarian innovation, often presented without attention to trade-offs or costs,[48] or in a manner that encourages humanitarian actors to simply embrace the risks that such a commitment to "experimental innovation" entails.[49]

The inevitability and potentially instructive nature of failure are often offered as an argument against diligence and caution. The "fail fast" approach to humanitarian innovation, as with technology companies, benefits from the narrative of urgency and the distance between those responsible for failure and those who bear its costs. Here, the emphasis is on the emergent distinction between "good" and "bad" failure hinging on the degree of preceding diligence informing an intervention – predictable failure is normatively bad. Whilst learning from experimentation is important, it does not obviate critical analysis or appropriate weighting of potential harms, especially when undertaken by humanitarian actors. Both the explicit acceptance of failure and the emphasis on urgency need to be closely interrogated. As noted by one commentator, "the 'lean start-up' model of experimentation and fail fast may not be appropriate under conditions where the ethics of playing with people's lives may be at the heart".[50]

Topical examples

Conceptualizing harm as risk of failure and success

Analysis of humanitarian innovation is often based on the assumption of the functionality of the underlying intervention, which misses the larger source of harm: the distortion of the underlying system that deploys it. In what follows, three examples of humanitarian experimentation, often cited as innovations, are presented. While biometrics have reached an "established" experimental *modus* (i.e., they are firmly integrated into humanitarian activity while significant experimental attributes continue to shape how they work), the experience with

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46 Alexander Betts and Louise Bloom, *Humanitarian Innovation: The State of the Art*, OCHA, New York, 2014, citing Ryan Babineaux and John Krumboltz, *Fail Fast, Fail Often: How Losing Can Help You Win*, Penguin, New York, 2014.

47 See, for example, Hendrik Tiesinga and Remko Berkhout (eds), *Labcraft: How Innovation Labs Cultivate Change through Experimentation and Collaboration*, Labcraft Publishing, London, cited in Louise Bloom and Romy Faulkner, "Innovation Spaces: Transforming Humanitarian Practice in the United Nations", Working Paper Series No. 107, Refugee Studies Centre, 13 March 2015.

48 Steve Blank, "Why the Lean Start-Up Changes Everything", *Harvard Business Review*, Vol. 91, No. 5, 2013; Eric Ries, *The Lean Startup: How Today's Entrepreneurs Use Continuous Innovation to Create Radically Successful Businesses*, Crown Business, New York, 2011.

49 "The exploratory and uncertain nature of innovation means that some degree of 'failure' is inherent, as results will often differ from expectations. … [O]rganisations and donors will need to become less risk averse and embrace 'failing fast' in order to support adaptation and improvement." Alice Obrecht, "Separating the 'Good' Failure from the 'Bad': Three Success Criteria for Innovation", *Humanitarian Exchange*, No. 66, 2016, available at: odihpn.org/wp-content/uploads/2016/04/HE-66-Web-Final.pdf.

50 John Bessant, "Learning from the Humanitarian Innovation Laboratory", *InnovationManagement.se*, 23 August 2016, available at: www.innovationmanagement.se/2016/08/23/humanitarian-innovation-laboratory/.

Ebola health data is a recent, one-time experience; and cargo drones, while portrayed as effectively changing humanitarian aid delivery, are in fact only in a testing phase. In each case it is demonstrated how these endeavours, even where technologically functional, affect the implicated humanitarian population as well as the humanitarian organizations involved. The forms of harm that materialize come not just from the design of the innovation, but also from the way in which the innovation affects how humanitarian organizations allocate their limited resources, particularly when analyzed according to humanitarian principles and the "do no harm" imperative. More specifically, cases are examined by drawing distinctions between risks resulting from failure and risks resulting from successful experimentation, as an analytical prism.[51] This distinction between risks stemming from technology failure and risks stemming from successful uses departs from the literature, in which technology failure has been the focus. Specifically, it stresses the need to appreciate how the effect of technology success constitutes an important dimension of the range of potential risks that may emerge in the context of humanitarian experimentation.

Humanitarian experimentation in global governance: UNHCR and biometrics

In emergency contexts of different kinds, humanitarianism refers to the delivery of assistance and protection to vulnerable populations. However, a different implication of humanitarianism becomes visible when we pay attention to the risks of failure and to the risks that may stem from success, in the context of the Office of the UN High Commissioner for Refugees' (UNHCR) use of innovative biometric registration technologies (mainly fingerprint and iris scanning) in various refugee settings, notably in Africa and the Middle East. UNHCR's first "trialling" of biometric refugee registration was in 2002, when the technology was introduced as a mandatory part of a repatriation programme along the Afghan–Pakistani border.[52] Since these initial endeavours, UNHCR has deployed biometrics in more than 125 sites across the world.[53] Although these endeavours have only received very limited critical attention, various failures have occurred, including failures that have a potential to translate into humanitarian failures with undesirable consequences for the implicated refugee populations.

For example, a technical challenge was encountered in Kenya where "intermittent network failure" caused problems for the implementation of a biometrics system. The project was intended to improve the delivery of humanitarian assistance, but instead this technical failure led to "delays,

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51 For more on this analytical framework, see K. L. Jacobsen, "Experimentation in Humanitarian Locations" and *The Politics of Humanitarian Technology*, above note 2.

52 Peter Kessler, "Afghan 'Recyclers' under Scrutiny of New Technology", *UNHCR News*, 3 October 2002, available at: www.unhcr.org/cgi-bin/texis/vtx/search?page=search&skip=252&docid=3d9c57708&query=waiting%20to%20go%20home.

53 UNHCR, "UNHCR's Responses to Bidders' Requests for Clarification", February 2013, available at: www.unhcr.org/512732395.pdf.

disruption or cancellation of the food distribution in the camps".[54] Similar "logistical and technical challenges" were encountered in Malawi, where UNHCR has recently been trialling the latest version of its biometric registration system.[55] Moreover, UNHCR has been made aware of other issues, including cases where biometric failures have caused "inactivation" of refugees in the system or cases where problems have arisen due to technical failures causing "pending" status and consequently delay, which in turn has complicated refugees' access to assistance – an example of this has been documented in relation to UNHCR's use of biometrics in Kenya.[56] Additionally, it has been pointed out that technical failures, such as the risk of false matches, can translate into humanitarian failures to assist genuine refugees.[57]

UNHCR has not only experienced failures in its roll-out of biometric refugee registration; the use of iris registration has also had a number of effects that deserve attention. Firstly, UNHCR's use of iris registration resulted in the creation of "humanitarian success stories" that, in turn, buttressed further roll-out of biometric registration technologies, not only in humanitarian refugee management but also beyond. Secondly, these humanitarian technology uses – the successful capture and storage of a refugee's iris image in the form of a digitalized biometric template – contributed in important ways to making it possible to include additional dimensions of refugee existence into broader efforts aimed at managing refugee flows. To understand how these technology uses may affect refugee safety, it is imperative to appreciate the broader political context within which humanitarian uses of biometrics unfold. Indeed, striving to improve the management of refugee flows is not solely a humanitarian undertaking but also a high priority for States, whose security practices are increasingly based on a logic which associates terrorism with migration.[58] Yet, in some cases of humanitarian refugee biometrics, cross-matching of data in humanitarian and national databases was an integral part of the system design. In the Dadaab camps in Kenya, biometric refugee registration was designed in such a way that the biometric data of refugees was cross-matched against the biometric data of Kenyan nationals (who had been registered biometrically during Kenyan elections).[59] In other words, this experimental use of biometrics produced digital refugees at risk of exposure to new forms of intrusion and insecurity – risks that

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54 World Food Programme (WFP)/UNHCR, *Joint Assessment Mission – Kenya Refugee Operation, Dadaab (23–25 June 2014) and Kakuma (30 June–1 July 2014) Refugee Camps*, 2014, available at: www.unhcr.org/54d3762d3.pdf.
55 UNHCR, "UNHCR Pilots New Biometrics System in Malawi Refugee Camp", *UNHCR News*, 22 January 2014, available at: www.unhcr.org/52dfa8f79.html.
56 WFP/UNHCR, *Joint Assessment Mission – Kenya Refugee Operation: Dadaab and Kakuma Refugee Camps*, 23–27 June 2014 and 30 June–1 July 2014, pp. 51–52.
57 Gus Hosein and Carly Nyst, "Aiding Surveillance: An Exploration of How Development and Humanitarian Aid Initiatives are Enabling Surveillance in Developing Countries", Privacy International, London, September 2013, available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=2326229.
58 Georgios Karyotis, "European Migration Policy in the Aftermath of September 11: The Security–Migration Nexus" *Innovation*, Vol. 20, No. 1, 2007.
59 Safran, "Kenya: Delivering Credible Elections Using Biometric Data", available at: www.morpho.com/en/media/20150504_kenya-delivering-credible-elections-using-biometric-data.

become visible once we acknowledge how successful technology trials can also have critical implications.[60] Insofar as "safer" and more acceptable biometric technologies were produced, and to the extent that they were circulating back to metropolitan centres, a critical implication of this case of humanitarian experimentation was that these practices did not simply help protect refugees; they effectively rendered the safety of this refugee population subordinate to the production of ostensibly safe technologies, so much so that the implicated refugees in a certain sense were delivering "safety" (in the form of tested technologies) to citizens outside of these experimental humanitarian zones – not the other way around.[61]

Disaster experimentation: Big data and Ebola

The 2014 outbreak of Ebola in West Africa was not only one of the most dramatic humanitarian crises in recent memory; it was also one of the clearest examples of disaster experimentation. There are strong indications that the humanitarian community asked for access to data that was illegal for it to have, under false pretences, without a strong rationale or proof of value. This wasted significant resources, complicated coordination, and broke a wide range of laws.

There have been more than twenty outbreaks of Ebola in sub-Saharan Africa, but this one became a pandemic threat because it overwhelmed the tenuous trust relationship between the Liberian government and its people, and then spread.[62] The failed legitimacy of Liberian health institutions was the catalyst for the regionalization of the outbreak – the Liberian people, without trustworthy guidance, ignored and overran the clinics trying to contain the disease. Public- and private-sector organizations confused the lack of legitimacy as a data problem. This led academics, journalists, governments and humanitarians to push for access to mobile network operators' databases, called call detail records (CDRs), to aid the response effort.[63] CDRs are the data equivalent of fissile material, meaning they are some of the most re-identifiable, dangerous and regulated data sets in the world.[64] Humanitarians justified access by citing the need to expedite the established, analogue process of contact tracing Ebola. At the time, however, there were no tested approaches to digital contact tracing, let alone approaches specific to the Ebola virus.[65] Consequently, in the middle of a disastrous global public health emergency,

60 K. L. Jacobsen, "Experimentation in Humanitarian Locations", above note 2.
61 K. L. Jacobsen, "Making Design Safe for Citizens", above note 2.
62 This section builds on S. M. McDonald, above note 2; Jonathan Corum, "A History of Ebola in 24 Outbreaks", *New York Times*, 29 December 2014, available at: www.nytimes.com/interactive/2014/12/30/science/history-of-ebola-in-24-outbreaks.html.
63 "Ebola and Big Data: Waiting on Hold", *The Economist*, 27 October 20147, available at: www.economist.com/news/science-and-technology/21627557-mobile-phone-records-would-help-combat-ebola-epidemic-getting-look
64 Alket Cecaj, Marco Mamei and Franco Zambonelli, "Re-Identification and Information Fusion between Anonymized CDR and Social Network Data", *Journal of Ambient Intelligence and Humanized* Computing, Vol. 7, No. 1, 2016.
65 See S. M. McDonald, above note 2 – specifically, interviews with Dr Joel Selanikio, a technologist and Ebola responder, and Linus Bengtsson, the CEO of Flowminder and the person most cited in calls for CDR access.

humanitarian organizations and their subcontractors lobbied for access to some of the world's most sensitive data to build and use an untested approach to combating one of its deadliest diseases. In some places, they got it.

The response to the Ebola outbreak was one of the most digital in humanitarian history. During and in the aftermath of the outbreak, it was also presented as a digital humanitarian success story. However, the systems and standards used were significantly less proven than other important interventions, such as vaccines. There is a stark contrast between the experimentation processes used to validate the effectiveness of vaccines and predictive data models prior to deployment in a humanitarian crisis.[66] The two primary proposed uses of CDRs were (1) to coordinate response efforts, and (2) to contact trace the spread of the disease.

The Ebola response's coordination problems, however, were as much a product of politics and the role of institutions as they were about technology or data. There was no primary operational point of control, such as ministries of health, meaning that both data and resources were often uncoordinated. This was exacerbated by a host of academics, private philanthropists and technology companies that deployed interventions with much fanfare, but without humanitarian experience or partners. The digitization of the response and the use of CDRs did not result in better coordination, but drew limited attention and resources towards fixing digital problems, at the expense of responding.[67]

The calls for CDRs to contact trace Ebola were deeply flawed and did not enable responders to digitally track or predict the spread of the disease. Ebola is a haemorrhagic fever, meaning that it only passes through contact with the fluids of an infected person. While CDRs can track approximate location, they are not specific enough to demonstrate contact, meaning they cannot show transmission. That did not prevent academics, journalists and humanitarian organizations from campaigning aggressively for access to CDRs.[68] Many of these organizations also stood to gain commercially from access to CDRs, whether through competitive advantage over other humanitarian organizations or through the testing of commercial products. Even if commercial benefit was not the primary motivation, the humanitarian community's request for CDRs functionally commoditized the state of exception created by the emergency – and, given their lack of applicability to contact tracing, raises questions about the motivations behind, and the standard of care exercised before, granting those requests.

Despite this, the humanitarian innovation community continues to debate the harms of experimentation with CDRs, focusing on privacy and security. Though these are important, rights-based concerns, they are a red herring for more serious harms. The most serious harm is the diversion of scarce resources to ineffective interventions. In the

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66 Carl H. Coleman, "Control Groups on Trial: The Ethics of Testing Experimental Ebola Treatments", *Journal of Biosecurity, Biosafety and Biodefense Law*, Vol. 7, No. 1, 2016.
67 Larissa Fast and Adele Waugaman, *Fighting Ebola with Information: Digitized Data and Information Flows in the West Africa Ebola Outbreak Response*, United States Agency for International Development, available at: www.globalinnovationexchange.org/fighting-ebola-information.
68 S. M. McDonald, above note 2.

Ebola response, key organizations used different data sets – and the resulting disparate and conflicting narratives caused significant challenges. In addition, CDRs are tightly regulated data sets, and there are telecom regulations, data protection laws and tort laws that prevent their sharing. The humanitarian community likely accessed CDRs illegally, subjecting its organizations to a range of legal liabilities. CDRs are dangerous assets in the best-intentioned hands, and as a result they are targeted by companies and intelligence operations that exploit humanitarian organizations for military operations.[69] Humanitarian organizations are also subject to the humanitarian principles: humanity, neutrality, impartiality, and independence, as well as do no harm. Yet, there is a growing body of proof that public service's use of algorithms causes significant harms, and should result in accountability.[70] In order to realize both the benefits and the principled obligations of digital humanitarianism, the organizations that undertake disaster interventions will need to invest in institutional experimentation and local dispute resolution infrastructure.

Aid experimentation and commercial opportunity: Cargo drones in unregulated airspace

The third topical example focuses specifically on the testing of immature technology in the humanitarian space, in order to unlock regulatory permissions and market access in the global North. In addition to the controversies surrounding drone wars, drones are generally perceived as technologies that are subject to a range of risks, from pilot error to mechanical failure, cyber-attacks and bad weather. The result is very limited access to civil airspace. Thus, the drone industry has a significant unmet need to test and improve the technology by increasing flight hours and trial applications. The African continent's lack of infrastructure, including power lines, airspace control and commercial flights, is attractive to the drone industry. African airspace has been described as "less cluttered with flights that have slowed the adoption of commercial drones in North America and Europe".[71] Africa is also a place where drones can obtain legitimacy as a "good" technology that is cheap, effective, precise and safe.[72] Hence, as noted by the founder of drone delivery company Zipline, "it's basically inevitable that showing that this can be done safely and reliably, and that it can save thousands of lives, will rapidly increase the adoption of this kind of technology in the US".[73]

69 Glen Greenwald, "How the U.S. Spies on Medical Nonprofits and Health Defenses Worldwide", *The Intercept*, 10 August 2016, available at: https://theintercept.com/2016/08/10/how-the-u-s-spies-on-medical-nonprofits-and-health-defenses-worldwide/.

70 Julia Angwin, "Make Algorithms Accountable", *New York Times*, 1 August 2016, available at: www.nytimes.com/2016/08/01/opinion/make-algorithms-accountable.html.

71 David Lagesse, "If Drones Make You Nervous, Think of Them as Flying Donkeys", *National Public Radio*, 31 March 2015, available at: www.npr.org/sections/goatsandsoda/2015/03/31/395316686/if-drones-make-you-nervous-think-of-them-as-flying-donkeys, cited in K. B. Sandvik, above note 30.

72 K. B. Sandvik, above note 30.

73 Amar Toor, "This Startup is Using Drones to Deliver Medicine in Rwanda: Zipline Will Begin Delivering Blood and Drugs across the Country in July", *The* Verge, 5 April 2016, available at: www.theverge.com/2016/4/5/11367274/zipline-drone-delivery-rwanda-medicine-blood.

The debates about drones in humanitarian work have so far revolved around monitoring, data collection and the volunteer tech communities. In a relatively new development, humanitarian logistics/supply chain management communities, the aviation industry and drone start-ups have been discussing and testing how cargo drones can help bridge the last mile to bring blood supplies and HIV diagnostic kits to suffering African populations in countries like Lesotho, Malawi and Rwanda. According to their promoters, the numbers of deaths cargo drones could help to prevent are staggering, making the cost of inaction morally unacceptable. For instance, according to the UN International Children's Emergency Fund, about 10,000 children died from HIV-related diseases in Malawi in 2014,[74] and less than half of them were receiving medical treatment. Drones could be a "breakthrough" in overcoming transport problems.[75]

Of particular concern is the fact that the threshold for flying over densely populated areas appears to be low. Matternet, a drone delivery start-up, has tested a project in Maseru, Lesotho. Matternet's drones delivered blood samples from clinics to hospitals, where they could be analyzed for HIV/AIDS. The planning phases of this testing were very short. When testing their drones in Lilongwe, Malawi, the company worked for a week to acclimate the drones to the new geography and make sure they could fly safely over densely populated areas, swiftly followed by the first official test launch the following week. In a different field test in Papua New Guinea, in order to enhance its ability to overcome the geographical and logistical challenges hampering its ability to deal with multi-drug-resistant tuberculosis, Médecins Sans Frontières ran a trial with Matternet in 2014. The test faced significant technological constraints – while the use of drones was effective with respect to time saved in contrast to ground transport and promising in terms of local community support, two out of six prototypes were lost, and there were significant challenges with respect to the human action required for battery swapping and the relatively short maximum range (28 kilometres) of the drone.[76]

This use of cargo drones has received significant and generally uncritical media attention – as if drones were already solving humanitarian problems. However, most cargo drone models under development are still prototypes, and pilot projects are currently limited to lightweight, high-value goods.[77] Here, it is noted that the evolving use of smaller cargo drones – based on pilots and test cases – exemplifies a disconnect between the process of invention and the application of the invention, in which the potential harms of a technology are

74 Aditya Bhat, "How these Drones in Malawi Will Save Lives of Children with HIV", *International Business Times*, 28 December 2016, available at: www.ibtimes.co.in/how-these-drones-malawi-will-save-lives-children-hiv-710178.

75 Geoffrey York, "Drones Enter Africa's Fight against HIV", *Globe and Mail*, 14 March 2016, available at: www.theglobeandmail.com/news/world/malawi-looks-to-use-drones-to-slash-wait-times-for-hiv-diagnosis/article29214675/.

76 Swiss Foundation for Mine Action (FSD), *Case Study No. 2: Delivery – Using Drones for Medical Payload Delivery in Papua New Guinea*, Geneva, 2016. Also see: www.youtube.com/watch?v=XpsGay6n8cM.

77 FSD, *Drones in Humanitarian Action*, Geneva, 2016, available at: http://drones.fsd.ch/en/drones-in-humanitarian-action/.

assessed in the abstract instead of in context. This disconnect is made possible and justified by reference to the "inherent" attributes of Africa: human suffering, lack of infrastructure and the imperative to find solutions. Having the application of an immature product like cargo drones so directly implicated in the invention process raises a number of questions about safety, security and responsibility. Many of the same dilemmas that surround the use of humanitarian drones for data collection are present with respect to cargo drones (which most often also have a camera). This includes the surveillance aspect, questions about the legality and purpose of data collection and its ownership, and challenges regarding the secure storage and appropriate sharing of data. At the same time, the cargo drone engenders an additional harm matrix: human biological material counts as personal data. Thus, losing biological material both destroys the possibility for treatment and compromises personal data. With respect to this, direct harm can ensue from a drone falling from the sky due to technological or human failure, caused by the drone itself or its cargo. Distributive harm can also ensue, when aid is not getting delivered (i.e., is lost or destroyed) or delivered late.

At this relatively early stage, however, there are also risks emerging from the "success" of cargo drone promotion, in the sense that the *modus operandi* of the experimental phase compromises some of the more fundamental tenets of responsibility, accountability and credibility of the humanitarian enterprise. The assertion that "Africa needs drones more than roads"[78] (because drones are cheaper, more environmentally friendly, or crash less than cars), a line of argumentation repeatedly offered by actors developing and selling cargo drones, is problematic.[79] By foregrounding the moral choice between saving lives and doing nothing, the trade-off between safety and risk acceptance becomes hidden. Similarly, comparing the cost of drones to the cost of building road networks risks obscuring resource prioritization processes.

A taxonomy of potential harms

Underlying trends and the risk of harm

As noted in examples above, experimental innovation in the testing and application of new technologies and practices in humanitarian contexts can underpin unethical, illegal and ineffective trends that result in increased vulnerability and harm for the implicated humanitarian subjects, and potentially also for the implicated humanitarian actors. These consequences can be direct or indirect. Risk can result from both the failure and the success of such experiments. The examples described above illustrate a host of experimental harms, from the privacy violation of collecting personally identifiable information, to commercial gains

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78 Rachel Feltman, "Making the Case that Africa Needs Drones more than Roads", *Quartz*, 16 March 2014, available at: qz.com/188112/making-the-case-that-africa-needs-drones-more-thanroads/.
79 See K. B. Sandvik, above note 30.

obtained from suspending restrictions on testing technology products on people, to the distribution of resources in ways that serve technologies or private-sector actors over the needs of populations in these unregulated contexts.

Biometric procedures can be set up in a way that violates international refugee and human rights law. The collection of personal identifiable information without consent is almost always illegal, and doing so often requires the extraordinary exertion of government powers. Cargo drones can be operationally ineffective, represent a wasteful use of available resources and potentially introduce a host of new, unplanned-for challenges with respect to personal data. The abuse of data rights causes direct harm not only for the people humanitarians serve, but also for humanitarian organizations, including loss of legitimacy and reputational damage, failure of operations, or litigation. It is, of course, also a loss for humanitarian organizations when, in the worst-case scenario, these practices of experimental innovation result in harm to beneficiaries. The examples above, however, are singular harms, which are exacerbated by their relationship to larger, underlying trends in humanitarian aid.

The adoption of humanitarian innovation and experimentation processes necessitates an articulation of the harms that emanate from their misuse. The harms created by humanitarian experimentation, however, are deeply contextual, and difficult to predict. The concrete examples and trends that have been explored above are intended as illustrative as opposed to comprehensive, and highlight the potential consequences of experimental practices in humanitarian contexts. Acknowledging that all interventions into contexts defined as emergencies involve some degree of uncertainty, a taxonomy intended to help humanitarian organizations recognize and frame their practices of innovation in ethically responsible ways is outlined here. Borrowing from the security community's best practices, this taxonomy is an effort to outline a threat modelling exercise. As a result, two tiers of harm taxonomy are presented: the risk of harm to humanitarian subjects and the risk of harm to humanitarian organizations. At a practical level, we emphasize a taxonomy of harm that weighs the organizational use of experimental innovation in humanitarian contexts against the potential to result in the following harms: (1) distribution of harm, (2) resource scarcity, and (3) legal liability and reputational damage.

Distribution of harm: Ethical variability in humanitarian space

When humanitarian organizations build systems to distribute relief, they implicitly influence the distribution of harm. According to humanitarian principles, this distribution is necessarily driven by need. However, digitization highlights more clearly than ever before how politicization and relationships of power shape mechanisms for need assessment and evaluation. Power relationships are crucial in the humanitarian domain broadly speaking – and are so too in relation to practices of experimental humanitarian innovation. Such practices may, for example, reinforce a specific distribution of security/insecurity by implicitly enacting assumptions about humanitarian subjects as "fit" for more experimental

practices of innovation than would be found acceptable outside of these humanitarian contexts. Humanitarian innovations unevenly distribute harm, not only by favouring those that are prioritized by a technology's assumptions, but also by exposing recipients of humanitarian assistance to the new harms posed by the underlying innovation itself.

Here it is useful to refer to the notion of "ethical variability", a concept known from discussions on the globalization of medical trials. According to Petryna, ethical variability is one of several modes assisting pharmaceutical sponsors in mobilizing much larger populations of human subjects, and in doing so much more quickly. Ethical variability refers to how international ethical guidelines (informed by principles and guidelines for research involving human subjects) are being recast – with standards lowered and the interest matrix shifted – as trials for global research subjects are organized.[80] So too is it paramount to acknowledge how ethical guidelines are being recast in the context of digital innovation in the name of making humanitarianism fit for purpose in an era of digital technology.[81] Even in the absence of ill intentions or negligence, the collection and use of sensitive data creates practical dynamics that inherently question, if not violate, humanitarian principles and the imperative to do no harm.[82]

Thus, humanitarian actors need to understand the linkage between datafication and harm distribution. The risks are not simply the failure of the technology, but the way that such failure limits or harms access to vital resources, such as humanitarian assistance. Another new type of insecurity emerges in the context of this experimental datafication endeavour: the risk that the digitized data may be used in ways that do not necessarily buttress the safety of recipients of aid and protection. How are beneficiaries informed about how personal data is handled, and with whom and for what purposes it will be shared? Whereas the humanitarian technology and innovation agenda sees data as inherently empowering, this notion stands in contrast to the outcome-oriented analysis of the World Bank's 2016 *Digital Dividends* report, which points to stark inequalities emerging as a direct effect of information technology and its use in humanitarian and development systems.[83] At the outset, it seems important to investigate whether information is necessary, versus sufficient, to achieve the desired impact of a humanitarian intervention in which it is treated as an end. In addition, it is clear that information distribution itself is uneven, and as the World Bank reports, it often becomes a source of inequality – in violation of core humanitarian principles. This inequality is not limited to beneficiaries; access to data shapes political, financial, and organizational dynamics as well, which is increasingly important as key elements of response efforts privatize.

80   A. Petryna, above note 25.
81   See Matthew Hunt *et al.*, "Ethics of Emergent Information and Communication Technology Applications in Humanitarian Medical Assistance", *International Health*, Vol. 8, No. 4, 2016.
82   K. B. Sandvik *et al.*, above note 2.
83   World Bank, *World Development Report 2016: Digital Dividends*, 2016, available at: www.worldbank.org/en/publication/wdr2016.

Resources distribution and scarcity considerations

Additionally, increased attention must be paid to a more fundamental shift that is afoot. As it was argued in the three case examples above, contemporary humanitarian experimentation is increasingly extractive. Consequently, there is a need to draw attention to the range of consequences resulting from how the humanitarian sector now sees data as both a means and an end of relief, in programming and policy terms. The humanitarian community's willingness to include commercial application and acquired data as impact metrics is a derogation of its traditional priorities, and a distraction from critical analysis of positive beneficiary impact. Attention must be paid not only to how humanitarian technology shapes perceptions of what counts as resources, but also to the method of distribution of those resources, in terms of factors that determine access, distribution rights, prioritization of resources and the transparency of the underlying reasoning.[84]

Resources are notoriously scarce during a humanitarian crisis, meaning that specific practices of humanitarian assistance should be evaluated not only against their individual likelihood of success, but also against their potential impact relative to other forms of humanitarian assistance. The resource analysis for humanitarian organizations engaging in innovation should define their desired impact, along with clear indicators, and show proof of an intervention's prior impact, whether from experimentation or deployment, as a weighting factor to evaluate their resource allocation. As described above, the potential for harm increases significantly when experimental methodologies influence the execution of humanitarian assistance – both in terms of efficiency and distribution.

Circling back to the historically situated account of humanitarian experimentation, it is here suggested that the current tendency for humanitarian innovation to be experimental represents an evolution, not only of what is being "tested" but also of who is doing the testing, the motivations for that testing, and the funding involved. In a growing number of crisis situations, resource scarcity is driving humanitarian organizations to partner with private-sector actors – a practice that combines the extraordinary operational license afforded to humanitarian organizations and the exceptional freedom given to the private sector to commercially trial unregulated technologies. In effect, however, these partnerships give the least tested interventions the greatest license to operate in contexts where the population has the least recourse. These partnerships bear significantly more legal, operational and principled scrutiny than they currently receive.

Hence, this paper draws attention not only to the operational role of humanitarian experimentation, but also to the underlying shifts in the character of humanitarianism: from physical to digital interventions, from public and non-profit actors to hybridized commercial implementations, and from government to private funding. More specifically, the emphasis must be on the range of consequences resulting from how the humanitarian sector now sees data as both

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84 K. B. Sandvik *et al.*, above note 2.

a means and an end of relief in programming and policy terms. This includes giving attention to the ever-changing assemblage of actors (an expanding humanitarian field, including increasing public–private partnerships and a growing humanitarian innovation field) as well as changing funding sources and financing models (a growing acceptance of profit motive, and a move away from public money through global philanthropy, venture capital and crowd-funding). Attention to such changes is important since they contribute in significant ways to shaping where and how humanitarian experimentation is taking place, and who is doing it.

Legal liability and reputational damage

Although emergencies are exceptional circumstances, they are not free from the rule of law – including the laws that regulate and protect the subjects of human experimentation. Humanitarian organizations, while operating with good intentions, often subject themselves to liability through innovation by overestimating how proven interventions are, underestimating the harms they may cause, and failing to engage in the bodies that regulate human experimentation. Currently, such regulatory needs are not a routine element of the laws that govern the specifics of an effort. Humanitarian organizations are increasingly held legally accountable for the intentional and unintentional consequences of their work. For many humanitarian organizations, legal liability, particularly in emerging areas of practice, can be difficult to decipher. Nevertheless, impact analysis is now a basic precondition for large-scale implementation of nearly every type of intervention. It is incumbent on humanitarian organizations to conduct a legal impact analysis, for both success and failure, of experimental and innovative interventions.

Finally, for their license to operate, humanitarian organizations uniquely rely on popular perceptions of their intentions, necessity and effectiveness. Where humanitarian experimentation results in the deployment of invalidated methodologies that undermine those perceptions, it risks both the individual integrity of the organization and future acceptance of the collective efforts of the international community. Humanitarian innovation initiatives require a clear articulation of the evidence base that underlies an intervention and a consideration of its potential effect on perceptions of the response effort.

Measuring against humanitarian imperatives and principles

Humanitarian organizations rely on their conformity with internationally approved principles for their license to operate in politically complex environments. It is argued here that humanitarian principles are a useful framework for understanding the practical considerations listed above, and that each weighted factor should include derogation of the core humanitarian principles as a potential source of harm. The focus here is on the core humanitarian imperatives and principles: (1) do no harm, (2) humanity, (3) neutrality, (4) impartiality and (5) independence.

- The principle of do no harm compels humanitarian organizations to define and evaluate the potential of an intervention to cause harm, and proof of impact is a necessary component of that analysis. It is difficult to prove that an untested, experimental intervention will not cause absolute or relative harm, but the onus of proof is on the implementing humanitarian organization, and should be a required component of any publicly funded intervention.
- The principle of humanity aligns particularly with the practical consideration of resource scarcity, in that it requires the prioritization of alleviating human suffering and preserving dignity. Humanitarian experimentation, in order to appeal to the principle of humanity, implies a need for both assessment of relative impact on human suffering and, uniquely, a need for mechanisms that give the affected a meaningful ability to hold implementers to account.
- The principles of neutrality and impartiality, though distinct, combine to highlight the importance of transparency in core components of humanitarian experimentation, including the priorities of needs assessment, the selection criteria for interventions, and the predictable outcomes or impact of using an intervention. For example, if a humanitarian organization is considering employing biometrics to coordinate relief distribution in ways that disproportionately benefit, explicitly or implicitly, a specific group, it is likely in violation of both principles.
- The principle of independence, in addition to the impact analysis, also invokes an analysis of motivation that includes economic, political and military benefit – an analysis that digitization and privatization make substantially more complicated. The increasing role of private-sector actors – particularly in supporting the deployment of experimental approaches to humanitarian crises – increases the necessity of performing beneficial ownership analyses of proposed interventions, in order to preserve perceptions of independence. Even with such an analysis, the digitization of interventions invites technical and infrastructure vulnerabilities that make it nearly impossible to definitively prevent the intrusion of domestic and extranational militaries, or the harm that may result from their access to sensitive data. Like do no harm, however, the principle of independence should be used by organizations to understand a type of potential harm and take mitigating steps.

Conclusion: The need for an ethics of humanitarian experimentation?

The examples discussed here raise critical questions about the construction of digital bodies, the collection of personal, identifiable information, and the turn to immature technologies to improve aid delivery in unregulated or under-regulated airspace.

This article has argued for a recognition of the fact that experimentation is taking place, and that some of this practice stands in tension with humanitarian principles and imperatives. Neither technology nor the act of producing technology are neutral. The decision to experiment and the design of experiments are deeply political acts shaping the humanitarian space. As has been emphasized,

it is imperative to place these practices – these humanitarian technology uses – in relation to an important, albeit commonly disregarded, history of humanitarian experimentation, notably in the field of medicine. As the three examples of biometrics, data modelling and cargo drone aid demonstrate, humanitarian uses of such technologies in the name of humanitarian innovation may engender a range of possible vulnerabilities and harms. Exposing already vulnerable subjects to technologies that may cause them harm conflicts with general moral values as well as with humanitarian principles. It is of course particularly disturbing when humanitarian actors, whose stated aim is to assist vulnerable subjects, can be seen to reinforce underlying hierarchies and perceptions of humanitarian subjects as suitable test subjects.

This article has focused on fleshing out a taxonomy of the challenges and potential harms of humanitarian experimentation, with particular attention to the vulnerabilities and harms that experimentation may engender, and how we can begin a structured conversation about these harms. As highlighted above, the examples offered in this article merely highlight some of the potential consequences of experimental interventions in humanitarian action, and as such, they are intended as illustrative rather than comprehensive. To suggest that humanitarians should recognize what they are doing and that certain standards and requirements should be defined is, however, not to be seen as a replacement for the need to revisit crucial issues concerning the constitution of humanitarian problems as technology-solvable, as well as more fundamental issues such as the contribution of humanitarian practices to the reinforcement (rather than critique) of hierarchies that in turn makes it possible to think of certain subjects as "suitable" subjects of experimentation. Adding to this, it is important to emphasize that an important limitation of this "do no harm" approach – which early critics of Mary Anderson's "do no harm" approach have also highlighted – is that it may lend itself to an interpretation in which "the minimization of harm" is seen as "little more than a tactical question".[85] Indeed, the need to address the issue of harmful effect stemming from current practices of humanitarian experimentation should not be reduced to "little more than a technical question".

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85   David Campbell, "Why Fight? Humanitarianism, Principles and Poststructuralism", *Millennium: Journal of International Studies*, Vol. 27, No. 3, 1998, p. 500.

REPORTS AND DOCUMENTS

Note on migration and the principle of *non-refoulement*
ICRC, 2018

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Migration is a global phenomenon that has an impact worldwide. Various factors have contributed to a growing complexity of patterns of mobility: large numbers of people leave, or are forced to leave, their countries of origin; some States have hardened their migration policies, introducing measures intended to prevent and deter foreign nationals from arriving on their territory and submitting asylum claims; and on their routes, migrants regularly have to cross or circumvent armed conflicts, gang violence or collapsing States. Migration movements often include persons who are in need of international protection and others who are not. In light of such "mixed movements", much of the current migration discourse and policies focus on the need to distinguish between "voluntary" migrants on the one hand and "forced" migrants, especially refugees, on the other. In reality, however, this distinction is not clear-cut. In particular, persons who are not considered to be refugees may still be in need of assistance and protection, including against *refoulement*. As a result, the International Committee of the Red Cross (ICRC) uses a broad description of "migrants" that focuses on their vulnerabilities rather than on their legal status. This being said, it is important to recall that while a number of international legal protections must be afforded to all migrants, others – in particular refugee status or subsidiary forms of protection – depend on the treaty obligations and/or domestic law of the State having jurisdiction and on the individual's particular circumstances.

Importantly, although States have the right to regulate migration and to return migrants from their territory if they are deemed irregular, this right is not absolute. Any decision to return an individual migrant must be exercised within

the limits established by domestic and international law, including the principle of *non-refoulement*.

This note recalls the legal basis of the principle of *non-refoulement* in different bodies of international law and presents how certain aspects of the principle have been interpreted by States, courts, human rights treaty bodies, or expert organizations. The note also explains – where relevant – which understanding of the principle of *non-refoulement* the ICRC follows in its dialogue with States.

What is *non-refoulement*?

The principle of *non-refoulement* prohibits the transfer of a person from one authority to another when there are substantial grounds for believing that the person would be in danger of being subjected to violations of certain fundamental rights.[1] This is in particular recognized where there is a risk of torture and other forms of ill-treatment, arbitrary deprivation of life, or persecution on account of race, religion, nationality, membership of a particular social group or political opinion, though it might cover a number of other grounds depending upon the treaties ratified by the States concerned.

The principle of *non-refoulement* is found expressly in international humanitarian law (IHL), international refugee law and international human rights law (IHRL), though with different scopes and conditions of application for each of these bodies of law. In the ICRC's view, the core of the principle of *non-refoulement* has also become customary international law.[2]

The principle of *non-refoulement* prohibits the transfer of individuals irrespective of whether the danger of fundamental rights violations emanates from State or non-State actors. If non-State actors are at the source of such danger, it has to be shown that the authorities in the State of return "were unable

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1   For the purpose of this note, the word "transfer" refers to any act by which jurisdiction or control over an individual changes from one authority to another (including returns, expulsions, extraditions, deportations or similar acts, irrespective of their denomination).

2   See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), para. 709. See also Office of the United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2007, paras 15, 21; Court of Final Appeal of the Hong Kong Special Administrative Region, *Case of C, KMF, BF and Director of Immigration/ Secretary for Security*, FACV 18, 19 & 20/2011, Intervenor's Case, 31 January 2013, paras 28–71; Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*: Opinion", in Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, pp. 87–177. Some States, however, seem to disagree with that conclusion or consider themselves as persistent objectors on some aspects (i.e., not bound by the customary norm). See, for instance, James C. Hathaway, "Leveraging Asylum", *Texas International Law Journal*, Vol. 45, No. 3, 2010.

or unwilling to protect" the person.[3] In such cases in particular, the question might arise as to whether an internal flight or relocation alternative exists that may be taken into consideration in the *non-refoulement* assessment.[4]

Grounds for preventing transfer under the principle of *non-refoulement*

Under refugee law, the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) and its 1967 Protocol prohibit the return of refugees and asylum-seekers to territories where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion (i.e., in case of persecution).[5] Similar norms exist in regional binding or non-binding instruments,[6] some of which have a broader scope and include risks due to events seriously disturbing public order (which would cover armed conflicts; see below). This prohibition applies to refugees or asylum-seekers, regardless of whether their status has been formally recognized. Under refugee law, the principle of *non-refoulement* is subject to exception when a refugee constitutes a danger to the security of the country in which the person is, or if she or he has been convicted of a particularly serious crime.[7] As a limitation

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3   See United Nations (UN) Human Rights Committee, *Dawood Khan v. Canada*, Decision, Communication No. 1302/2004, 10 August 2006, para. 5.6; Committee on the Rights of the Child, General Comment No. 6 (2005), UN Doc. CRC/GC/2005/6, 1 September 2005, para. 27; UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions*, UN Doc. HCR/GIP/16/12, 2 December 2016 (UNHCR Guidelines on International Protection No. 12), para. 30; European Court of Human Rights (ECtHR), *Case of Salah Sheekh v. The Netherlands*, Application No. 1948/04, Judgment, 23 May 2007, para. 137; European Union (EU), Directive 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), 13 September 2011 (EU Qualification Directive), Art. 6 (c); see also, in a more limited manner, Committee against Torture, General Comment No. 2, "Implementation of Article 2 by States Parties", UN Doc. CAT/C/GC/2, 24 January 2008, para. 18.
4   See, for instance, UNHCR Guidelines on International Protection No. 12, above note 3, paras 40–43; EU Qualification Directive, above note 3, Art. 8; ECtHR, *Salah Sheekh v. The Netherlands*, Application No. 1948/04, Judgment, 11 January 2007, para. 141. For further discussions, see the section "Where and When Does the Principle of *Non-Refoulement* Apply?", below.
5   Convention relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entered into force 22 April 1954) (1951 Refugee Convention), Art. 33; Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967).
6   Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, 10 September 1969 (entered into force 20 June 1974), Art. II(3); American Convention on Human Rights, 22 November 1969 (entered into force 18 July 1978), Art. 22(8); Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984 (Cartagena Declaration), Art. III(3); Bangkok Principles on the Status and Treatment of Refugees (Bangkok Principles), 24 June 2001, Art. III(1).
7   1951 Refugee Convention, Art. 33(2).

to the general rule, however, this exception needs to be interpreted narrowly.[8] Moreover, contrary to refugee law, the principle of *non-refoulement* under IHRL allows no exception or derogation and is afforded to every individual, irrespective of his or her legal status. This means that even if a person could be returned in accordance with refugee law, IHRL may still prohibit the transfer.

Refoulement is prohibited under human rights law on a number of grounds. The strongest protections exist in cases of danger of being subjected to torture (found expressly in the Convention against Torture), cruel, inhuman or degrading treatment or punishment, and arbitrary deprivation of life (found expressly in regional IHRL instruments).[9] The United Nations (UN) Human Rights Committee and the European Court of Human Rights (ECtHR) have considered that *non-refoulement* is an integral component of the protection against torture or other forms of cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life even when it is not expressly mentioned in the relevant treaty,[10] and the UN Sub-Commission on the Promotion and Protection of Human Rights asserted that it is customary with regard to these grounds.[11] Furthermore, several international and regional instruments, regional courts and treaty bodies extend the prohibition against return to other grounds, including the risk of enforced disappearance,[12] the death penalty,[13] being tried by a special or *ad hoc* court,[14] flagrant denial of justice,[15] or

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8   See Andreas Zimmermann and Philipp Wennholz, "Article 33 (2)", in Andreas Zimmermann (ed.), *The 1951 Convention on the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, Oxford, 2011, para. 2.

9   Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984, Art. 3; Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series No. 67, 9 December 1985 (entered into force 28 February 1987), Art. 13(4); Charter of Fundamental Rights of the European Union, 2000/C 364/01, 18 December 2000, Art. 19(2).

10 UN Human Rights Committee, General Comment No. 20 on Article 7, 10 March 1992, para. 9; UN Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12; ECtHR, *Soering v. United Kingdom*, Application No. 14038/88, Judgment, 7 July 1989, paras 88–91.

11 UN Sub-Commission on the Promotion and Protection of Human Rights, Res. 2005/12, "Transfer of Persons", UN Doc. E/CN.4/2006/2, 12 August 2005, p. 25, para. 3.

12 International Convention for the Protection of All Persons from Enforced Disappearance, 2006, Art. 16 (1); furthermore, the Human Rights Committee considers enforced disappearance as an act of torture or cruel, inhuman and degrading treatment (see Human Rights Committee, *Grioua v. Algeria*, Communication No. 1327/2004, UN Doc. CCPR/C/90/D/1327/2004, 16 August 2007, paras 7.6, 7.7, and references therein), which would include the risk of enforced disappearance under the prohibition of transfer in case of risk of torture or other forms of ill-treatment.

13 Transferring an individual to a State where s/he faces a real risk of being sentenced to death is prohibited if (a) the transferring State has itself abolished the death penalty, or (b) there is a real risk of being sentenced to death following an unfair trial. See UN Human Rights Committee, *Kwok Yin Fong v. Australia*, UN Doc. CCPR/C/97/D/1442/2005, 23 November 2009, paras 9.4, 9.7. See also ECtHR, *Al-Saadoon v. United Kingdom*, Application No. 61498/08, Judgment, 2 March 2010, para. 137.

14 Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series, 9 December 1985 (entered into force 28 February 1987), Art. 13(4).

15 ECtHR, *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, Judgment, 17 January 2012, para. 258, with references therein; see also UN Sub-Commission on the Promotion and Protection of Human Rights, above note 11, p. 26, op. para. 8.

underage recruitment and participation in hostilities.[16] Some regional courts have also held that serious illness may give rise to a prohibition against returning a person in exceptional cases if the return would lead to "a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy".[17] As a result, the ICRC is conscious that whether or not some of the above-mentioned grounds apply depends on the ratification of the relevant treaties by the State concerned.

IHL contains robust prohibitions against transfers of detainees or protected persons that would violate the principle of *non-refoulement* in times of international armed conflict.[18] In the ICRC's view, in non-international armed conflicts the fundamental protections contained in Article 3 common to the four Geneva Conventions are to be understood as prohibiting parties to the conflict from transferring persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights upon transfer.[19] *Non-refoulement* under IHL applies only in situations of armed conflict. While the principle of *non-refoulement* under IHL may, in certain circumstances, also be relevant in the migration context,[20] it will not be further discussed in this note, which focuses primarily on international refugee and human rights law.[21]

The principle of *non-refoulement* also includes the prohibition against transferring a person to an authority where there is a risk that the receiving authority would transfer the person to another authority in violation of the principle of *non-refoulement* (also called secondary, indirect or chain *refoulement*).[22]

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16 See UN Committee on the Rights of the Child, General Comment No. 6 (2005), above note 3, para. 28, which provides that in view of the high risk of irreparable harm involving fundamental human rights, including the right to life, States should not return children 'where there is a real risk of under-age recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties'.

17 ECtHR, *Case of Paposhvili v. Belgium*, Application no. 41738/10, Judgment, 13 December 2016, para. 183; ECtHR, *N. v. United Kingdom*, Judgment, Application No 26565/05, 27 May 2008, para. 42; see also Inter-American Court of Human Rights, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Ser. A, No. 21, 19 August 2014, para. 229.

18 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 12; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 45(3)–(4).

19 ICRC Commentary on GC I, above note 2, para. 708.

20 See, in particular, GC IV, Art. 45(4).

21 For a more comprehensive discussions of the ICRC's view on the *refoulement* prohibition in non-international armed conflict, see ICRC Commentary on GC I, above note 2, paras 708–718. For general discussions of detainee transfers in times of armed conflict, see Cordula Droege, "Transfers of Detainees: Legal Framework, *Non-Refoulement* and Contemporary Challenges", *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, p. 675; Laurent Gisel, "The Principle of *Non-Refoulement* in Relation to Transfers", in *Detention in Armed Conflicts: Proceedings of the Bruges Colloquium*, 2015, pp. 113 ff, 117–120. Regarding the question of how IHL protects migrants, see Helen Obregón Gieseken, "The Protection of Migrants under International Humanitarian Law", in this issue of the *Review*.

22 UN Human Rights Committee, General Comment No. 31, above note 10, para. 12; Committee against Torture, General Comment No. 1, "Implementation of Article 3 of the Convention in the Context of Article 22", UN Doc. A/53/44, Annex IX, 21 November 1997, paras 2, 3; ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment, 23 February 2012, para. 147. See also C. Droege, above note 21, p. 677.

Transfers to places affected by armed conflict

There has been some debate as to whether the principle of *non-refoulement* protects individuals from being transferred to places affected by "generalized" or "indiscriminate" violence,[23] including countries affected by armed conflicts. In principle, the mere fact that a person fled a territory affected by armed conflict, or fled indiscriminate or generalized violence, does not alter the assessment of whether that person qualifies as a refugee under the 1951 Refugee Convention or falls within the scope of the *refoulement* prohibition under IHRL: the assessment has to be made based on the established criteria under each body of law.[24] Some human rights instruments emphasize that "a consistent pattern of gross, flagrant or mass violations of human rights" or of "serious violations of international humanitarian law" has to be taken into account in the *non-refoulement* assessment.[25] Moreover, in times of armed conflict, entire groups or communities may be at risk of persecution based on a discriminatory ground or systematically threatened with or exposed to fundamental human rights violations, and therefore entitled to international protection.[26] At the same time, the ICRC recognizes that not every person fleeing an armed conflict has a well-founded fear of persecution on account of one of the grounds recognized in the 1951 Refugee Convention,[27] or can be said to face a real risk of fundamental human rights violations as required for a *non-refoulement* claim under IHRL.[28] Yet, the ICRC notes that the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees, which was developed in the Central and Southern American context, include a rather broad scope of persons protected against *non-refoulement*. In addition to the *non-refoulement* prohibition in the 1951 Refugee Convention, these instruments

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23   For explanations of the terms "generalized" or "indiscriminate" violence, see UNHCR Guidelines on International Protection No. 12, above note 3, paras 71–73 (generalized violence) and fn. 17 (indiscriminate violence).

24   State practice has varied on whether persons fleeing armed conflict need to show a risk of persecution over and above that of other persons fleeing the same context. However, neither the wording, context or object and purpose of the 1951 Refugee Convention seem to support a "differential risk" requirement regarding persons fleeing armed conflict. See discussion of pertinent State practice in Andreas Zimmermann and Claudia Mahler, "Art. 1 A para. 2", in A. Zimmermann (ed.), above note 8, paras 315–318. For further analysis, see UNHCR Guidelines on International Protection No. 12, above note 3, paras 22–23; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, Oxford University Press, Oxford, 2007, pp. 126–128.

25   Article 16(2) of the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006 (entered into force 23 December 2010) refers to both situations; Article 3(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment refers to the former.

26   See A. Zimmermann and C. Mahler, above note 24, paras 311–313; UNHCR Guidelines on International Protection No. 12, above note 3, paras 17–18; ECtHR, *Case of N. A. v. The United Kingdom*, Application No. 25904/07, Judgement, 17 July 2008, para. 116.

27   UNHCR stresses, however, that in its experience, "the targeting of individuals, as well as whole areas and populations, often has ethnic, religious and/or political purposes and links". UNHCR Guidelines on International Protection No. 12, above note 3, para. 33.

28   See ECtHR, *N. A. v. UK*, above note 26, paras 114–115; ECtHR, *S. K. v. Russia*, Application No. 52722/15, Judgment, 14 February 2017, para. 55.

recognize a prohibition against returning persons who fled contexts in which threats might be less individualized but more situational, such as armed conflicts or other situations seriously disturbing public order.[29] In the EU context, "civilians" not qualifying as refugees are entitled to "subsidiary protection" if they face a "serious and individual threat to … life or person by reason of indiscriminate violence in situations of international or internal armed conflict", which includes protection against *refoulement*.[30] The ECtHR has recognized a prohibition against returning individuals to "the most extreme cases of general violence, where there is a real risk of ill-treatment [or violations of the right to life] simply by virtue of an individual being exposed to such violence on return".[31]

In different contexts, States have considered returning individuals to countries affected by armed conflict when the conflict had evolved and parts of the State were considered "safe". The ICRC supports the view that such internal flight or relocation alternatives can only be deemed to exist if it is legally and practically possible for the individual to safely access the "safe" area and if it would be reasonable, meaning not unduly harsh, for the person to stay there. At the very least, the individual would need to be effectively protected from those dangers of fundamental rights violations that forced the person to flee and justified his/her initial *non-refoulement* claim, or other ones that would justify a *non-refoulement* claim. It has been further argued that an internal flight alternative is only reasonable if the person can lead a relatively normal life in the new location.[32] In this respect, in States affected by armed conflict, the possibility of returning persons to certain parts of such a State may exist if the conflict only

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29 The Cartagena Declaration is legally non-binding, but it has informed the legislation and practice of Central and South American States. See UNHCR Guidelines on International Protection No. 12, above note 3, para. 63.

30 EU Qualification Directive, above note 3, Art. 15(c). In order to establish an individual threat, the provision has been interpreted as requiring such a high level of indiscriminate violence that every civilian would face a real risk of suffering serious harm "solely on account of his presence on the territory". European Court of Justice, *Elgafaji v. Staatssecretaris van Justitie*, Case No. C-465/07, 17 February 2009, para. 35. If a person is granted "subsidiary protection" under the EU Qualification Directive, Article 21 of the Directive reiterates: "Member States shall respect the principle of non-refoulement in accordance with their international obligations." In this respect, the jurisprudence of the ECtHR mentioned in the subsequent footnote is particularly important.

31 ECtHR, *N. A. v. UK*, above note 26, para. 115; ECtHR, *S. K. v. Russia*, above note 28, paras 55–63. In the *S. K. v. Russia* case, such an extreme case of general violence was recognized to exist in Syria, in particular in Aleppo, in 2015–17, where the Court found that "various parties to the hostilities have been employing methods and tactics of warfare which have increased the risk of civilian casualties or directly targeting civilians. The available material discloses reports of indiscriminate use of force, recent indiscriminate attacks, and attacks against civilians and civilian objects" (para. 61). Another extreme case of general violence was found to exist in Mogadishu in 2010. See ECtHR, *Case of Sufi and Elmi v. The United Kingdom*, Applications Nos 8319/07 and 11449/07, Judgment, 28 November 2011, para. 248.

32 See UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/03/04, 23 July 2003, paras 22–30. However, there is debate on which civil, political, economic and social rights need to be respected, protected or fulfilled for an internal relocation not to be "unduly harsh". For discussion of relevant case law, see Andreas Zimmermann and Claudia Mahler, "Part Two General Provisions, Article 1 A, Para. 2", in A. Zimmermann (ed.), above note 8, paras 645–662; and G. S. Goodwin-Gill and J. McAdam, above note 24, pp. 123–126.

affects a specific part of a State while other parts of the State remain largely unaffected. As the Office of the United Nations High Commissioner for Refugees (UNHCR) cautions, in other cases returns may not be relevant or reasonable because armed conflicts are regularly "characterized by widespread fighting, are frequently fluid, with changing frontlines and/or escalations in violence, and often involve a variety of state and non-state actors, who may not be easily identifiable, operating in diverse geographical areas".[33]

Where and when does the principle of *non-refoulement* apply?

Under international refugee law, the principle of *non-refoulement* "applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State", with the decisive criterion being whether persons "come within the effective control and authority of that State".[34] Similar positions have been taken by regional human rights courts and human rights treaty bodies.[35] Thus, the ICRC understands that the central question for determining if a State is bound by the principle of *non-refoulement* is whether it exercises jurisdiction over the persons concerned, namely if they are within the territory, in the territorial sea,[36] or under the effective control of that State.[37] For instance, if migrants find themselves in the territorial sea of a State or to the extent that a State exercises effective control over individuals on a boat during interception or rescue operations (including on the high seas), it will be bound by the principle of *non-refoulement*. This is crucial, as the first contact between migrants and national authorities increasingly takes place outside the land territory of a State. Once a State exercises jurisdiction over an individual, the State has to assess – on a case-by-case basis – whether or not that individual would be at risk of fundamental rights violations upon return (see the section on procedural safeguards below).

The application of the principle of *non-refoulement* to admission and non-rejection at the border is mostly recognized today. Non-rejection at the border was

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33 UNHCR Guidelines on International Protection No. 12, above note 3, para. 40.

34 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, paras 24, 43.

35 Committee against Torture, *J. H. A. v. Spain*, Communication No. 323/2007, 21 November 2008, para. 8.2; UN Human Rights Committee, General Comment No. 31, above note 10, para. 10; ECtHR, *Jamaa*, above note 22, paras 72, 74, 136. For further discussion, see Tilman Rodenhäuser, "Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control", *International Journal of Refugee Law*, Vol. 26, No. 2, 2014, pp. 242–245.

36 According to Article 2(1) of the Convention on the Law of the Sea, 10 December 1982 (entered into force 16 November 1994): "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."

37 It should be noted, however, that although the extraterritorial application of the principle of *non-refoulement* under human rights law has wide support, it is still contested by a small number of States.

included in the principle of *non-refoulement* in several key instruments on refugee protection subsequent to the 1951 Refugee Convention.[38] This is further supported by various Conclusions of UNHCR's Executive Committee, including in relation to migration by sea, as well as by regional human rights courts and treaty bodies.[39] It should be noted, however, that simply denying entry or returning a boat to the high seas is not necessarily in breach of the principle of *non-refoulement* if it does not have the effect or result of returning persons where they could be at risk. Denying entry or disembarkation would have the practical effect of *refoulement* if this leaves persons with no option but to return to a State in which there are substantial grounds to believe that the person would be in danger of fundamental rights violations. This would be the case, for instance, if the ship's next port of call is in a country in which the person is in danger of fundamental rights violations, including through secondary *refoulement*. The applicability of *non-refoulement* to interdiction operations (also sometimes referred to as interception or "push-back") and to rescue operations on the high seas is also generally recognized.[40] However, the practical application of the principle of *non-refoulement* in these cases is often less clear. In particular, the ICRC is conscious that some questions remain on when persons are considered to be under the jurisdiction of a State.

Although there is no general obligation to grant admission to, or disembarkation onto, a State's territory, it is argued that under international refugee law, States should ensure admission of asylum-seekers, at least on a temporary basis, in order to carry out a fair and effective procedure to determine their status and protection needs.[41] As emphasized below, IHRL requires States to provide procedural safeguards when assessing a protection claim of any person under their jurisdiction, which is normally done on a State's territory. If it is found that a person would be at risk upon return, the State must adopt measures that would not amount to *refoulement* (i.e., granting refugee status, temporary protection or removal to a safe third country).

In addition to prohibiting direct measures to transfer a person to a place where there are substantial grounds to believe that the person would be in danger of fundamental rights violations, it has also been argued that the principle of *non-refoulement* prohibits indirect or disguised measures with the same effect

38 UN General Assembly, Declaration on Territorial Asylum, UN Doc. A/RES/2312(XXII), 14 December 1967, Art. 3(1); Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, Art. II (3); Cartagena Declaration, Art. III(5); Bangkok Principles, Art. 3(1).

39 See, for example, UNHCR Executive Committee Conclusion No. 6 (XXVIII), 1977, para. (c); UNHCR Executive Committee Conclusion No. 15 (XXX), 1979, para (c); UNHCR Executive Committee Conclusion No. 22 (XXXII), 1981, Section II; UNHCR Conclusion Executive Committee No. 53 (XXXIX), 1988, para. 1. Moreover, as seen in the references in above note 35, States have to protect individuals from *non-refoulement* once these individuals fall under the State's jurisdiction.

40 Inter-American Commission on Human Rights, *Haitian Centre for Human Rights et al. v. United States*, Report No. 51/96, 13 March 1997, para. 171; ECtHR, *Jamaa*, above note 22, paras 77–78; UNHCR Executive Committee Conclusion No. 97 (LIV), 2003, preamble and para. (a).

41 See, for example, UNHCR Executive Committee Conclusion No. 81 (XLVIII), 1997, para. (h); UNHCR Executive Committee Conclusion No. 82 (XLVIII), 1997, para. (ii); UNHCR Conclusion Executive Committee No. 85 (XLIX), 1998, para. (q); UNHCR Executive Committee Conclusion No. 99 (LV), 2004, para. (l). See also A. Zimmermann and P. Wennholz, above note 8, paras 105–109.

(also referred to as "constructive *refoulement*").[42] Indeed, the ICRC would be guided by the view that if a State cannot lawfully return an individual, the principle of *non-refoulement* should be understood as also prohibiting indirect measures designed to circumvent this prohibition. This would mean that States may not create circumstances which leave an individual who is protected by the principle of *non-refoulement* with no real alternative other than returning.[43]

Procedural aspects of *non-refoulement*

It follows from the prohibition on *non-refoulement* that a State which is planning to return a migrant must assess carefully and in good faith whether there are substantial grounds for believing that the person runs the risk of being subjected to a fundamental rights violation. The policies and practices of the country of return and the particular circumstances of the individual migrant are both relevant for the assessment.[44] The person must not be returned if there are substantial grounds for believing that she or he would be in danger of being subjected to a fundamental rights violation.

Under IHRL, a person who has grounds to allege a violation of his or her rights has the right to an effective remedy.[45] In the context of *non-refoulement*, the right to a remedy means the right to challenge the return or transfer before an independent and impartial body.[46]

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42 See, for instance, Walter Kälin, Martina Caroni and Lukas Heim, "Article 33(1)", in A. Zimmermann (ed.), above note 8, para. 111.

43 See Committee against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, 9 February 2018, para. 14. Likewise, in the view of the International Law Commission (ILC), "any form of disguised expulsion of an alien is prohibited" under international law. See ILC, *Draft Articles on the Expulsion of Aliens, with Commentaries*, UN Doc A/69/10, 2014, Article 10. This prohibition finds support in the jurisprudence of the Iran–US Claim Tribunal (see references in *ibid*., paras 4–5 on Art. 10) and the Eritrea–Ethiopia Claims Commission (see *Partial Award, Civilians Claims – Ethiopia's Claim 5*, The Hague, 17 December 2004, paras. 125–127). At the same time, some States have questioned whether "disguised expulsions" are prohibited under international law, and others see a need for further clarification of the scope of that prohibition. See ILC, *Expulsion of Aliens: Comments and Observations Received from Governments*, UN Doc. A/CN.4/669, 21 March 2014; see also Committee against Torture, Written Submissions on the Draft Revised General Comment on the Implementation of Article 3 of the Convention in the Context of Article 22, available at: www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx (all internet references were accessed in February 2018).

44 If the ICRC conducts detention visits on the basis of its own conventional or statutory mandate in the potential State of return, it does not – in light of its confidential working method – contribute to assessments made by the returning State of the situation in the potential State of return; in particular, it does not share information about conditions of detention or detainee treatment with third States.

45 See in particular Article 2(3) of the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976); Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 4 November 1950 (entered into force 3 September 1953); and Article 25 of the American Convention on Human Rights.

46 See UN Human Rights Committee, General Comment No. 31, above note 10, para. 15; Committee against Torture, General Comment No. 4 (2017), above note 43, para. 13. Both committees require such review to take place before a judicial or administrative authority, emphasizing that such review must be independent and impartial. For its part, the ECtHR requires "independent and rigorous scrutiny" of any complaint. See ECtHR, *Jamaa*, above note 22, para. 198.

In the ICRC's experience, for an assessment under the principle of *non-refoulement* to be effective, a number of minimum procedural guarantees are essential:

i)   timely information to the person concerned of the intended return or transfer, in a language that s/he understands;

ii)   the opportunity for the person concerned to express to an independent and impartial body any fears s/he may have about the return or transfer and explain why s/he would be at risk;

iii)   suspension of the transfer during the review of the well-foundedness of the person's fears because of the irreversible harm that would be caused if the person were indeed found to be at risk.[47]

Some human rights bodies or courts demand additional guarantees, including a right to legal support during the process and other due-process guarantees.[48] For the transfer or expulsion of migrants from the transferring State's territory, the effective remedy is typically before national courts or a dedicated board or committee. While court review is not a strict requirement, human rights law requires that the remedy has to be effective – i.e., the person concerned needs to have a meaningful opportunity to obtain an independent and impartial decision ensuring that s/he would not be transferred in violation of the principle of *non-refoulement*.[49] For its part, the UNHCR Executive Committee has recommended a set of minimum procedural guarantees to be respected in determining refugee status and protection against *non-refoulement* under the 1951 Refugee Convention, which include the guarantee that a person should be given the possibility to appeal a first-instance negative decision on refugee status.[50]

As a result, the ICRC is conscious that applicable international (including regional) law as well as national law must be analyzed to know the full extent of the procedural requirements in a particular situation.

Readmission agreements and diplomatic assurances

In the context of the determination of asylum claims or the return of migrants, States (in particular destination countries) have declared certain countries "safe",

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47   To varying degrees, these guarantees are also found in recommendations of human rights bodies or the jurisprudence of human rights courts. See, for example, Committee against Torture, General Comment No. 4 (2017), above note 43, para. 13; ECtHR, *Jamaa*, above note 22, paras. 197–207.

48   See, for example, Committee against Torture, General Comment No. 4 (2017), above note 43, paras 13, 18; ECtHR, *Chahal v. The United Kingdom*, Application No. 70/1995/576/662, Judgment, 11 November 1996, para. 154; ECtHR, *MSS v. Belgium and Greece*, Application No. 30696/09, Judgment, 21 January 2011, para. 301.

49   See e.g. Committee against Torture, *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 2005, para. 13.8.

50   See UNHCR Executive Committee, Determination of Refugee Status No. 8 (XXVIII), 1977, para. (e)(vi). See also UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, 2011, para. 192.

including countries of origin or transit, in order to facilitate the transfer or return of non-nationals. For this purpose, States have also concluded readmission agreements. Although these measures are not *per se* incompatible with refugee law or human rights law, they often raise *refoulement* concerns. A person may be at risk of fundamental rights violations – or onward transfer in violation of the principle of *non-refoulement* (secondary *refoulement*) – even in a country that has been declared "safe" and with which a readmission agreement exists. Thus, the ICRC would concur with the view that declaring a country "safe" or concluding a readmission agreement does not relieve a State from its obligations under the principle of *non-refoulement* as discussed in this note, including the provision of procedural safeguards.[51] Moreover, UNHCR's Executive Committee has concluded that additional conditions should be fulfilled in order to safeguard the rights of refugees, including that no asylum-seeker should be returned to a third country for determination of the claim without sufficient guarantees, in each individual case, that the person will be readmitted to that country, will have the possibility to seek and enjoy asylum, and will be treated in accordance with accepted international standards.[52]

In order to extradite, expel or return persons while ensuring compliance with their obligations under international law – in particular the principle of *non-refoulement* – States have also made use of diplomatic assurances or transfer agreements in which the receiving authority provides assurances to the transferring State that transferees will be treated in accordance with international standards. These assurances or agreements are normally concluded with regard to specific individuals. The ICRC notes that there is ongoing debate among States and human rights institutions as to whether, and if so to what extent, such agreements may be taken into account when assessing whether there are substantial grounds to believe that an individual is in danger of fundamental rights violations.[53] In the ICRC's view, diplomatic assurances can in no case exonerate the transferring State from its obligations under the principle of *non-refoulement*, in particular the obligation to proceed to an individual assessment of whether the person concerned will face a risk upon return. To determine the

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51 See also Inter-American Commission on Human Rights, *John Doe et al v. Canada*, Report No. 24/11, 23 March 2011, para. 111; ECtHR, Decision as to the Admissibility of Application No. 32733/08 by K. R. S. against the United Kingdom, 2 December 2008.
52 UNHCR Executive Committee Conclusion No. 15 (XXX), 1979; UNHCR Executive Committee Conclusion No. 58 (XL), 1989; UNHCR Executive Committee Conclusion No. 85 (XLIX), 1998; UNHCR Executive Committee Conclusion No. 87 (L), 1999; UNHCR Executive Committee, "Note on International Protection", 4 June 1999, paras 19–20. UNHCR has further elaborated upon these criteria. See, for example, UNHCR, "Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers", Division of International Protection, May 2013.
53 Most recently, a number of States expressed disagreement with a draft general comment by the Committee against Torture, which stated that "diplomatic assurances from a State party to the Convention to which a person is to be deported are contrary to the principle of 'non-refoulement', provided for by article 3 of the Convention". Committee against Torture, General Comment No. 1 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, Draft Prepared by the Committee, UN Doc. CAT/C/60/R.2, 2 February 2017, para. 20. States' written submissions on the draft are available at: www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx.

weight, if any, to be given to these agreements, the review body should be guided by the positions adopted by various human rights bodies,[54] including:

● in case of transfer to States where there is "systematic practice of torture", assurances are unlikely to remove the risk and should not be resorted to;
● general assurances to the effect that the receiving State will abide by international standards, without specific assurances related to the particular individual in question, do not remove the risk for that person;
● transfer agreements may only remove the risk if they are accompanied by an effective post-transfer monitoring mechanism.[55]

In all cases, the effectiveness of diplomatic assurances or transfer agreements should be considered with caution because such assurances are not always complied with by the receiving State. In case of doubt about the receiving State's compliance with a transfer agreement or the effectiveness of post-transfer monitoring mechanisms agreed between the returning State and the receiving State, and therefore about the potential breach of the principle of *non-refoulement*, States must not transfer the individual in question.

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54 See, for instance, UN Human Rights Committee, *Mohammed Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006, paras 11.3–11.5; ECtHR, *Qatada*, above note 15, para. 189.
55 Contrary to IHL, there are no explicit post-transfer obligations under IHRL or refugee law. However, post-transfer monitoring is a key element to ensure that diplomatic assurances are complied with. For post-transfer obligations under IHL, see Article 12 of GC III and Article 45 of GC IV, which apply in international armed conflict, and ICRC Commentary on GC I, above note 2, para. 716, with regard to non-international armed conflict.

REPORTS AND DOCUMENTS

ICRC policy paper on immigration detention

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Introduction

The International Committee of the Red Cross (ICRC) has worked on behalf of detained irregular migrants for many years as part of its activities for detainee populations in general, but has only recently started implementing specific programmes for detained migrants in countries of transit and destination. The ICRC visits detained migrants in both criminal and dedicated immigration detention facilities. During these visits, as with all detainees, the ICRC assesses whether detained migrants are treated humanely, held in conditions that preserve their dignity and afforded due process of law. The ICRC also evaluates whether they are able to maintain contact with the outside world, such as with their families and consular authorities, if they wish to do so. As part of its dialogue with the authorities, the ICRC also raises protection issues related to return to ensure that the authorities fulfil their obligations under relevant international law – in particular with respect to the principle of *non-refoulement*.[1]

The ICRC works in immigration detention[2] on its own or in collaboration with National Red Cross and Red Crescent Societies in several countries along migration routes. National Societies also work independently in immigration detention, mainly but not exclusively providing Restoring Family Links services and direct assistance where these services are needed. The ICRC will continue at global, regional and bilateral levels to support the work of National Societies by providing expertise, knowledge-sharing platforms and resources.

The ICRC vulnerability approach

The ICRC's engagement is prompted by migrants' vulnerability, and its activities are defined by their needs. The ICRC — like the rest of the International Red

Cross and Red Crescent Movement — uses a broad description of "migrants"[3] which includes refugees, asylum-seekers and irregular migrants. It does so in order to capture the full extent of humanitarian concerns related to migration and to provide sufficient flexibility to address their often complex situations and the fact that migrants may become vulnerable on their way to or in their country of destination. This being said, it is important to recall that the legal status of individuals is crucial in determining the applicable regime(s), and to stress that ICRC action aims to ensure that migrants receive the protection to which they are entitled under international and domestic law, including the special protection afforded to certain categories of people such as refugees and asylum-seekers.

Main issues of concern

Migration is a growing global phenomenon, and many States endeavour to control and contain irregular migration by adopting restrictive migration policies. This may result in the use of coercive measures, including a systematic resort to detention, either administrative or criminal. Systematically resorting to the detention of irregular migrants, regardless of their individual personal circumstances, is in contradiction with the right to liberty and security of persons – which is one of the most fundamental human rights – and with the key considerations that *detention should be a measure of last resort* and non-custodial measures should always be considered first.

Administrative detention for the purposes of immigration control is sometimes used as a deterrent or as punishment. This should not be the case, as *detention for administrative reasons should, by definition, be non-punitive in nature.*

The ICRC encourages States to treat irregular migration as an administrative infraction rather than as a crime. Criminalization of irregular entry or stay may hinder detained migrants' access to specialized services, further stigmatize irregular migrants as a group, and prevent them from finding the specialized support many of them may need following previous exposure to violence and abuse. Such detention also has a negative impact on the judicial

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1   The principle of *non-refoulement* prohibits the transfer of persons from one authority to another when there are substantial grounds to believe that the person would be in danger of being subjected to violations of certain fundamental rights. This is in particular recognized for torture and other forms of ill-treatment, arbitrary deprivation of life and persecution. The principle of *non-refoulement* is found expressly in international humanitarian law, international human rights law and refugee law, although with different scopes in each of these bodies of law. The gist of the principle of *non-refoulement* has also become customary international law.

2   In this paper, the term "immigration detention" refers to detention for reasons of irregular entry or stay in a country's territory.

3   The ICRC describes migrants as persons who leave or flee their habitual residence to go to new places – usually abroad – to seek opportunities or safer and better prospects. This definition includes all types of migrants regardless of their legal status, while recognizing the special protection of refugees and asylum-seekers. See International Federation of Red Cross and Red Crescent Societies, *Policy on Migration*, 2009, available at: www.ifrc.org/PageFiles/89395/Migration%20Policy_EN.pdf.

system, which often has a very heavy caseload, and on the penitentiary system, which is often already overcrowded.

This paper intends to briefly highlight – and focuses exclusively on – key considerations for States when considering the administrative detention of irregular migrants, i.e. detention initiated/ordered by an administrative authority for reasons of irregular entry or stay in a country's territory, without criminal charges being brought against the person. Administrative detention may take place in dedicated immigration detention facilities or in those used by the criminal justice system.

Key considerations for States

The ICRC urges States, when considering the administrative detention of irregular migrants, to respect the following fundamental points (most of which reflect existing international law and are compatible with international standards and/or safeguards, as elaborated in human rights jurisprudence, in soft-law instruments and by United Nations human rights bodies and mechanisms):

1. Detention should be an exceptional measure; liberty and alternatives to detention should always be considered first – i.e., detention should be a measure of last resort.

A large body of research[4] has shown the negative impact of administrative detention on the mental health of migrants, which is linked to the uncertainty of the administrative process and fears for the future, compounding previous traumas related to the migrants' personal history. The ICRC is a daily witness to this negative impact on migrants in its visits to detention centres.

2. Detention can only be ordered on the basis of a decision taken in each individual case, without discrimination of any kind. A decision to detain must not be based on a mandatory rule for a broad category of persons.

The element of individual assessment is crucial to enabling a review of the particular circumstances of each person, avoiding unnecessary detention decisions and ensuring that detention is justified and only used as a measure of last resort.

3. Any detention must be determined to be necessary, reasonable and proportionate to a legitimate purpose. Administrative detention may not serve as a deterrent or as punishment.

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4   See Mary Bosworth, "The Impact of Immigration Detention on Mental Health: A Literature Review", Appendix 5 in Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office by Stephen Shaw*, January 2016; Janet Cleveland, Cécile Rousseau and Rachel Kronick, *The Harmful Effects of Detention and Family Separation on Asylum Seekers' Mental Health in the Context of Bill C-31*, Brief Submitted to the House of Commons Standing Committee on Citizenship and Immigration concerning Bill C-31, the Protecting Canada's Immigration System Act, April 2012; Colin Neave, *Suicide and Self-Harm in the Immigration Detention Network*, Report by the Commonwealth and Immigration Ombudsman, May 2013.

Administrative immigration detention can only be used in cases where an individual assessment confirms in the case of a particular migrant the existence of an acceptable basis for which immigration detention may be justified, in particular if a specific migrant is believed to present a risk to public security or a risk of absconding. It follows that administrative detention should not be used as a means of deterrence or punishment for irregular entry and/or stay, as this in itself is not one of the limited acceptable grounds that may justify the detention of migrants. An individual assessment of the existence of such risks will determine whether administrative detention is considered necessary, reasonable and proportionate, *after non-custodial measures have been considered.*

4. Detention should be limited in time.

Administrative detention must not last beyond the period for which the State can provide appropriate justification – it should be limited in time.

5. Conditions and treatment in administrative detention should be non-punitive.

If migrants are held in administrative detention, it is critical that their liberty not be constrained beyond what is strictly necessary. For example, migrants should be able to move around freely within their place of detention, family members should be accommodated together, and migrants must be able to maintain meaningful contacts with the outside world. To facilitate this, it is important that irregular migrants be segregated from persons suspected of, charged with or sentenced for criminal offences. All places where migrants are deprived of their liberty must provide decent living conditions. The detaining authorities must ensure their personal safety and provide for their needs, both physical and psychological, including access to adequate medical care. They must be protected against all forms of abuse and exploitation, including sexual violence.

6. Migrants must be allowed to have contact with members of their family.

States must allow detained migrants to contact their families, but they should also ensure that migrants have the means, both technical and financial, to do so. Many migrants lose all their belongings during their journey or at the time of their arrest and do not have the means to make an international phone call. The authorities should provide detained migrants, free of charge, at least an initial phone call to their family, in the country or abroad, to inform family members of their whereabouts. Moreover, if migrants have family or friends able to visit, these individuals should be able to have contact visits with the detained migrants.

7. Respect for key procedural safeguards is essential.

The ICRC considers that a number of key procedural safeguards must be observed, as required by existing law or as a matter of policy and good practice:

i.   Migrants must be informed promptly, in a language they understand, of the reasons why they are being detained as well as of their other rights, including the possibilities of appeal.

ii.   The decision to detain must be made by a duly authorized official in accordance with the criteria laid down by law.

iii. Migrants have the right to be registered and held in a recognized place of detention.
iv. If so requested by the migrant, the relevant diplomatic or consular authorities must be informed, without delay, of a migrant's detention. Migrants must be informed of their right to inform and to communicate with their consular or diplomatic authorities.
v. The decision to place in detention must be reviewed with the least possible delay by a judicial or other independent authority. This procedure should include the right to appeal. The necessity to maintain in detention must be reviewed periodically. All migrants have the right to challenge the lawfulness of their detention before a judicial body having the authority to order their release if their detention is unlawful.
vi. Migrants should be allowed to have legal assistance in challenging their detention.
vii. Migrants should be able to attend the proceedings in person and/or to be represented by their legal representative.

8. Migrants have the right to seek and enjoy asylum from persecution.

The detention of refugees and asylum-seekers should generally be avoided. As all persons have the right to seek and enjoy asylum from persecution, any detention of persons exercising this right must be carefully circumscribed. The irregular status of migrants or the fact that they are detained should not prevent them from being able to apply for asylum or to pursue their asylum claim. Thus, migrants should be given the necessary information about this right and allowed to exercise it, including by being given access to asylum procedures.

9. The special circumstances of certain categories of especially vulnerable migrants, such as children, victims of torture or trafficking, persons with mental disabilities and/or health conditions, and elderly people, should be considered. Detention of these vulnerable groups should be avoided.

The serious negative effects of detention on the mental health of migrants are magnified when it comes to children, as their developmental needs cannot be met in such a setting. This also applies to victims of prior trauma, who cannot be properly treated in detention. Children shall only be detained as a measure of last resort and for the shortest appropriate duration. Their best interests must be the primary consideration in every decision to initiate or continue detention. In addition, States should not detain victims of torture or trafficking or persons with mental disabilities and/or health conditions solely on the basis of their immigration status. Detention of migrants with physical disabilities should only take place when the authorities provide reasonable accommodation that preserves their dignity. The specific needs of other groups that may present special vulnerabilities in certain circumstances – such as women, stateless persons or victims of sexual abuse – should also be taken into account, and the need for their detention should be carefully considered.

Geneva, April 2016

REPORTS AND DOCUMENTS

Translating the Kampala Convention into practice: A stocktaking exercise*

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In 2016, the International Committee of the Red Cross (ICRC) carried out a study to take stock of current progress in implementing the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention). As the first ever legally binding international instrument of its kind, the Kampala Convention represents a significant step forward in reaffirming the rights of internally displaced persons (IDPs) in the face of a growing displacement problem in Africa. The stocktaking exercise grew because of the recognition of the value of the Kampala Convention and the urgent need to make it as effective as possible. The ICRC was involved from the outset in the drafting of the Kampala Convention and, since its adoption, has been working on promoting its ratification and implementation. The stocktaking exercise, therefore, is part of the ICRC's continuous support to the Kampala Convention. It is also an additional step within the framework of the ICRC's long-term operational engagement in addressing the needs of the displaced and their host communities affected by armed conflict and other situations of violence in Africa.

At the origin of the stocktaking exercise was also the observation that several States have undertaken – or are undertaking – important action to domesticate and operationalize the Kampala Convention, but they have tended to do so in isolation. The ICRC felt there was a need to compile the diverse experiences of States in order to bolster efforts to fully implement the Convention, by allowing States to learn from each other about how the Convention can work best.

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* The complete report is available online at: https://shop.icrc.org/translating-the-kampala-convention-into-practice-2636.html.

The study examined the practice of twenty-five African countries in which the ICRC is operating – these include not only States party to the Kampala Convention, but also other States not yet party who have taken action on internal displacement in the form of normative, policy or concrete measures. The focus has been on those obligations that are based in international humanitarian law or touch on humanitarian issues that the ICRC encounters in operations across Africa.

The findings were published in a report that identifies lessons learned, best practices and key challenges in States' efforts to meet their obligations towards IDPs, as provided in the Kampala Convention. The report offers recommendations to States and other actors concerned (African Union, Regional Economic Communities, UN agencies, civil society organizations, etc.) on how to translate the Kampala Convention into real improvements for IDPs.[**]

The report is being used by ICRC delegations in Africa in bilateral discussions with States on their obligations to protect and assist IDPs, and to provide them with durable solutions. It is also used to support the adoption by States of national legal frameworks and policies as part of their responses to situations of internal displacement. At the continental level, the report informs the ICRC's long-standing cooperation with the African Union and sub-regional forums (e.g. the Intergovernmental Authority on Development and the Economic Community of West African States) on promoting ratification of the Kampala Convention and strengthening its implementation. For example, the report served as a starting point for discussions among experts during the first meeting of the Conference of States Party to the Kampala Convention that was held in Harare in April 2017. According to the framework of the Plan of Action adopted by the Conference, the ICRC is to support further initiatives to enhance awareness of the Kampala Convention and facilitate the sharing of experience and expertise among States on its implementation.

The report's findings and recommendations are also proving to be useful in the ICRC's dialogue with States in other regions beyond Africa, insofar as they provide examples of measures that States can adopt to address internal displacement more effectively at the national and regional levels.

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Executive summary

The displacement of millions of people within their own countries, whether due to natural disasters, armed conflict or other situations of violence, became a pressing humanitarian concern in the second half of the twentieth century. The number of internally displaced people (IDPs) has continued to grow in this new century, resulting in severe humanitarian, social and economic costs.

[**] At the time of writing, the report is available in English, French, Spanish and Portuguese. Translation into Arabic is forthcoming. In addition, the Executive Summary of the report is available in Arabic and Russian.

Africa is a continent especially affected by this trend. In response to the challenge of preventing and addressing internal displacement on the continent, African States joined forces through the African Union (AU) to create the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention, or the Convention) in 2009. This innovative treaty, the world's first ever legally-binding instrument on IDPs, entered into force in 2012, after 15 African States ratified it. Today, 25 African States are party to the Kampala Convention, while another 18 have signed but not yet ratified it.

The International Committee of the Red Cross (ICRC) launched a stocktaking exercise to support the efforts of the AU, Regional Economic Communities (RECs), Regional Mechanisms for Conflict Prevention, Management and Resolution (RMs), and States party to the Kampala Convention in monitoring and effectively implementing the Convention. Our aim in undertaking this exercise is simple: to help increase the Convention's effectiveness in reducing internal displacement caused by armed conflict and other situations of violence and in improving protection of and assistance to IDPs in Africa.

The ICRC has long worked to protect and assist IDPs around the world, as part of our mandate to help people affected by armed conflict and other situations of violence. The ICRC has also been engaged from the outset in supporting the Kampala Convention. We were involved in the drafting of the Convention, providing legal advice relating to international humanitarian law (IHL) and supporting the negotiation process leading to the adoption of the Convention in October 2009. Since then, the ICRC has been working closely with the AU Commission (AUC) and African States to encourage and support ratification, national implementation and adoption of practical measures for the operationalization of the Kampala Convention. To this end, we offer legal advice on ways in which the Convention can be adopted and domestic normative frameworks to implement the Convention strengthened. In addition, in our operational dialogue with States across Africa, we recommend concrete measures that can be taken by States to adopt and implement the Convention.

The ICRC has for several decades produced tools that provide technical support and guidance to States on the national implementation of IHL and other relevant legal frameworks. The ICRC capitalized on this expertise and experience in carrying out the present stocktaking exercise. In addition, we were able to benefit from our field presence in Africa, where ICRC delegations in 29 countries carry out protection and assistance activities for IDPs, host communities and all those suffering the consequences of armed conflict or other situations of violence.

Throughout the first half of 2016, ICRC delegations across Africa provided updates and analysis on national developments relating to IDPs including States' latest actions to join, nationally implement and operationalize the Kampala Convention. These included States that have ratified the Kampala Convention as well as States that have not, but have adopted domestic normative frameworks or policies on the protection of IDPs, based on provisions of the 1998 Guiding Principles on Internal Displacement (the Guiding Principles) and two of the Great

Lakes Pact Protocols. Some States that are facing situations of internal displacement, but have no formal domestic framework in place, were also considered.

An independent consultant commissioned by the ICRC compiled and analysed this field input and drafted Findings (in the form of lessons learned, some examples of good practices and key challenges) and Recommendations. These reflect the analysis of State practice in 25 African countries.

The Findings provide a picture of the current level of operationalization of the Kampala Convention. They outline States' efforts to discharge their responsibilities related to preventing and addressing internal displacement.

The Recommendations, intended for States but also for other organizations (e.g. AU, RECs and RMs, the UN, the ICRC and civil society organizations), are based on the Findings, as well as on additional research and consultations within the ICRC and with selected external stakeholders. They are structured as proposed actions to address challenges in implementing the Convention, capturing insight into ways in which current implementation of the Convention can be strengthened. The Recommendations are all without prejudice to the duty of States to carry out their respective obligations under international and domestic law.

The focus of the stocktaking exercise, and hence of this report, has been on those Kampala Convention obligations that are directly drawn from IHL and/or relate to humanitarian issues that the ICRC encounters in operations across Africa

In the writing of this report, we have endeavoured to keep the following questions in mind:

–   What impact does the Kampala Convention have on the ground?
–   What difference can it make in the lives of IDPs?
–   What more needs to be done – by States, the AUC, RECs, RMs, the ICRC and other organizations and humanitarian actors – for the full implementation of the Kampala Convention to become a reality?

The report contains more than 80 Findings and 25 Recommendations. They are grouped under five main headings, according to the legal obligations and related measures required for their implementation:

1.   Prevention
2.   Planning, management and monitoring of protection and assistance activities
3.   Providing adequate humanitarian assistance to IDPs
4.   Protection of IDPs
5.   Durable solutions for IDPs

The ICRC hopes that each of these Findings and Recommendations will be of interest to some States, depending on their own particular approach to the Kampala Convention. Several cross-cutting themes emerged in the formulation of the Findings and Recommendations, of which three merit particular mention:

1.   The importance for States and other actors of engaging in dialogue with IDP communities in order to ensure their meaningful participation in decision-making on law, policies and programmes that affect them;

2. The urgent need for ensuring access of IDPs to essential services such as health care and education;
3. The vital roles the AUC – and RECs and RMs – will play in the future in reinforcing the efforts of AU Member States to fully implement the Kampala Convention.

As part of the lessons learned drawn from the stocktaking exercise, the report underlines that efforts must be made before a crisis occurs to ensure that obligations under the Kampala Convention are translated into domestic law. This includes putting in place the necessary structures with mandates and resources to respond to the protection and assistance needs of IDPs. Effective coordination between the different ministries and government agencies concerned, as well as between the central, regional and local levels of public authorities, is crucial. In particular, experience reveals the importance of ensuring an inclusive process that engages all key domestic actors, starting with IDPs and host communities, who need to be involved in consultations, information-sharing and decision-making.

When it comes to ensuring access for IDPs to essential goods and basic services (e.g. health care, education and family tracing and reunification services), the lack of human and financial resources is often an obstacle for States to fulfil their primary obligations. Thus, effective access to IDPs by humanitarian organizations is a key factor in meeting the needs of those IDPs. Equally important is a commitment by public authorities and international actors to abide by humanitarian principles in providing assistance to IDPs.

On ensuring effective protection of IDPs, the report explores the challenges of striking the right balance between humanitarian and security considerations in regulating the movement of IDPs, as well as those of maintaining the strictly civilian and humanitarian character of IDP settings. On another note, the difficulties often faced by IDPs in obtaining official documents (e.g. personal identity documents) have an impact on their ability to access basic services and livelihood options. One important lesson learned is that efficient strategies for providing or replacing such documents deliver dividends in responding to urgent humanitarian needs.

When an armed conflict is ongoing, measures can and, in many cases, must be taken, by States and other parties to the conflict, to prevent displacement from occurring in the first place. This is especially true in ensuring respect for IHL and increasing efforts to protect civilians and limit the harm to which they are exposed. In practice, violations of IHL continue to be a major cause of conflict-related internal displacement in Africa. The challenge here is to strengthen States' commitment (and capacity) to respect and ensure respect for IHL.

Finally, concerning the important role played by the AU, RECs and RMs on the way forward, the report confirms the need for further coordinated efforts to increase awareness of internal displacement issues and to promote the Kampala Convention among AU Member States.

Today, the Kampala Convention provides a comprehensive framework that has already begun to bring concrete improvements to the daily lives of many IDPs in

Africa. To realize its full potential, however, it needs to be systematically and comprehensively translated into practice by African States. The hope is that this report will contribute to the important work of fully operationalizing the Kampala Convention, to the benefit of current and future IDPs in Africa.

List of recommendations

The full set of the report's recommendations is compiled here for ease of reference. Each recommendation and its supporting rationale can be reviewed in context within the report.

1. Prevention

For States
Recommendation 1: States that have not yet done so, should expedite their ratification of, or accession to, the Kampala Convention.

Recommendation 2: States party to the Kampala Convention should initiate and complete actions to incorporate treaty obligations in domestic law and policy processes, including criminal prohibitions, requesting advice and technical support if/as needed.

Recommendation 3: States should take steps to promote knowledge of the Kampala Convention by all the actors concerned, including IDPs themselves, host communities, civil society and public authorities, at central, regional and local levels.

Recommendation 4: States should ensure that all relevant public authorities – including armed and security forces – are fully informed of their obligations and instructed to respect and ensure respect for international humanitarian law.

For other actors
Recommendation 5: International and humanitarian organizations should continue to offer technical advice and support to AU Member States, not only for ratification of the Kampala Convention, but also for the full range of domestic implementation measures required under national legal and policy frameworks.

Recommendation 6: The AUC, RECs, RMs, and other organizations with expertise in this domain should expand public awareness-raising and capacity-building activities on the Kampala Convention, in coordination with States and local civil society actors. The African Commission on Human and Peoples' Rights (ACHPR) and its special rapporteur on refugees, asylum seekers and internally displaced persons can also play a part in this regard, in accordance with their mandates and the role attributed to them by the Convention.

Recommendation 7: The AUC and AU Member States should ensure that the first Conference of States Parties takes place as soon as possible and adopts a

comprehensive plan of action/road map on the operationalization of the Kampala Convention.

2. Planning, management and monitoring of protection and assistance activities

For States

Recommendation 8: States should take steps to ensure that the designated coordinating authority or body has the necessary mandate and legitimacy to mobilize all ministries and agencies concerned, and is granted adequate resources (human and financial) to function effectively.

Recommendation 9: Public authorities should develop adequate capacities at all levels to gather and maintain solid and current data on the needs, vulnerabilities and capacities of IDPs, as well as on durable solutions, including disaggregated data (by sex, age and other relevant factors).

Recommendation 10: Public authorities should proactively ensure consultation and active engagement of IDPs and host communities in order to ensure their participation in decision-making on actions undertaken on their behalf. This engagement should take into account the diverse profiles of the displaced population (e.g. sex, age and other factors).

Recommendation 11: Public authorities at all levels with responsibilities for delivering assistance should establish mechanisms for monitoring short and longer-term outcomes. These should incorporate appropriate elements of accountability to IDPs.

For other actors

Recommendation 12: When supporting States to develop laws and policies, including national strategies on internal displacement, other actors should favour approaches that ensure the maximum ownership on the part of the authorities.

3. Providing adequate humanitarian assistance to IDPs

For States

Recommendation 13: Assessments should look at the needs and capacities of IDPs, as well as those of host communities, local authorities and services, to continuously inform the design of programme responses.

Recommendation 14: States should develop capabilities to foresee, assess and respond effectively to the multiple needs of IDPs.

Recommendation 15: States should ensure that all relevant public authorities – including armed and security forces – are fully informed of their obligations and instructed to facilitate rapid and unimpeded access of humanitarian organizations to IDPs. They should also ensure that IDPs can meet their basic

needs (water, food, shelter, etc.) and access essential services (medical care, education, etc.).

For other actors

Recommendation 16: Other actors should ensure that requests for rapid and unimpeded access to IDPs by humanitarian organizations, as well as activities carried out pursuant to such access, be in full accordance with the principles of humanity, neutrality, impartiality and independence of humanitarian actors.

4. Protection of IDPs

For States

Recommendation 17: States should ensure that all relevant public authorities – including armed and security forces – are fully informed of their obligations and instructed to facilitate freedom of movement and residence of IDPs.

Recommendation 18: Public authorities should develop adequate capacities at central and local levels to create and maintain an updated register of all IDPs. This can provide an agreed-upon baseline for all the actors concerned.

Recommendation 19: Public authorities should endeavour to allocate adequate efforts and resources to ensure that IDPs are able to obtain personal identity documents and other official documents within a reasonable time.

Recommendation 20: Public authorities should strengthen their laws, policies and concrete measures to ensure that the civilian and humanitarian character of IDP sites is maintained.

For other actors

Recommendation 21: International and humanitarian actors should provide coordinated support to States to ensure a practical and effective system to address family tracing and family reunification needs.

5. Durable solutions for IDPs

For States

Recommendation 22: States should ensure that all branches and agencies of the public authorities are fully informed of the need for meaningful consultation with and active engagement of IDPs and host communities in decision-making on durable solutions.

Recommendation 23: States should proactively initiate dialogue with international and national partners and donors on issues related to durable solutions in order to fulfil their own international obligations.

Recommendation 24: States (and other relevant stakeholders) should ensure that any peace agreement contains specific provisions and recommendations on

addressing and solving existing situations of internal displacement, as necessary, taking into account the challenges of the context.

For other actors

Recommendation 25: The UN and other international actors that are in a position to do so should contribute to monitoring conditions of return, with particular attention to the perspectives and concerns of the IDP communities in question. They should also help ensure the voluntary and safe character of return and other durable solutions, as well as safety, dignity and adequate conditions for IDPs in their current places.

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Introduction

Background on internal displacement and the Kampala Convention

The displacement of millions of people within their own countries, whether due to armed conflict or other situations of violence[1] or natural disasters, became a pressing humanitarian concern in the second half of the twentieth century. As the number of IDPs has continued to grow in this new century, it has generated severe humanitarian, social and economic costs around the globe. In addition to reaching alarming proportions, internal displacement has become more protracted in nature. This reflects the increasing duration of armed conflicts and the inability to find lasting solutions for the hundreds of thousands of IDPs.

Africa is one of the continents most affected by this trend. In 2015, it was home to an estimated 12 million IDPs, that is, nearly a third of the total number of people displaced worldwide as a result of armed conflict and other violence.[2] Displaced people often have particular needs and vulnerabilities, which may exacerbate the difficulties they face living in a conflict or violent environment. They are often deprived of their livelihoods and their assets. Families, particularly children, are often separated, and lose the safety and support that comes with living in their communities. Women and girls are especially vulnerable to sexual

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1   "Other situations of violence" (hereafter "other violence") denotes "situations in which violence is perpetrated collectively but which are below the threshold of armed conflict. Such situations are characterized in particular by the fact that the violence is the work of one or several groups made up of a large number of people." *International Review of the Red Cross (IRRC)*, Vol. 96, No. 893, February 2014, pp. 275–304: www.cambridge.org/core/journals/international-review-of-the-red-cross/article/the-international-committee-of-the-red-crosss-icrcs-role-in-situations-of-violence-below-the-threshold-of-armed-conflict/64183418A12D456A04D7BB59529547D5, consulted 1 October 2016.
2   Internal Displacement Monitoring Centre, *GRID 2016: Global Report on Internal Displacement*, IDMC, Geneva, 2016: www.internal-displacement.org/assets/publications/2016/2016-global-report-internal-displacement-IDMC.pdf, consulted 2 October 2016.

violence and exploitation.[3] Poor access to essential goods and services, such as health care or education, is commonplace in displaced communities. IDPs may face exclusion due to a lack of documentation, voice or influence – or all three. Fear, anguish and uncertainty can dominate their lives.

In response to these urgent needs, African States joined forces to create the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention, or the Convention) in 2009.[4] This pioneering treaty,[5] the world's first ever legally binding instrument on internal displacement, entered into force in 2012 after 15 African States joined it.[6] Today, 25 African States are party to the Kampala Convention, while another 18 have signed but are not yet party to it.[7] While the number of States Parties has continued to grow, the momentum from earlier years has been lost.

A number of States have initiated or adopted domestic laws and policies to incorporate their obligations under the Convention. However, more action is needed. More concrete and practical measures are urgently required to realize the Kampala Convention's full potential and make a positive difference in the lives of IDPs on the continent. Above all, African States need to allocate greater resources – human, financial, technical and political – to preventing and responding to internal displacement.

The AU continues to play a central role in relation to the Kampala Convention.[8] It has placed its commitment to the Convention at the centre of a

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3   Norwegian Refugee Council, *The Kampala Convention: Make it Work for Women*, NRC, 2015, available at: (https://www.nrc.no/globalassets/pdf/reports/the-kampala-convention—make-it-work-for-women.pdf, consulted 8 October 2016.

4   African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, AU, 2009: http://www.au.int/en/sites/default/files/treaties/7796-treaty-0039_-_kampala_convention_african_union_convention_for_the_protection_and_assistance_of_internally_displaced_persons_in_e.pdf, consulted 24 October 2016.

5   The Kampala Convention details the obligations not only of States, but also of non-State armed groups and international organizations with respect to preventing displacement and protecting and assisting IDPs. It also recognizes the vital role of host communities in responding to internal displacement. Furthermore, it takes into account the fact that internal displacement in Africa results from multiple causes, such as natural disasters, armed conflicts and development projects. For a review of these and other innovative aspects of the Convention, see Internal Displacement Monitoring Centre, *From Kampala to Istanbul: Advancing Global Accountability for IDPs through Law and Policy Making*, IDMC, Geneva, 19 May 2016: http://www.internal-displacement.org/search?q=From+Kampala+to+Istanbul, consulted 29 September 2016.

6   ICRC, "ICRC welcomes entry into force of Kampala Convention for displaced persons", Addis Ababa/Geneva, 12 December 2012: https://www.icrc.org/eng/resources/documents/news-release/2012/12-05-kampala-convention-entry-into-force.htm, consulted 29 September 2016.

7   African Union, *List of Countries which Have Signed, Ratified/Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, African Union, Addis Ababa, 1 April 2016: http://www.au.int/en/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally_displaced_persons_in_africa_kampala_convention_11.pdf, consulted 29 September 2016.

8   Article 8(3) of the Kampala Convention attributes an important role to the AU in supporting States Parties to fulfil their obligations related to the protection and assistance of IDPs under the Convention. In turn, Article 5(3) of the Convention recognizes that States Parties have the obligation to respect the AU's mandate.

broader humanitarian agenda.[9] Acknowledging the urgent need to address internal displacement on the continent and the Convention's potential to this effect, the AUC launched a strategy, in cooperation with its partners and UN agencies. This strategy aims at achieving continent-wide ratification and full implementation of the Convention. It focuses on four key elements: (1) capacity-building for Member State institutions dealing with the issue of internal displacement; (2) promoting ratification and domestication of the Kampala Convention; (3) strengthening and monitoring reporting mechanisms; and (4) awareness of, advocacy for and promotion of the Convention.

Promoting the Kampala Convention has also been a key priority for Chaloka Beyani, the outgoing UN special rapporteur on the human rights of internally displaced persons. Mr Beyani has argued strongly for the full operationalization of the Kampala Convention. By this, he means not only ratifying the Convention and passing legislation, but also implementing specific policies and practical measures that improve the situation for IDPs.[10] His emphasis on operationalizing the Convention added further impetus to carrying out the stocktaking exercise.

The ICRC and the stocktaking exercise

The decision to carry out this stocktaking exercise on the Kampala Convention is part of the ICRC's commitment to tackling internal displacement worldwide. We believe the exercise is an important contribution to the ICRC's response to the growing humanitarian needs of IDPs.[11] The ICRC's commitment to strengthen protection of people through law, operations and policy also finds its expression in this stocktaking exercise.[12]

The stocktaking exercise is also part of the ICRC's continued support to the Kampala Convention. The ICRC was involved from the outset in the drafting of the Kampala Convention, providing legal advice on issues relating to IHL and

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9   The AU's Common African Position (CAP) provides a long-term strategic vision on addressing displacement and other humanitarian issues in Africa, in line with the AU's Agenda 2063. See African Union, *Common African Position (CAP) on Humanitarian Effectiveness*, AU, Istanbul, 23–24 May 2016: http://www.au.int/en/sites/default/files/newsevents/workingdocuments/29553-wd-cap_rev-final_version_as_of_13_april_2016.pdf, consulted 29 September 2016. See also AU, *Agenda 2063: The Africa We Want,* 2nd ed., August 2014: http://archive.au.int/assets/images/agenda2063.pdf, consulted 2 October 2016.

10   See for example United Nations Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani,* United Nations, New York, 2014: http://www.refworld.org/docid/53999ed54.html, consulted 28 October 2016; and United Nations Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani*, United Nations, New York, April 2016, particularly paragraphs 37–43 and 101: http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/32/35, consulted 28 October 2016. See also United Nations, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani,* United Nations, New York, 2016: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/246/93/PDF/N1624693.pdf?OpenElement, consulted 28 October 2016.

11   ICRC, *ICRC Strategy 2015–2018,* ICRC, Geneva, 2014, in particular p. 14, strategic objective 2.5: https://shop.icrc.org/strategie-du-cicr-2015-2141.html, consulted 29 September 2016.

12   *Ibid.*, p. 15.

supporting the negotiation process that lead to its adoption in 2009.[13] We later provided comments on the AU's draft Model Law for the Kampala Convention's implementation, especially on provisions drawn from IHL.[14]

Since 2009, the ICRC has been promoting the ratification of, or accession to, the Kampala Convention, and supporting its implementation. We do so by providing legal and technical advice on adopting and strengthening domestic legal frameworks to implement the Convention, and by recommending practical measures in dialogue with States across Africa.[15]

Specifically, the stocktaking exercise grew from the recognition of the importance of fostering States' exchanges of experiences in implementing the Kampala Convention.[16] To date, many AU Member States have undertaken significant action to translate the Convention into reality, but they have tended to do so in isolation. There is a need to compile the diverse experiences of States in order to bolster efforts to go beyond implementation in theory and ensure operationalization in practice. The stocktaking exercise was designed to help in this regard. By collecting lessons learned and identifying examples of good practice, it offers an opportunity to share how the Kampala Convention can work best. This report aims to encourage further consideration and discussion – within and among States – on actions that can more effectively implement their obligations on internal displacement. Finally, the fruits of this exercise may help inspire States that have not yet ratified or acceded to the Convention to do so.

The ICRC is not new to this type of exercise. For many years, we have produced tools that provide technical support and guidance to States on implementing IHL[17] and other legal frameworks domestically in relation to humanitarian issues, such as the protection of the provision of health care during armed conflict or other emergencies[18] and the plight of missing people and their families.[19] The ICRC

13 The ICRC, along with the UNHCR, was specifically named in the preamble of the Kampala Convention, p. 3.
14 African Union, *(Draft) Model Law for the implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, introduced at the Fifth Ordinary Session of the African Union Commission on International Law (AUCIL), 26 November – 5 December 2012, Addis Ababa, Ethiopia, AUCIL/Legal/Doc.6 (V), on file at the ICRC.
15 ICRC, *Annual Report 2015*, ICRC, Geneva, 9 May 2016: https://www.icrc.org/en/document/annual-report-2015-icrc, consulted 29 September 2016.
16 Internal Displacement Monitoring Centre *et al.*, *Workshop Report – Kampala Convention: From Ratification to Domestication and Operationalisation*, IDMC, Geneva, April 2016: http://www.internal-displacement.org/publications/2016/workshop-report-, consulted 29 September 2016.
17 See for example ICRC, *The Domestic Implementation of International Humanitarian Law: A Manual*, ICRC, Geneva, 1 December 2015: https://www.icrc.org/eng/resources/documents/publication/pdvd40.htm, consulted 29 September 2016.
18 Health Care in Danger project: http://healthcareindanger.org/hcid-project, consulted 2 October 2016. See also ICRC, "The implementation of rules protecting the provision of health care in armed conflicts and other emergencies: A guidance tool", 28 February 2015: https://www.icrc.org/en/document/implementation-rules-protecting-provision-health-care-armed-conflicts-and-other-emergencies, consulted 21 October 2016.
19 ICRC, *ICRC Report: The Missing and their Families*, Geneva, 2003: https://www.icrc.org/eng/assets/files/other/icrc_themissing_012003_en_10.pdf, consulted 24 October 2016. See also ICRC, Guiding Principles/Model Law on the Missing: https://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law, consulted 24 October 2016.

capitalized on this expertise to carry out the stocktaking exercise. In addition, we were able to benefit from our presence in Africa, where our delegations in 29 countries carry out protection and assistance activities for IDPs, host communities and all those suffering the consequences of armed conflict or other violence. This has allowed the ICRC to add an operational perspective to considering how best to translate the Kampala Convention into practice. In doing so, the stocktaking exercise is intended to complement the valuable work of other actors, such as the UNHCR and the IDMC, that have provided particular support for the domestic implementation of the Kampala Convention.

Methodology of the stocktaking exercise

Throughout the first half of 2016, ICRC delegations across Africa provided updates and analysis on developments relating to IDPs, including States' latest actions to join, nationally implement and operationalize the Kampala Convention. This included States that are party to the Kampala Convention, whether or not they have adopted implementing laws and policies at the domestic level. It also includes some States that are not yet party to the Convention, but have adopted normative frameworks or policies on the protection of IDPs based on parallel provisions of the 1998 Guiding Principles on Internal Displacement (the Guiding Principles)[20] or of two of the Great Lakes Region protocols.[21] Also included were some non-States Parties that have no domestic framework in place, but have taken some action to address internal displacement. Overall, the practice of 25 African countries was taken into account.

The decision to include the experience of States not party to the Kampala Convention allowed for the compilation of a broader set of African practice on key aspects of States' implementation of their obligations related to internal displacement. It also reflects an underlying recognition among States that the obligations of the Convention are built upon existing rules of IHL and IHRL, in addition to the Guiding Principles and the 2006 Great Lakes Pact.[22] Although some States have not ratified the Convention, they may have adopted measures that result in concrete benefits for IDPs. Such practices can be a source of

20 United Nations, *Guiding Principles on Internal Displacement*, 11 February 1998: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/104/93/PDF/G9810493.pdf?OpenElement, consulted 28 October 2016.

21 International Conference on the Great Lakes Region, *The Pact on Security, Stability and Development for the Great Lakes Region*, Nairobi, 2006: http://www.icglr.org/images/Pact%20ICGLR%20Amended%2020122.pdf, consulted 24 October 2016. The Pact comprises 10 separate Protocols, including the *Protocol on the Protection and Assistance to Internally Displaced Persons*: http://www.refworld.org/pdfid/52384fe44.pdf, consulted 10 October 2016, and the *Protocol on the Property Rights of Returning Persons*: https://www.lse.ac.uk/collections/law/projects/greatlakes/4.%20Humanitarian%20and%20Social%20Issues/4c.%20Protocols/Final%20protocol.PropertyRights%20-En%20r.pdf, consulted 8 October 2016. For comparison of the different provisions, see the Annex to this report.

22 See for example International Refugee Rights Initiative, *Comparison of the Kampala Convention and the IDP Protocol of the Great Lakes Pact: A Briefing Note by the International Refugee Rights Initiative*, January 2014: http://www.refugee-rights.org/Assets/PDFs/2014/Comparative%20Note%20on%20the%20Kampala%20Convention%20and%20IDP%20Protocol%20FINAL-EN.pdf, consulted 29 September 2016.

inspiration to States that have yet to ratify the Convention, as well as those States Parties that are experiencing challenges in implementing it. Finally, by identifying the experiences of States not party to the Convention, the exercise highlights the consideration that these States have given to putting into practice activities aimed at protecting and assisting IDPs. This helps illustrate to these States that, while they have yet to ratify the Convention, they are *de facto* already implementing components of it.

An independent consultant commissioned by the ICRC compiled and analysed the input received from delegations. The exercise consisted of the following:

1. An assessment of how the Kampala Convention is being implemented in domestic law and policy. This part sought to identify domestic normative and policy frameworks, whether specifically related to the Kampala Convention or not, that could have a concrete impact on the protection of and assistance to IDPs.
2. A review of practical measures and concrete actions adopted by States to implement the Convention.

In the analysis of State practice, the following questions were kept in mind:

– What impact does the Kampala Convention have on the ground?
– What difference can it make in the lives of IDPs?
– What more needs to be done – by States, the AUC, RECs and RMs, the ICRC and other organizations and humanitarian actors – for the full implementation of the Kampala Convention to become a reality?

In consultation with the ICRC's own experts and selected external experts, and building on further research, the analysis of the information compiled through the exercise led to the drafting of Findings (in the form of lessons learned, some examples of good practices and key challenges) and Recommendations.

The Findings reflect the current level of States' efforts to prevent and address internal displacement. As part of the Findings, the examples of good practices reflect the experiences of States that have successfully adopted normative, policy or concrete measures to implement the Convention's obligations. The mention of specific States in relation to good practices is made so that other States can study those experiences and consult the relevant laws, policies and practices as needed. It is not intended to exclude other States that may have taken equally important actions. In addition, referring to legislation or policies as good practices does not necessarily mean that they are being fully implemented in practice; in some cases implementation needs more time.

The Recommendations are based upon the Findings but look ahead, suggesting actions to address challenges in implementing the Convention and offering insight as to how current implementation of the Convention can be strengthened. These Recommendations are all, it should be emphasized, without prejudice to the duty of States to carry out their respective obligations under international and domestic law.

As part of the stocktaking process, the ICRC convened a consultation meeting at the AU headquarters in Addis Ababa, Ethiopia, on 14 September 2016. Prior to this, the preliminary findings and draft recommendations from the exercise had been shared with the AUC and its Member States. Representatives of more than 25 Member States, the AUC's Department of Political Affairs and several RECs/RMs attended the meeting. Working under the Chatham House Rule,[23] they provided feedback on the stocktaking exercise and its initial conclusions, and exchanged views on the way forward. The outcomes of this meeting contributed to the finalization of the Findings and Recommendations that form the heart of this report.

At the same time as the stocktaking exercise was being carried out, the ICRC's delegation in Abuja was working on an in-depth country report, looking at the operationalization of the Kampala Convention in the states of Borno, Adamawa and Yobe in Nigeria. The resulting report is based on assessments carried out over the last year, including a survey of IDPs in the three states and interviews with key government and non-government stakeholders involved in providing assistance and protection to IDPs. It will be published in the coming months.

Structure and scope of this report

The main substance of the report consists of more than 85 Findings and 25 Recommendations. These are organized in five parts. Each part is based on a set of key obligations under the Kampala Convention grouped by topic, as follows:

1. Prevention
2. Planning, management and monitoring of protection and assistance activities
3. Providing adequate humanitarian assistance to IDPs
4. Protection of IDPs
5. Durable solutions for IDPs

Each of the 25 Recommendations is followed by a supporting rationale. The Recommendations are mainly intended for States, but in each of the five parts, one or more Recommendations also concern other actors. These may include the AUC, RECs, RMs, the UN, the ICRC and civil society organizations.

Given the wide range of topics covered in the Kampala Convention, we found it necessary to limit the scope of the exercise. This report, therefore, does not purport to be exhaustive. It is focused on those obligations most familiar to the ICRC, either because they are drawn directly from IHL or because they relate to humanitarian concerns that we encounter in our operations across Africa (e.g. issues of IDP registration and documentation).

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23 Participants are free to use the information received at the event, but neither the identity nor the affiliation of the speakers and panellists, nor that of any other participant, may be revealed: http://www.chathamhouse.org/about/chatham-house-rule, consulted 21 October 2016.

In addition, the report's focus on States meant it was not possible to examine the obligations of NSAGs, defined as "armed groups" and "non-State actors" in the Kampala Convention.[24] These obligations were clearly considered important by Member States when negotiating and adopting the Convention, and remain so today.

Finally, not all of the observations made and conclusions drawn by the ICRC through the stocktaking exercise are included in the report. Some of these will be shared directly with the States concerned in the ICRC's traditional framework of bilateral confidential dialogue that we maintain with public authorities around the globe.

Findings and recommendations

1. Prevention

Summary of key obligations

(a) Incorporate obligations under the Kampala Convention in domestic law (Article 3.2(a));
(b) Ensure individual criminal responsibility for arbitrary displacement (Article 3.1(g)).

Lessons learned

The lessons learned in the areas of ratification or accession and incorporation in domestic law are perhaps predictable for any public officials or other experts who have worked on treaty domestication, but are nonetheless important.

First and foremost, experience across Africa confirms that it is crucial for States to take action on ratification or accession and domestic implementation of the Kampala Convention before a crisis occurs that would result in internal displacement. Regardless of the causes of internal displacement in a given situation, it is rare that it develops slowly enough to allow policy makers and lawmakers to respond in real time by putting appropriate laws and policies in place.

With this in mind, States may find it useful to initiate their own review on how they could revive or expedite the procedures required in their particular jurisdiction to join the Convention and implement it at the national level. In particular, they may wish to follow the example of the numerous States that have taken advantage of the technical support available to expedite their ratification or accession and national implementation processes. In this regard, one very useful starting point is the AUC, which developed a draft Model Law and has already advised a number of States on its application. International organizations such as the IDMC, NRC and UNHCR organise training for public officials, without

24 Kampala Convention, Article 1.

charge, on the national implementation of the Kampala Convention, and support States in adopting laws and policies on internal displacement.[25] In June 2015, the GPC, led by the UNHCR, established a TTLP as a technical entity to coordinate global efforts on law and policy-making on internal displacement. As part of its activities, the TTLP organizes learning and technical support opportunities to strengthen States' capacity to develop and implement national IDP legislation and policies.[26] For its part, the ICRC's Advisory Service on IHL has produced a series of tools and publications providing technical support and guidance on adopting national legislation, as well as analysis of State practice to address humanitarian issues.[27] The ICRC also provides, on a regular basis, confidential advice to the authorities on developing domestic normative and policy frameworks that reflect Kampala Convention obligations.

It is evident that States will achieve the best results where there is a clear and sustained political will to discharge their responsibilities. This is the case both in incorporating the Kampala Convention into domestic law, and in preventing and responding to internal displacement. Officials with responsibilities for IDP-related matters would be well advised to consider anew how they might build ownership and momentum in their own country towards becoming party to the Convention and especially to its implementation.

One important lesson learned from the ICRC's field consultations and many years of work on behalf of IDPs in Africa, is that the domestic implementation of the Kampala Convention requires an inclusive process. This means engaging all key domestic actors in consultations, information sharing and decision-making. These include ministries and governmental agencies concerned, at central and field levels, municipal authorities and civil society organizations, as

25 For example, see Internal Displacement Monitoring Centre, *A Review of the Normative Framework in Kenya relating to the Protection of IDPs,* IDMC, Geneva, August 2015: www.internal-displacement.org/publications/2015/a-review-of-the-normative-framework-in-Kenya, consulted 29 September 2016; Internal Displacement Monitoring Centre, *Applying the Kampala Convention in the Context of Zimbabwe*, IDMC, Geneva, February 2015: www.internal-displacement.org/publications/2015/applying-the-kampala-convention-in-the-context-of-zimbabwe, consulted 30 September 2016; Internal Displacement Monitoring Centre, *Workshop Report – Domesticating the Kampala Convention: Law and Policy Making,* IDMC, Geneva, 2014, available at: www.internal-displacement.org/assets/publications/2014/201407-af-kampala-convention-law-policy-workshop-report-en.pdf, consulted 25 October 2016 (on supporting Liberia's national process of ratification and implementation of the Kampala Convention). See also Internal Displacement Monitoring Centre, *Workshop Report – The National Responsibility to Protect Internally Displaced Persons: The Kampala Convention*, IDMC, Geneva, May 2015: www.internal-displacement.org/publications/2015/the-national-responsibility-to-protect-internally-displaced-people-the-kampala-convention, consulted 28 October 2016.

26 The ICRC takes part in meetings of the TTLP as active observer and has supported various initiatives by the TTLP since its creation, including with regard to the promotion and implementation of the Kampala Convention. For example, the ICRC was a facilitator in the TTLP-sponsored regional workshop on the national implementation of the Kampala Convention, organized by the AU in partnership with the NRC and the UNHCR in Addis Ababa, Ethiopia, at the end of 2015. The workshop brought together six AU Member States with the purpose of supporting the domestication and implementation of the Kampala Convention, while promoting national responsibility and the sharing of experiences between them. See Internal Displacement Monitoring Centre, *Workshop Report – Kampala Convention: From Ratification to Domestication and Operationalization, op. cit.*

27 For more information on these tools, see: www.icrc.org/en/war-and-law/ihl-domestic-law/documentation#penal, consulted 29 September 2016.

well as IDPs and host communities.[28] Without an inclusive process, the necessary ownership by these actors will likely be lacking. This could potentially result in delays at one or more points in the domestic implementation process.

Public education and raising awareness of the Kampala Convention and the plight of IDPs are important factors in translating political commitments into concrete measures. These activities can be usefully carried out with the public authorities and civil society, as well as with IDPs and host communities. They can serve to encourage the public's interest and engagement, and their dialogue with public authorities, on the issue of internal displacement. This in turn can help ensure that addressing internal displacement remains a priority that enjoys sustained political will.[29] Special attention should be given to ensuring that draft or adopted laws and policies are made available in all official languages and, if different, in the languages of the most affected stakeholders, whether IDP or host communities.

It is crucial that laws and policies on internal displacement contain provisions for adequate means (institutional/mandate, human resources, budget) for their implementation and operationalization. This has been an important and sometimes difficult "lesson learned" in numerous places, where implementation processes have been initiated with serious effort, but have stalled because of a lack of adequate resources to sustain the work. Often this failure to ensure sufficient resources has been to the detriment of the specific protection and assistance needs of IDPs.

Finally, strong and clear criminal prohibitions relating to displacement can have an important deterrent effect and can contribute to broader efforts to combat impunity for violations of IHL. For decades, the ICRC has worked closely with States in developing tools and resources to support domestication of IHL obligations, including on criminal responsibility and on mechanisms for coordination among public authorities to strengthen prevention of and accountability for serious violations of IHL.[30]

28 On the importance of a consultative approach in adopting national instruments on IDPs, see Global Protection Cluster, *Regulatory Frameworks on Internal Displacement: Global, Regional and National Developments*, 2016, p. 20: http://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR-GPC-Reg-Framework-IDP.pdf, consulted 29 October 2016. On the process of developing domestic legislation and policies, see Internal Displacement Monitoring Centre and Brookings-LSE Project on Internal Displacement, *National Instruments on Internal Displacement: A Guide to their Development*, August 2013: www.internal-displacement.org/publications/2013/national-instruments-on-internal-displacement-a-guide-to-their-development, consulted 31 October 2016.

29 On engaging parliamentarians in advocacy and awareness-raising efforts to support the adoption of national legal instruments on IDPs, in view of the important role parliamentarians can play in promoting such instruments, see United Nations High Commissioner for Refugees and Inter-Parliamentary Union, *Internal Displacement: Responsibility and Action – Handbook for Parliamentarians*, UNHCR & IPU, Geneva, 2013: www.unhcr.org/protection/migration/525bee0c9/inter-parliamentary-union-ipu-handbook-internal-displacement-responsibility.html, consulted 31 October 2016.

30 See the penal repression factsheets from the ICRC's Advisory Service on IHL: www.icrc.org/en/war-and-law/ihl-domestic-law/documentation#penal, consulted 2 October 2016; ICRC, Advisory Service on IHL, *Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based on Domestic Practice: Report of the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law,* ICRC, Geneva, 29 August 2013: www.icrc.org/en/publication/4138-preventing-and-repressing-international-crimes-towards-integrated-approach-based, consulted 2 October 2016.

Some examples of good practices

Across Africa, States have taken a range of actions to realise the national implementation of the Kampala Convention[31] and to more broadly develop a national approach to IDP-related challenges. While there is, of course, no single "template" or one single "best" approach, the number and diversity of efforts undertaken provide practical examples for other States, as they move to join and/ or implement the Convention in their own particular context.

Uganda was a pioneer, adopting The National Policy for Internally Displaced Persons in 2004,[32] long before the Kampala Convention was created. Uganda's policy was designed to implement the Guiding Principles, and is broad in scope. It includes the establishment of a national coordination body, detailed arrangements for intergovernmental coordination at the national and the local levels, specific provisions for aspects of protection and assistance, and arrangements for public education.[33] The Policy's implementation was the subject of a multi-stakeholder review in 2006. The report on this review provides a helpful snapshot, detailing the challenges of implementation, and remains valuable a decade later.[34]

In Somalia and Mali, the authorities have worked closely with international partners to develop national laws and policies.[35] This widened the scope of

31 Internal Displacement Monitoring Centre, *The Kampala Convention Two Years On: Time to Turn Theory into Practice*, IDMC, Geneva, December 2014: www.internal-displacement.org/publications/2014/the-kampala-convention-two-years-on-time-to-turn-theory-into-practice, consulted 29 September 2016.

32 Republic of Uganda, Office of the Prime Minister, Department of Disaster Preparedness and Refugees, *The National Policy for Internally Displaced Persons,* Uganda, August 2004: www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf, consulted 29 September 2016.

33 For a good summary of Uganda's National Policy for IDPs see J. Miller, "Brookings-Bern Project on Internal Displacement: Uganda's IDP Policy", *Forced Migration Review*, January 2007: www.brookings.edu/wp-content/uploads/2016/06/200701_JM_FMRUganda.pdf, consulted 29 September 2016.

34 For more information on the practical implementation of Uganda's National Policy, see the summary of the 2006 workshop: Universität Bern and the Republic of Uganda, *Workshop on the Implementation of Uganda's National Policy for Internally Displaced Persons,* Kampala, Uganda, 3–4 July 2006: www.brookings.edu/wp-content/uploads/2016/06/Uganda_Workshop2006_rpt.pdf, consulted 29 September 2016. For additional background on other early efforts to establish national laws and strategies on internal displacement, especially in relation to the Guiding Principles, see: J. Wyndham, *A Developing Trend: Laws and Policies on Internal Displacement*, Human Rights Brief, Vol. 14, Issue 1, Article 2, 2006: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1191&context=hrbrief, consulted 29 September 2016.

35 A signatory since 23 October 2009, Somalia has not yet ratified the Convention. It has developed, but not yet adopted, a comprehensive national policy on internal displacement under the leadership of the Ministry of Interior and Federalism, with the help of the Office of the UN Special Rapporteur on the Human Rights of IDPs. In addition, authorities in Puntland developed policy guidelines on displacement in 2012, and in 2016 the Somaliland Internal Displacement Policy was adopted at the initiative of the Ministry of Resettlement, Rehabilitation and Reconstruction, with the assistance of various international organizations, including the local protection cluster. For more information on the efforts to develop and implement a national policy in Somalia, see: J. Drumtra, Brookings-LSE Project on Internal Displacement, *Internal Displacement in Somalia*, Washington, December 2014, pp. 16-19: www.refworld.org/docid/54bd197b4.html, consulted 8 October 2016; Global Protection Cluster, *Regulatory Frameworks on Internal Displacement*, *op. cit*., p. 24. In Mali, a party to the Convention since 2012, an inter-institutional committee for the domestication of the Kampala Convention was established in April 2016 by the Ministry of Solidarity, Humanitarian Action and Reconstruction in the

consultation amongst these key groups and is expected to bear fruit as those States move forward with finalizing and bringing into force their policies and programmes.

In Kenya, a comprehensive framework to address displacement issues has been developed and adopted.[36] Kenya is a party to the Great Lakes Pact, but not yet a party to the Kampala Convention. It is worth noting that Kenya's framework addresses a number of Convention obligations and can serve as an example for other States, party and non-party alike.[37]

In Burundi, a comprehensive peace agreement (the Arusha Peace and Reconciliation Agreement for Burundi, 2000) includes multiple provisions relating to internal displacement (e.g. on access to people in need and the security of international personnel and provision of humanitarian aid) that are consistent with the Kampala Convention.[38] Burundi is not yet a party to the Kampala Convention, but here again these measures are, in many cases, consistent with Convention obligations.

In the Democratic Republic of the Congo, the Child Protection Code (2009) includes a provision on the rights of displaced children, which specifies their right to protection and humanitarian assistance.[39] This is an interesting example of a legal basis for protecting and assisting IDP children, even in the absence of specific legislation implementing the Kampala Convention.

Also in the Democratic Republic of the Congo, the authorities have initiated a working group to convene representatives of humanitarian and UN agencies and have been consulting national stakeholders on the terms of reference for this body (*Groupe de travail technique sur le déplacement*). Such a structure and process is likely to boost consultation and engagement by key stakeholders, who can be expected to contribute more to national action on internal displacement in the future.[40]

North. Charged with steering the policy-making process, the committee initiated a normative audit of the Malian legal framework in light of the requirements of the Kampala Convention. Republic of Mali, *Décision No. 2016/0109 du Ministre de la Solidarité, de l'Action Humanitaire et de la Reconstruction du Nord*, 28 April 2016, on file at the ICRC.

36 Internal Displacement Monitoring Centre, *Towards a Comprehensive Response to Internal Displacement in Kenya: A Roadmap for Action,* IDMC, Geneva, August 2015: www.internal-displacement.org/publications/2015/towards-a-comprehensive-response-to-internal-displacement-in-kenya-a-roadmap-for-action, consulted 29 September 2016. See also Refugee Consortium of Kenya and the Danish Refugee Council, *Behind the Scenes: Lessons Learnt from Developing a National Policy Framework on Internal Displacement in Kenya*, January 2013: https://goo.gl/B45dsu, consulted 31 October 2016.

37 Internal Displacement Monitoring Centre, *A Review of the Normative Framework in Kenya relating to the Protection of IDPs, op. cit.*

38 *Arusha Peace and Reconciliation Agreement for Burundi*, Arusha, August 2000, for example, Protocol IV, Chapter 1, Articles 1–3: https://peaceaccords.nd.edu/accord/arusha-peace-and-reconciliation-agreement-burundi, consulted 24 October 2016.

39 Democratic Republic of the Congo, *Loi No. 09/001 du 10 janvier 2009 Portant sur la Protection de l'Enfant*, Article 2(2) : www.leganet.cd/Legislation/JO/2009/L.09.001.10.01.09.htm#TICI, consulted 10 October 2016.

40 For background on the challenges of internal displacement in the Democratic Republic of the Congo and responses to these, see: Internal Displacement Monitoring Centre, *Democratic Republic of the Congo 2014: Multiple Crises Hamper Prospects for Durable Solutions*, IDMC, Geneva, December 2014: www.internal-displacement.org/sub-saharan-africa/democratic-republic-of-the-congo/2014/multiple-crises-hamper-prospects-for-durable-solutions, consulted 8 October 2016.

In many States, existing domestic laws provide for the criminalization of acts of arbitrary or forced displacement. In Rwanda, to give but one example, the Penal Code (2012) includes crimes and penalties relating to arbitrary displacement.[41] Of note, the criminal law provisions in Rwanda are complemented by separate measures that address other aspects related to the prevention of displacement.[42] Several African States have criminalized forced displacement in their implementing legislations of the Geneva Conventions or the Statute of the International Criminal Court (e.g. Botswana, Burkina Faso, Kenya, Mauritius, Nigeria and Senegal). It is worth mentioning that Burkina Faso, Mauritius and Senegal have criminalized forced displacement as a crime against humanity and a war crime for both international and non-international armed conflicts.[43]

In West Africa, States have taken action through the ECOWAS to promote awareness of and adhesion to the Convention, including through a tour of select capitals in 2016. In East Africa, States joined forces under the auspices of the IGAD in October 2016 at a seminar in Nairobi, jointly organized with the ICRC. The seminar reviewed national measures undertaken by IGAD Member States and considered how to promote the Convention.[44]

These represent only a sample of the kinds of actions undertaken by States. Considered together, they demonstrate that there are many examples of States having overcome a range of challenges regarding national implementation. Considered on their own, they demonstrate that there are many recent, practical precedents for States that are now – or soon will

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41 The 2012 Penal Code provides in Article 123(7) that forced displacement of the civilian population or their transfer to or systematic detention in concentration or forced labour camps is a war crime. Penalties are provided for under Article 125. See Republic of Rwanda, *Organic Law No. 01/2012/OL of 02/05/2012 Instituting the Penal Code*: www.unodc.org/cld//document/rwa/2012/penal_code_of_rwanda.html?lng=en, consulted 25 October 2016.

42 For example, the 2009 *National Disaster Management Policy* (revised in 2012) refers to "mass movement of population", which includes internal displacement, as a "main hazard" in Rwanda: www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiEloXJgK_PAhVRGsAKHb-EAQ8QF ggdMAA&url=http://%3A%2F%2Fwww.ifrc.org%2Fdocs%2FIDRL%2FRwandaDisaster_Management_ Policy_01.pdf&usg=AFQjCNHs1Pf4cgXS4XuekwnaEKdvv63BhA&cad=rja, consulted 10 October 2016. See also Republic of Rwanda, *Law No. 41/2015 of 29/08/2015 relating to Disaster Management*, available at: www.rema.gov.rw/fileadmin/templates/Documents/rema_doc/Laws%20updated/Law_establishing_ the_Gishwati_-Mukura_National_Park.pdf, consulted 10 October 2016. This new law refers to the Kampala Convention in its preamble. While it does not refer to displacement directly, internal displacement could qualify as a disaster, according to the definition of disaster in Article 2(4) of the law: "serious calamity occurring on a small or large area of the country involving loss of life, physical or psychological injury or important material, economic, or environmental damages, which exceeds the ability of the affected population to overcome with its own resources".

43 For more information, see the ICRC National Implementation Database: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCountry.xsp, consulted 28 October 2016.

44 The preliminary findings of the ICRC stocktaking exercise were also shared with participants during the IGAD-ICRC seminar, including a number of examples of good practices from East African States. See "Kenya: IGAD and ICRC hold seminar on the Kampala Convention", 10 October 2016: www.icrc.org/en/document/igad-and-icrc-hold-seminar-kampala-convention, consulted 24 October 2016.

be – taking specific steps to make the Kampala Convention an integral part of their domestic law.

Key challenges

The momentum the Kampala Convention enjoyed between its adoption in 2009 and its entry into force in 2012 has stalled in recent years.

Few States have ratified or acceded to the Convention in the period from 2014 to the present. As of September 2016, there were 18 AU Member States that had signed up to the Kampala Convention, but had not taken the required action to ratify or accede to it, even after several years.[45]

Of equal concern is that many States are experiencing delays in the process of enacting the necessary legislation to give domestic effect to the Convention. In some cases, these delays exceed several years. Causes for this vary from State to State. They may include: a lack of awareness by some authorities on the issue of internal displacement, their obligations and/or on the importance of the Kampala Convention; lack of capacity; lack of budget allocations; internal displacement not being seen as a priority issue by the authorities; and the involvement of the State in an armed conflict. Similarly, a number of States have invested considerable time and effort into elaborating a national IDP policy or strategy, but have not managed to complete this process.

Numerous States in the monist legal tradition rely on their constitution, which automatically transposes international treaties into domestic law.[46] However, this generally does not complete domestic implementation. For example, the provisions of the Kampala Convention concerning criminal responsibility will likely be unenforceable or contrary to the principle of legality, unless there are designated penalties in law.

In practice, there are few or no prosecutions relating to crimes under the Kampala Convention taking place in domestic courts today. The lack of specific criminal provisions in domestic legal orders is certainly one of the main factors that underlie the lack of operationalization of this part of the Convention.

When an armed conflict is ongoing, measures can and, in many cases, must be taken by States and other parties to the conflict to prevent displacement from occurring in the first place. This is especially true in ensuring respect for IHL and increasing efforts to protect civilians and limit the harm to which they can be exposed. In practice, violations of IHL continue to be a major cause of internal displacement in armed conflicts in Africa. The challenge here is to strengthen States' commitment (and capacity) to respect and ensure respect for IHL. Another challenge, particularly in protracted armed conflicts, is to avoid

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45 African Union, *List of Countries which Have Signed, Ratified/Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, op.cit.

46 For a discussion of the monist legal tradition and implications for implementation of IHL treaties, see ICRC, *The Domestic Implementation of International Humanitarian Law: A Manual*, ICRC, Geneva, September 2015: www.icrc.org/eng/assets/files/publications/icrc-002-4028.pdf, consulted 29 September 2016.

Kampala Convention
Status of signature and ratification

Kampala convention ratification

- Signature
- Ratification Accession
- Not signed

Source: http://www.au.int/en/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally_displaced_persons_in_africa_kampala_convention_11.pdf

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Internal Displacement: Law and Policy Developments

* This section focuses on a wider set of normative tools: it comprises other instruments or statements confirming the validity of the Guiding Principles, including peace-treaties referring to them. It also includes laws or policies relevant but not specifically focused on displacement.

displacement that can be seen by parties as a natural incidence of military operations, and whose rationale in this regard is not being questioned.

State authorities may find it difficult to prevent displacement in areas where NSAGs are present. There is no simple solution to this obstacle, which can have serious and protracted humanitarian consequences. That said, it must be recalled that the Kampala Convention creates obligations for NSAGs (referred to as "Armed Groups" and "Non-state actors" in the Convention)[47] and includes numerous references to them.[48] More generally, IHL establishes obligations on NSAGs that are party to an armed conflict.[49]

Recommendations

For States

> Recommendation 1: States that have not yet done so should expedite their ratification of, or accession to, the Kampala Convention.

– The Kampala Convention offers a comprehensive and detailed framework of reference that can guide States in discharging their sovereign obligations in preventing and responding to internal displacement. Thus, ratification of the Convention provides a State with a clear legal basis for the adoption of domestic normative and policy measures related to the protection and assistance of IDPs.
– There are a number of States that have not ratified the Kampala Convention but have been putting in place concrete measures that correspond to obligations under the Convention. For such States, ratification is a logical step that would bring coherence to domestic law, policy and practice, and is a further exercise of their sovereignty.
– Numerous obligations contained in the Kampala Convention are already included in the existing obligations of States under IHL and IHRL. Ratification of the Kampala Convention complements and builds upon those existing legal obligations, providing more clarity on how they should be interpreted and implemented. This can help States reinforce the protection of and assistance to IDPs.
– Ratification of the Kampala Convention demonstrates a State's commitment to preventing and addressing internal displacement. This can help attract donor support and technical advice/assistance for the full range of Kampala Convention elements. This can include technical advice/assistance on

47 Kampala Convention, Article 1(e) and 1(n) respectively.
48 *Ibid.* See for example, Articles 2(e), 3(1)(h) and (i), and 7(4) and (5).
49 As noted in the Introduction above, this report is focused on the obligations and practice of States, thus it does not examine the obligations of NSAGs, which are recognized as an essential component of the Kampala Convention.

adopting domestic legislation and coordination structures and financial support to assist IDPs and host communities in the emergency phase and in the longer term.

– Additional ratifications reinforce the Kampala Convention's legitimacy and relevance by highlighting the AU's leading role in responding to the challenge of internal displacement. They also lead to more experiences and good practices that can be shared with other States in Africa and beyond.

> Recommendation 2: States party to the Kampala Convention should initiate and complete actions to incorporate treaty obligations in domestic law and policy processes, including criminal prohibitions, requesting advice and technical support if/as needed.

– Ratification is an important step. However, it needs to be followed by the adoption of normative, policy and concrete measures at the national level in order to ensure that the protections afforded by the Kampala Convention become a reality for IDPs.

– Domestic implementation through measures appropriate for a State Party's legal system and governance structures will help ensure that the State is able to respond effectively to the needs of IDPs.

– To be effective, laws and policies developed to implement the Kampala Convention need to include the provisions for adequate means (institutional/ mandate, human resources, budget) for their practical implementation.

– States can request advice and technical assistance on domestic implementation from the AUC (which has developed a draft Model Law), other States party to the Kampala Convention and from various international and humanitarian organizations (such as the ICRC and the UNHCR). They can also benefit from the growing set of good practices and lessons learned on the implementation of the Kampala Convention. In so doing, domestic implementation helps expand the expertise of public authorities on matters related to internal displacement. In addition, by taking inspiration from the experience of other States and adapting solutions to their specific contexts, States can in turn contribute to establishing good practices.

– Criminalizing arbitrary displacement that amounts to a war crime or a crime against humanity is a legal obligation for all States party to the Convention. Strengthening the domestic legal framework on this aspect will allow States Parties to ensure individual criminal responsibility for perpetrators in domestic courts.

– Domestic implementation measures demonstrate a State's readiness to effectively discharge its primary responsibility for IDPs on its territory. This can help attract donor support and technical advice and assistance. States can maintain this support by demonstrating the effectiveness of their domestic strategies and mechanisms.

> Recommendation 3: States should take steps to promote knowledge of the Kampala Convention for all the actors concerned, including IDPs themselves, host communities, civil society and public authorities, at central, regional and local levels. (See also Recommendation 6 on the role of other actors in awareness-raising and capacity-building and Recommendation 12 on the importance of fostering national ownership through capacity-building activities.)

– This is an essential element to ensure an inclusive national process from ratification through domestication and practical implementation of the Convention. Public awareness contributes to ownership and sustainability of such a process by strengthening the commitment of all the actors involved to fully implementing the Convention.

– International and humanitarian partners will often be ready and willing to cooperate with States on awareness-raising activities, as well as to carry out more specialized capacity-building activities for public authorities and other actors, in particular public officials.

– In the same vein, local civil society actors are often well placed to promote knowledge of the Convention. In many cases, their capacities can be used to complement efforts by public authorities and their partners. Notably, the efforts of civil society actors can help public authorities to better understand and build upon public interest on IDP-related matters and the Kampala Convention in particular. They can also help ensure sustained interest in domesticating the Convention.

– Of great importance are activities to raise awareness of the Kampala Convention among IDP communities themselves. These activities can empower IDPs by making them more aware of their rights and responsibilities.

> Recommendation 4: States should ensure that all relevant public authorities – including armed and security forces – are fully informed of their obligations and instructed to respect and ensure respect for IHL.

– Violations of IHL are a major cause of displacement during armed conflict.

– Improving respect for IHL in armed conflicts will, in many cases, prevent displacement from occurring in the first place, by strengthening the protection of civilians and limiting the effects of hostilities on civilian lives and property.

– Of particular importance is respect for the fundamental principles of distinction, proportionality and precaution, as well as the prohibition on the forced displacement of the civilian population, in whole or in part, for reasons

related to the armed conflict, unless the security of the civilians involved or imperative military reasons so demand.[50]

– When displacement does occur, respect for IHL can help ensure that it is, as much as possible, kept to a minimum and is temporary. Furthermore, IHL provides important protections to civilians during displacement, so its full implementation contributes to ensuring the safety and well-being of IDPs.[51]

– Failure to respect IHL can result in civilian and military superiors being found guilty of war crimes, whether directly or under the doctrine of command or superior responsibility.[52]

– National criminal law prohibitions relating to displacement can be included in military manuals, training curricula and briefing modules.

For other actors

> Recommendation 5: International and humanitarian organizations should continue to offer technical advice and support to AU Member States, not only for ratification of the Kampala Convention, but also for the full range of domestic implementation measures required under national legal and policy frameworks.

– Many States have already benefited from this advice and support and/or continue to express an interest in receiving it.

– When offering their advice and support, organizations can usefully share good practices initiated by other States and/or facilitate peer-to-peer exchanges and the sharing of experiences between States directly. This has proven to be very effective in encouraging States to take the necessary measures to implement the Kampala Convention. It can also help streamline domestic implementation processes.

– When building the authorities' capacities, international actors can reinforce best practices in consultation with IDPs.

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50 See Customary IHL Database, Rules 1, 14 and 15 and, specifically on displacement, Rules 129, 131, 132 and 133: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul, consulted 11 October 2016. See also Geneva Convention relative to the Protection of Civilians Persons in Time of War, Art. 49; Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts of 1977, Art. 85(4)(a); and Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 1977, Art. 17.

51 See ICRC, Advisory Service on IHL, *Internally Displaced Persons and International Humanitarian Law - Factsheet*, ICRC, Geneva, March 2010: www.icrc.org/en/war-and-law/ihl-domestic-law/documentation#displaced, consulted 11 October 2016. For an overview of IHL provisions that are relevant to the protection and assistance of IDPs, see also the Annex to this report.

52 For further information on command responsibility, see: ICRC Advisory Service on IHL, *Command Responsibility and Failure to Act*, ICRC, Geneva, April 2014: www.icrc.org/eng/assets/files/2014/command-responsibility-icrc-eng.pdf, consulted 11 October 2016.

> Recommendation 6: The AUC, RECs, RMs and other organizations with expertise in this domain should expand awareness-raising and capacity-building activities on the Kampala Convention, in coordination with States and local civil society actors. The ACHPR and its special rapporteur on refugees, asylum seekers and internally displaced persons can also play a part in this regard, in accordance with their mandates and the role attributed to them by the Convention. (See also Recommendation 3 on the role of States in promoting knowledge of the Kampala Convention and Recommendation 12 on the importance of fostering national ownership through capacity-building activities.)

- Increased public knowledge of the Kampala Convention can help expedite States' processes of ratification, domestication and operationalization of the Convention.
- RECs and RMs are often well placed to foster greater awareness of internal displacement issues, including of the potential of the Kampala Convention to prevent and address internal displacement.
- The AUC, RECs, RMs and other organizations concerned should consider approaching States to champion the Kampala Convention and share their experiences with other States.
- Local civil society actors are typically cost-effective partners with solid knowledge of the context. As such, they can contribute positively to the implementation of public awareness-raising and capacity-building activities by international actors.
- The ACHPR and its special rapporteur on refugees, asylum seekers and internally displaced persons are both expressly mentioned in the Kampala Convention. They are assigned specific roles in supporting and monitoring States Parties' implementation of the Convention.[53] Thus, the ACHPR and the special rapporteur are both well placed to usefully contribute to the promotion and national implementation of the Kampala Convention, in cooperation with the AUC and others.
- Awareness-raising and capacity-building activities should be carried out with internally displaced communities as part of a meaningful and regular dialogue with those communities.

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53 Articles 8(3)(e) and (f) of the Kampala Convention provide that, in order to support States Parties' efforts to protect and assist IDPs under the Convention, the AU shall *inter alia* share information on situations of internal displacement with the ACHPR, and cooperate with the special rapporteur on refugees, asylum-seekers and internally displaced persons in addressing IDP-related issues. Article 14(4) of the Convention refers to the reporting mechanism under Article 62 of African Charter on Human and Peoples' Rights and the voluntary procedure of the African peer-review mechanism. It establishes that, in complying with such mechanisms, States party to the Kampala Convention shall submit information on the legislative and other measures taken to give effect to the Convention.

> Recommendation 7: The AUC and AU Member States should ensure that the first Conference of States Parties takes place as soon as possible and adopts a comprehensive plan of action/road map on the operationalization of the Kampala Convention.

– Article 14(1)–(3) of the Kampala Convention provides for the establishment of a Conference of States Parties as the Convention's main monitoring body to convene regularly under the auspices of the AU. The first meeting of the Conference of States Parties will be a historic demonstration of the political will within Africa to address the issue of internal displacement proactively and collectively. It will confirm the AU's strong leadership in this regard.

– The Conference will have numerous practical benefits. It will offer States Parties the opportunity to exchange experiences of ratification and implementation of the Kampala Convention. It will also allow States Parties and invited international and humanitarian organizations to consider together how to best address the challenges of prevention and response to internal displacement in Africa.

– Furthermore, the Conference can be an important source of information for States considering ratification, and particularly for those that have already signed the Convention but have not yet joined it.

– The first meeting of the Conference of States Parties could help establish shared reporting and monitoring mechanisms and supervisory functions for the Convention, as foreseen in Article 14. A permanent Kampala Convention Secretariat could be established to these ends.

– The first meeting of the Conference could conclude with the adoption of a comprehensive road map (or plan of action) for the full implementation of the Kampala Convention, with benchmarks and timeframes.[54] This could include, for example, detailed plans on the various vulnerable sub-groups within the internally displaced population that require protection and for the collection and analysis of data by sex, age and other relevant factors. This road map could then be regularly reviewed at, and between, subsequent meetings of the Conference of States Parties in the future.

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54 In July 2010, the *AU Roadmap for Implementation of the Outcomes of the AU Special Summit on Refugees, Returnees and IDPs in Africa* (that is, the 2009 Summit that adopted the Kampala Convention, jointly with the Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa) was adopted for the period 2010–2015. The roadmap called for speedy ratification of the Kampala Convention, development of an action plan, implementation and revision of the action plan based on experience. See Brookings-LSE Project on Internal Displacement, United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), *Forum on the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),* Kampala, 17 June 2011: www.brookings.edu/wp-content/uploads/2012/04/Forum-on-African-Union-IDP-Convention-Kampala-2011-Report-2.pdf, consulted 29 October 2016. See also United Nations Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons (2016), op. cit.*

– AU Member States should ensure that the work of the Conference of States Parties and the road map fall within the AU's Humanitarian Agenda 2063 and the Common African Position on Humanitarian Effectiveness and its Ten-Year Action Plan. These should take into account the various African Human Rights Mechanisms and the roles they play in ensuring conditions necessary for the protection of IDPs as a specifically vulnerable group.

2. Planning, management and monitoring of protection and assistance activities

Summary of key obligations

(a) *Designate an authority or body, where needed, responsible for coordinating activities aimed at protecting and assisting IDPs and assign responsibilities to appropriate organs for protection and assistance, and for cooperating with relevant international organizations or agencies, and civil society organizations, where no such authority or body exists (Art. 3.2(b));*

(b) *Provide necessary funds for providing assistance and protection to IDPs (Art. 3.2(d));*

(c) *Assess the needs of IDPs, including through consultation with them, and facilitate participation of IDPs in decisions regarding their assistance and protection (Art. 5.5; Art. 9.2(k));*

(d) *Monitor and evaluate the effectiveness of humanitarian assistance provided to IDPs (Art. 9.2(m)).*

Lessons learned

It is essential to ensure that the designated coordinating authority or body has the necessary mandate and authority to mobilize all ministries and agencies concerned. It must be equipped with adequate resources (human and financial) to function effectively.

The coordination structures and processes that are put in place to address situations of internal displacement must be clearly defined to ensure effective information-sharing and decision-making at the national level between relevant ministries and agencies. They must take into account the shared responsibilities of different levels of government, especially between the central/national level and subnational/local levels. Experience indicates that regional and municipal authorities are often at the forefront of the protection and assistance response on behalf of IDPs, but may not receive adequate resources and support on a timely basis. Finally, the roles of actors outside government (whether IDP communities or civil society organizations) should also be recognized and incorporated in coordination processes.

At the same time, without well-designed and well-managed normative and policy frameworks and national coordination bodies/processes, States facing situations of internal displacement may have difficulty in maintaining donor

interest and support for programmes. Contrariwise, States that demonstrate efforts to ensure good governance in relation to IDP matters can expect to see positive interest from donors.

It is also clear that international actors (e.g. UN agencies, ICRC, NGOs) can play important roles in supporting the development of national strategies and policies to respond to situations of internal displacement. However, if they lead rather than accompany national authorities, there is a risk that the authorities will not have sufficient ownership to carry forward the strategies and policies into the implementation phases. A genuine partnership between national authorities and international actors, consistent with the State's primary responsibility towards IDPs under its jurisdiction, is likely to produce more sustainable results. The good will of international actors is no substitute for the political will and commitment of authorities to prevent and address internal displacement.

There are strong indications that responses are most effective when there is availability of solid data on the needs, vulnerabilities and capacities of IDPs, including disaggregated data by sex, age and other relevant factors, which can constitute an agreed-upon baseline for all actors involved in the response.

Some examples of good practices

The National Strategy for IDPs in Mali specifically addresses the potential roles of the international community, including humanitarian and development actors. Art. 5(2) of the Strategy underlines the call of the UN secretary-general to humanitarian and development actors to support the government of Mali in the application and implementation of the Kampala Convention.[55]

Also in Mali, the Ministry of Solidarity and Humanitarian Action, which is responsible for IDP-related matters, has representatives not only in the capital, but also at regional and local levels. This helps ensure good coordination and cooperation between the national and local levels, and reflects the important roles local administrations can play in facilitating assistance to IDPs.

In South Sudan, new legislation provides for the mandate of the RRC. The role of the RRC is one of coordination of humanitarian agencies and humanitarian work, and its mandate extends to coordinating relief, rehabilitation, resettlement and reintegration of IDPs and returnees.[56] RRC local structures have been formed and deployed in the country. Going forward, it will be useful to regard the developing policies of the RRC for an assessment of the impact of this Commission's role in implementing the principles at the heart of IDP protection.

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55 Republic of Mali, Ministère de la Solidarité, de l'action humanitaire et de la reconstruction du Nord, *Stratégie Nationale de gestion des personnes déplacées internes et des rapatriés,* Bamako, May 2015: www.globalprotectioncluster.org/_assets/files/field_protection_clusters/Mali/files/strategie-nationale-de-gestion-des-pdis-et-des-rapatries-28-mai-2015.pdf , consulted 11 October 2016. See also: Conseil Supérieur de la Diaspora Malienne (CSDM), *Assistance humanitaire aux réfugiés et déplacés de la crise malienne*, Bamako, 15 August 2016: www.csdmalienne.org/actualites/assistance-humanitaire-aux-refugies-et-deplaces-de-la-crise-malienne/, consulted 11 October 2016.

56 Government of South Sudan, Relief and Rehabilitation Commission Act 2016, additional information available at: www.icnl.org/research/monitor/southsudan.html, consulted 25 October 2016.

In Somalia, a comprehensive national Policy Framework on Displacement was developed in 2014. This includes provisions for early warning, data collection and designation of roles within the national authorities.[57]

The Arusha Peace and Reconciliation Agreement for Burundi includes multiple provisions relating to the protection and assistance of IDPs. These include provisions related to responsibilities for humanitarian aid and to access and security for international personnel.[58]

In Nigeria, the Humanitarian Coordination Forum and its sector-specific working groups are active at the federal level and in many of the states in the north-east, including the three states most affected by internal displacement (Borno, Adamawa and Yobe). The coordination forums have helped to improve regular information exchange between all stakeholders involved in protection and assistance for IDPs. All actors should continue to strengthen these forums and improve coordination.

In addition, IDPs in many of the camps in Yola and Maiduguri participate in decisions regarding their assistance and protection through camp chairmen and chairwomen. These positions have been created by the IDPs in the camps so that the views of both male and female IDPs are taken into account.

Also in Nigeria, considerable efforts have been made by national stakeholders, with support from the IOM, to implement the Data Tracking Matrix. This tool has provided a reference base line of the number of IDPs in the north-eastern region of the country, enabling more informed programming. Further efforts should be taken to ensure accurate data in areas that are harder to access for security reasons.

In Zambia, the authorities have established a Disaster Management and Mitigation Unit, which reports to the vice-president and receives funds every year.[59]

In Burkina Faso, CONASUR, the government body responsible for disaster response, has been able, together with donors, to respond effectively and rapidly to short-term crises. Having a standing structure in place certainly improves a State's capacity to respond to emergencies, and allows for an accumulation of experience and the development of standing procedures.

Where legislative or other delays mean that an appropriate coordination structure for IDPs is not established, other existing structures can, in some cases, be adapted to provide practical responses to the needs of IDPs. This can prove useful, although it does not diminish the importance of coordination structures and bodies specifically established for the purpose of dealing with internal displacement. Thus in Chad, the *CNARR*, has, in practice, played some role in relation to IDPs. In Liberia, the Refugee Commission would be mobilized in cases of internal displacement.

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57   See J. Drumtra, *Internal Displacement in Somalia*, *op. cit.*, pp. 16-17.
58   *Arusha Peace and Reconciliation Agreement for Burundi*, *op. cit.*, Protocol III, Art. 26, and Protocol IV, Art. 2, respectively.
59   Government of Zambia, Disaster Management and Mitigation Unit, Office of the Vice-President. See www.dmmu-ovp.gov.zm/?page_id=18, consulted 24 October 2016.

In some countries, such as Rwanda and Ethiopia, State authorities have agreements with their country's NS for initial assessment and rapid response at the outset of a displacement situation. This type of agreement can be very valuable in that it can, in advance, serve to put in place plans and resources needed to respond to sudden emergencies.

There have been positive experiences in a number of contexts with the use of collaborative profiling exercises (e.g. those led by the JIPS in the field).[60]

Key challenges

In a number of States, processes and plans for a coordination body have been developed and sometimes approved, but not fully implemented. Reasons for this may include delays in appointing key personnel and a lack of funds, political will or agreement on the roles of the coordination body or departments or agencies concerned.

In several contexts, States have established a coordination body for IDP issues but have failed to adequately fund it, whether from State resources (annual or ad hoc funds) or from partner/donor funding.

Furthermore, a coordinating body for refugee response or disaster risk reduction/response has been established in some countries, but not explicitly mandated to address IDP issues. During internal displacement crises, this body may *de facto* (or by default) be tasked with responding. Although this may prove useful, there are risks that the coordinating body may lack either the authority or resources to address IDP issues effectively.

Many States experience difficulties in establishing and maintaining the required level of dialogue with internally displaced communities. This can be the result of various factors, ranging from it not being seen as a priority to inadequate policies and structures and security/access concerns, etc. This can undermine the authorities' ability to implement programmes that respond to the needs of IDPs on the ground using available resources in the most efficient way.

A related difficulty arises when the IDP representatives (e.g. the IDP committees or chairpersons in camp settings) with whom the authorities engage, do not fully reflect the composition and views of the entire displaced community. It is often the most marginalized or vulnerable sub-groups with specific needs (e.g. women, the elderly and the disabled) who are not well represented. This can make it hard for authorities to accurately assess the range of existing needs.

Ensuring accurate assessments and planning well-targeted assistance and protection programmes in a timely manner outside major urban areas is often a challenge. Experience shows that the greatest knowledge and technical skills to perform needs assessments and plan assistance activities tend to be concentrated in the capitals or major cities. When IDPs are located outside these areas, it can be harder to address their needs.

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60 See www.jips.org/en/about/about-jips, consulted 24 October 2016.

Another challenge frequently faced in implementing effective responses is the lack of solid and comprehensive data on the needs, vulnerabilities and capacities of IDPs in a given context. This includes disaggregated data (by sex, age or other relevant factors) that can constitute an agreed-upon baseline for all actors concerned. There can be many obstacles to the identification of IDPs and adequate data collection. These can include IDPs' frequent dispersion with host families and communities, the lack of access to internally displaced communities by authorities or humanitarian actors,[61] or IDPs seeking anonymity for protection reasons. Where an overly restrictive definition of IDPs is adopted, this may result in data that does not accurately reflect the scope of the problem.

Recommendations

For States

> Recommendation 8: States should take steps to ensure that the designated coordinating authority or body has the necessary mandate and legitimacy to mobilize all ministries and agencies concerned, and is granted adequate resources (human and financial) to function effectively.

- It is essential that a State's normative and policy frameworks on IDPs are accompanied by the right government structure to operationalize these frameworks.
- The precise arrangements will vary from State to State, but in every case the designated authority must have the mandate and legitimacy needed in a given State to be effective.
- Of particular importance are the arrangements for cooperation and coordination between ministries and agencies at the national level, as well as between the national and local levels.
- Without sustained political will, even the best-designed coordination body for IDP responses is unlikely to ever be – or remain – effective in assisting and protecting IDPs.
- The designated authority must also consistently – or in times of a crisis – have adequate financial and human resources, so as to be in a position to translate the laws and policies into concrete action.
- It is in the interest of every State to have the best available information about the needs of people under its jurisdiction, especially those who are vulnerable because of internal displacement.

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61 Please refer to section 3 of the Findings and Recommendations for more information on need assessments and engagement with IDPs and host communities.

> Recommendation 9: Public authorities should develop adequate capacities at all levels to gather and maintain solid and current data on the needs, vulnerabilities and capacities of IDPs, as well as on durable solutions, including disaggregated data (by sex, age and other relevant factors). (See also Recommendation 18 on the importance of authorities maintaining an IDP register.)

– The availability of solid data leads to more effective and targeted responses, translating into better assistance and protection for the displaced. When all the actors concerned support the data analysis, this can provide a valuable common baseline for coordinated programming.[62]

– States that engage in collaborative data collection and analysis with international actors will strengthen their own capacities in this domain. In addition, they will be able to help ensure that data is collected, analysed and understood with the benefit of accurate knowledge of the context and the displacement-affected communities concerned.

– Data on durable solutions (e.g. which solutions IDPs would prefer in a given context, numbers of people who have integrated locally, pursued return, etc.) is also very important. This not only helps ensure a better response in a given context, but also provides greater insights that can be useful to improving responses elsewhere.

> Recommendation 10: Public authorities should proactively ensure consultation of and active engagement with IDPs and host communities in order to ensure their participation in decision-making on actions undertaken on their behalf. This engagement should take into account the diverse profiles of the displaced population (e.g. sex, age and other factors). (See also Recommendation 22 on the importance of consultation and active engagement of IDPs in decision-making on durable solutions.)

– This is the single most important element in ensuring that the needs of IDPs are effectively met in each phase of their displacement. This in turn helps ensure accountability towards the people on behalf of whom activities are carried out. Accountability requires that activities respond to people's real needs and priority concerns, and make the most effective use of available resources.

– The necessary engagement starts with needs assessments, continues throughout the design and implementation of programme responses, and concludes with the monitoring and evaluation of the responses.

– Consultation of and engagement with IDPs are consistent with full consideration of their human dignity and rights. Both help reinforce the

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62 Please refer to the JIPS website, www.jips.org/, for further benefits of collaborative data collection and analysis.

agency and autonomy of IDPs themselves, individually and in communities. As a result, IDPs are able to contribute to their own protection and assistance.

– Particular attention should be paid to ensuring that women, elderly people, the disabled and minority groups are able to make their voice heard and can participate in the decision-making process.

– It is important that IDPs are actively involved, through their community leaders and chairpersons, in the management of their camps.

– Public authorities should ensure continual dialogue with IDP communities, as their needs are likely to change as the situation evolves. Consideration of the wishes and concerns of IDPs is especially important in order to provide durable solutions, which should be the result of a free and informed choice.

> Recommendation 11: Public authorities at all levels with responsibilities for delivering assistance should establish mechanisms for monitoring short and longer-term outcomes. These should incorporate appropriate elements of accountability to IDPs.

– The main advantage of establishing an effective monitoring mechanism is an improved capacity on the part of the authorities to ensure that assistance reaches those for whom it is intended, and that resources are used in the most efficient way.

– Monitoring and evaluation allows for programmes to be adjusted and adapted, as needed, so that the assistance provided responds best to the needs of IDPs.

– Effective monitoring and evaluation can involve a two-way feedback loop that allows IDP communities to provide continuous input on programming responses intended to benefit them.

– When each of the public authorities has mechanisms in place to effectively monitor the impact of assistance and ensure accountability, this can have a positive effect across government bodies, strengthening the State's capacities in overall programme delivery and accountability.

– An effective monitoring mechanism will add to donor confidence about the impact of protection and assistance activities for IDPs.

– Effective monitoring mechanisms can be used to encourage other stakeholders to establish their own mechanisms for monitoring short and longer-term outcomes of assistance.

For other actors

> Recommendation 12: When supporting States to develop laws and policies including national strategies on internal displacement, other actors should favour approaches that ensure the maximum ownership on the part of the authorities. (See also Recommendation 6 on the role of other actors in awareness-raising and capacity-building.)

– International actors must allow States to nourish a sense of ownership in the development of laws and policies, including of national strategies, to address IDP-related situations. This can help ensure that national authorities are committed and able to advance the strategies and policies in the implementation process.
– To this effect, international actors should aim for genuine partnerships and incorporate national capacity-building into their programme objectives and schedules.

3. Providing adequate humanitarian assistance to IDPs

Summary of key obligations

(a) *Provide IDPs with adequate food and other essential items to the fullest extent practicable and with the least possible delay (Art. 9.2(b));*
(b) *Provide IDPs with adequate shelter to the fullest extent practicable and with the least possible delay (Art. 9.2(b));*
(c) *Provide IDPs with adequate water and sanitation to the fullest extent practicable and with the least possible delay (Art. 9.2(b));*
(d) *Provide IDPs with adequate medical care and other health services to the fullest extent practicable and with the least possible delay (Art. 9.2(b));*
(e) *Provide IDPs with education and any other necessary social services to the fullest extent practicable and with the least possible delay (Art. 9.2(b));*
(f) *Support self-reliance and sustainable livelihood initiatives as appropriate and feasible (Art. 3.1(k));*
(g) *Provide assistance to host communities where appropriate (Art. 9.2(b));*
(h) *Facilitate rapid and unimpeded access to IDPs by humanitarian organizations (Art. 3.1(j); Art. 5.7).*

Lessons learned

When States lack the necessary human and financial resources to fulfil their primary role and duty in responding to internal displacement and assisting IDPs, effective access to IDPs by humanitarian organizations is a key factor in meeting the needs of those IDPs. This must be accompanied by a commitment of state authorities and international actors to abide by humanitarian principles in providing assistance to IDPs. The importance of upholding humanitarian principles to maintain or expand access cannot be overstated.

In many places, IDPs are not accommodated in camps or other official facilities but instead stay with host families and in host communities.[63] In such situations, experience shows that it is essential to consider the needs of host

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63 It must be recognized that in some countries, IDPs may not seek shelter with host communities but may choose, or be obliged, to base themselves in remote and hard-to-reach areas because of security and other concerns.

communities when assessing the needs of IDPs, as opposed to considering IDP needs in isolation. This takes into account the possible negative impact of displacement on those who receive IDPs, particularly as a result of sharing already strained resources. Acknowledging the significant contributions that host communities often give also helps to reduce or avoid possible tensions between them and IDPs.

As with other target groups, cash-based interventions on behalf of IDPs should be privileged by States and other actors, provided that local markets are functioning. Cash transfer programmes can give ownership and dignity to IDPs, allowing them to determine their own priorities and make choices on how to spend it. Further, cash enables a "virtuous cycle" at a market level, as the money provided to the beneficiaries is reinjected in the market, and resident shopkeepers benefit from it. This can result in IDPs being perceived as less of a burden by the host community.

For rural communities with farming as their main livelihood, protracted displacement to urban areas might require re-orienting their livelihood strategies to access the formal labour market. States and other actors should create opportunities for vocational training and employability in favour of IDPs, supporting registered micro-economic initiatives. In the same vein, if protracted displacement occurs in a rural area, local authorities should facilitate the official allocation of arable land for agricultural activities, in order to avoid the risk of "daily labour" exploitation.

It is important to consider that schools and other community structures can provide a short-term solution for housing IDPs. However, the communal nature of these ad hoc facilities and the lack of privacy prevent normal family cohesion in the long term. In addition, this sort of solution in the mid-to-long term will have a negative impact on access to education for the children residing in the area, as the school will not be fully available for classes. This can also be an additional source of tensions between residents and IDPs.

Some examples of good practices

In Burkina Faso, CONASUR, the government's body responsible for disaster response, has in the short term been able to provide a rapid and effective assistance response to emergencies, together with donors.

In a number of countries, humanitarian organizations are generally given rapid and unimpeded access to IDPs by State authorities.

In Rwanda, for example, the State authorities have engaged humanitarian actors in a National Platform for Disaster Risk Reduction, which meets regularly. This ongoing cooperation can help improve coordination in times of emergencies and thus improve access for the provision of humanitarian assistance to the resident and displaced communities most in need.

Also in Rwanda, the State authorities have established a structure within the government that centralises decision-making of possible requests for international assistance. The National Disaster Management Executive Committee (NDMEC),

which includes ministries and agencies with responsibilities in responding to natural disasters, advises the Rwandan government on disaster situations where domestic capacities may not be sufficient and recommends, where necessary, that the government seek international assistance.[64] Similar mechanisms can help ensure a speedy delivery of assistance as needed.

In Ethiopia, in the context of implementing the National Policy and Strategy on Disaster Risk Management, the government has established Disaster Risk Management and Food Security Committees not only in the capital, but also at the local level. These committees are directly involved in the counting of IDPs, initial assessments, compilation of figures with IOM support, and the provision of assistance through government, the Ethiopian Red Cross Society, international NGOs and humanitarian actors, such as the ICRC.

Some interesting examples have been found concerning the important issue of access to education for internally displaced children. In Mali, the national authorities have organized mobile schools (*écoles itinérantes*) and special examination sessions to allow internally displaced children and youth to continue their education. Also in Mali, the authorities have facilitated issuing birth certificates for displaced children in order to enrol them in school. This measure has benefited both children who needed to begin their primary education and children who were already attending school in their place of origin, but needed to go to school now in their place of displacement. In Ethiopia, local school authorities have allowed internally displaced children who did not have resident personal identity documents to attend school, thus avoiding or reducing interruptions to their education.[65] Similarly, in South Sudan, the authorities have sometimes made arrangements to facilitate access to education for internally displaced children, e.g. by waiving school fees or approving curricula for schools in Protection of Civilians sites located on UNMISS bases.

Key challenges

In a number of countries, recent or current armed conflicts mean that the authorities are not functioning at their best. In some cases, there is a new government that is at the start of its mandate and thus still in the process of defining priorities and establishing effective control over, and coordination with, all the relevant departments and agencies. This may have a negative impact on the provision of humanitarian assistance to IDPs.

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64 The functions of the NDMEC are provided for in Section II.3.1 of the 2009 *National Disaster Management Policy* (revised in 2012), *op. cit.* They include "taking appropriate actions when the impact of the disaster goes over the national capacity to cope with it" and "advising H.E. the president on whether to declare a national disaster and subsequently to appeal for international assistance based on information and analysis provided by NDMEC". See also Republic of Rwanda, *Law No. 41/2015 of 29/08/2015 relating to Disaster Management, Article 16, op. cit.*

65 However, these ad hoc arrangements highlight the importance of States developing effective programmes to ensure that IDPs, including children, receive necessary identity and other documents to allow them to benefit from education and other services: see key obligation (g) in the section on protection of IDPs below and Recommendation 19.

Similarly, ongoing armed conflicts may prevent States from enabling safe access to IDPs by their own officials and agencies and/or by international and humanitarian actors. In such cases, there is also the risk that urgent military concerns may lead to overly broad restrictions on humanitarian access which are incompatible with fundamental rules of IHL.

One specific challenge is linked to the fact that States may not have adequate financial resources or a large enough pool of qualified human resources to respond to the needs of the population at the best of times. In such circumstances, the State will probably lack the capacity to respond adequately to the assistance needs of IDPs and host communities in times of crisis.

Another point to consider is that, although States may cooperate effectively with donors to respond in the short term, the lack of programmes and policies for the post-emergency phase often results in weaker responses by the State and donors alike.

Furthermore, in a number of countries, State initiatives to assess or facilitate assessment of the needs, vulnerabilities and capacities of IDPs, in cooperation with international organizations, have not been systematic.

Some States may, for various reasons, underestimate the scale or duration of an internal displacement crisis. This risks leaving urgent assistance and protection needs of IDPs unmet. It may also result in inadequate attention by States and other actors to the issue of durable solutions for IDPs. RECs and RMs may not fully realize their potential to encourage States to properly address the scale and duration of a given IDP-related situation.

Experience also indicates that, when programmes to promote self-reliance and sustainable livelihoods are absent or not sufficiently developed, IDPs are often not in a position to pursue any possible independent economic opportunities. This in turn exacerbates their dependency on humanitarian assistance, which can prolong or increase the burden of the authorities in this regard. In addition, in many of these cases, IDPs end up becoming involved in the informal economy. This can include activities that, although providing some much-needed income for internally displaced families, can have negative environmental and social consequences. It can also include some harmful coping mechanisms, such as child labour and prostitution.

There are also specific challenges in promoting self-reliance for IDPs in camp settings. One key set of constraints are security considerations, which may lead the authorities to restrict the freedom of movement of IDPs and limit the flow of goods and services in and out of camps. As a result, IDPs' ability to access livelihoods and carry out some income-generating activities (e.g. casual labour, petty trade) may be undermined.

Another example of challenges can be seen in contexts where the prolonged presence of IDPs leads to competition with host communities for scarce resources, both natural resources and public services such as health care, education and water. This can create or exacerbate tensions, in some cases adding to pre-existing ethnic, social or cultural tensions and differences.

Finally, in some places, the lack of respect for the fundamental rules of IHL during armed conflict means that health care facilities, such as hospitals and health clinics, are not accorded due protection, and are sometimes even deliberately attacked.[66] This makes access to health care for IDPs (as well as for the civilian population in general) even more challenging.

Recommendations

For States

> Recommendation 13: Assessments should look at the needs and capacities of IDPs, as well as those of host communities, local authorities and services, to continuously inform the design of programme responses.

- Because host communities are so often both a key part of responses to situations of internal displacement and negatively affected by such situations, their own needs must also be addressed. The aim is to ensure their continued capacity to provide for themselves and to support those who are displaced.
- Failure to pay attention to the needs of host community can lead to heightened tensions and competition between them and IDPs. This can result in greater vulnerability for IDPs and reduced options for durable solutions.
- Assessment and monitoring of local authorities and services can allow for programming which reinforces them, rather than seeking to create parallel services which can be duplicative and more costly.

> Recommendation 14: States should develop capabilities to foresee, assess and respond effectively to the multiple needs of IDPs.

- States have the primary responsibility to respond to internal displacement in an effective manner. This includes assessing the needs of IDPs under their jurisdiction and providing them with adequate humanitarian assistance, including food, water, shelter, medical care, education and access to livelihoods.
- States should seek international support where national resources are not adequate to meet the needs of IDPs. International organizations can complement and support the efforts of the authorities, especially in case of sudden and/or massive displacement. However, they cannot replace them, nor does the involvement or support of international organizations diminish a State's sovereign responsibilities towards its population.
- States should seek opportunities to develop national capacities for assessment of needs, whether within government or with trusted local partners, such as the NS.

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66 Health Care in Danger project: http://healthcareindanger.org/hcid-project/, consulted 29 September 2016.

Recommendation 15: States should ensure that all relevant public authorities – including armed and security forces – are fully informed of their obligations and instructed to facilitate rapid and unimpeded access of humanitarian organizations to IDPs. They should also ensure that IDPs can meet their basic needs (such as water, food, shelter, etc.) and access essential services (such as medical care, education, etc.)

– Discharging their obligation to assist IDPs and, where appropriate, host communities, whether independently or with the support of international actors, is an exercise of State sovereignty.
– States with limited resources will often be able to meet the needs of IDPs on their territory only with international support, particularly in case of a sudden crisis. Where international organizations' access to IDP communities, and vice versa, is hindered, the risks of serious harm to the IDPs in need become much greater.
– Besides the unacceptable humanitarian consequences, interference with humanitarian access can increase tensions between IDPs and host communities, in addition to exacerbating possible grievances and mistrust of State authorities on the part of IDP communities.
– Failure to ensure rapid and unimpeded humanitarian access may, in certain circumstances, constitute a serious violation of IHL (i.e. a war crime).
– Public authorities – including armed and security forces – should understand and respect the working arrangements of humanitarian actors, for instance, that some organizations may not be able to accept armed escorts to facilitate access to less secure areas.

For other actors

Recommendation 16: Other actors should ensure that requests for rapid and unimpeded access to IDPs by humanitarian organizations, as well as activities carried out pursuant to such access, be in full accordance with the principles of humanity, neutrality, impartiality and independence of humanitarian actors.

– Respect for humanitarian principles will best serve to guarantee effective and repeated access to IDPs and host communities for humanitarian organizations. As such, it will be of the greatest benefit to IDPs in need.
– At times, States may be cautious about the presence and activities of international organizations on their territory. Consistent respect for humanitarian principles by humanitarian actors can help mitigate this.

4. Protection of IDPs

Summary of key obligations

(a)   Respect and ensure the rights of IDPs to seek safety (Art. 9.2(e)) and be received without discrimination (Art. 9.2(a));
(b)   Ensure that IDPs live in satisfactory conditions of safety, dignity and security (Art. 9.2(a));
(c)   Respect the civilian and humanitarian character of IDP sites (Art. 9.2(g));
(d)   Guarantee the freedom of movement and choice of residence of IDPs (Art. 9.2 (f));
(e)   Take necessary measures to trace and reunify families separated through displacement (Art. 9.2(h));
(f)   Create and maintain an updated register of all IDPs (Art. 13.1);
(g)   Ensure that IDPs are issued necessary personal identity and other official documents (Art. 13.2).

Lessons learned

Across Africa, experience shows that where IDPs have access to basic communication services, they are able to reconnect with their loved ones and help each other. Only a limited number of them will need to depend on established mechanisms to find missing family members.

It is critical to note that supporting IDPs' efforts to restore contact with their family members as soon as possible can have several advantages. First, it prevents people from going missing, reduces the number of persons unaccounted for and alleviates the suffering of IDPs who do not know the fate and whereabouts of their loved ones. Second, it can reduce the burden on the authorities and humanitarian actors (e.g. the costs of providing for unaccompanied minors for extended periods of time). Finally, it may also facilitate durable solutions, insofar as families may be unwilling to relocate until missing family members are found, or conversely, may be in a better position to relocate if family links in the area of relocation are restored.

As such, ad hoc actions on restoring family links are important, for example, through liaison with the ICRC and/or the local NS,[67] even in the absence of a properly structured mechanism. At the same time, every case that is resolved reduces vulnerability and can empower the IDPs concerned, so a structured strategy is warranted.

Another important lesson learned is that efficient strategies for the provision or replacement of necessary personal identity and other official documents deliver dividends in responding to urgent humanitarian needs. They facilitate medium and longer-term efforts to enable IDPs to move freely, access livelihood options and pursue durable solutions themselves. This can, in turn, facilitate family reunification.

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67   Restoring Family Links: https://familylinks.icrc.org, consulted 24 October 2016.

On a final note, investment in ensuring that IDP sites maintain their civilian and humanitarian character can bring important returns in mitigating security and vulnerability risks. The IDPs in question will enjoy better protection, which will reduce "self-defence" efforts in the camps and often benefit nearby communities alike.

Some examples of good practices

Many important provisions for the protection of IDPs were included in the comprehensive peace agreement negotiated in 2015 between the government of South Sudan and the opposition. For example, the mandate of the Transitional Government for National Unity includes expediting "the relief, protection, voluntary and dignified repatriation, rehabilitation and resettlement of IDPs".[68] While these commitments have not yet been implemented, they are important undertakings concerning IDPs by the government and the opposition that may become concrete in the future.

Similarly, provisions for the protection of IDPs were also included in the 2000 Arusha Peace and Reconciliation Agreement for Burundi, which remains relevant today.[69]

It should be noted that, in Niger, the authorities have at times provided for the evacuation/transfer of the disabled and the elderly to safer locations. By doing so, they have complied with their obligations to protect IDPs, taking account of the special needs of some of the most vulnerable members of the displaced communities.

In Uganda, the National Strategy for IDPs expressly authorizes local authorities to issue necessary documents to IDPs.[70] This includes replacement of documents lost as a result of displacement. The Strategy specifically precludes the imposition of fines or extra costs for replacing documents, or of other "unreasonable conditions". Of note, the Strategy specifies that men and women shall have equal rights to obtain identification documents, and that women have the right to have such documents issued in their own name.

In addition to States, other stakeholders can be both actors and catalysts in the development of good practice. In the Central African Republic, MINUSCA adopted a directive concerning the civilian character of IDP camps.[71] This

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68 Intergovernmental Authority on Development, *Agreement on the Resolution of the Conflict in the Republic of South Sudan*, Addis Ababa, Ethiopia, 17 August 2015, Article 2.1.2: https://unmiss.unmissions.org/agreement-resolution-conflict-republic-south-sudan-addis-ababa-ethiopia, consulted 10 October 2016.

69 On the continuing relevance of the Arusha Peace and Reconciliation Agreement for Burundi, see: P. Nantulya, *Burundi: Why the Arusha Accords Are Essential*, Africa Center for Strategic Studies, 5 August 2015: http://africacenter.org/spotlight/burundi-why-the-arusha-accords-are-central, consulted 29 September 2016.

70 Republic of Uganda, Office of the Prime Minister, Department of Disaster Preparedness and Refugees, *The National Policy for Internally Displaced Persons,* Clause 3.5, Uganda, August 2004: www.brookings.edu/wp-content/uploads/2016/07/Uganda_IDPpolicy_2004.pdf, consulted 29 September 2016.

71 MINUSCA's mandate explicitly includes the protection of civilians. UN Security Council Resolution 2149 (2014), paragraph 30(a), S/RES/2149 (2014): www.un.org/ga/search/view_doc.asp?symbol=S/RES/2149%20%282014%29, consulted 13 October 2016. For further background on MINUSCA see: www.un.org/fr/peacekeeping/missions/minusca/background.shtml, consulted 13 October 2016, and www.un.org/fr/peacekeeping/missions/minusca/mandate.shtml, consulted 13 October 2016.

followed a joint consideration by MINUSCA, the local authorities in Bambari and Kagabandoro, and international organizations. The directive specified the role and responsibilities of the authorities and MINUSCA in ensuring that weapons and armed groups do not find their way into IDP camps. This is an example of a multilateral arrangement that built on a State's political will.

In Nigeria, a respectful and professional screening process is used to guarantee security in the majority of the IDP camps in Yola and Maiduguri. In particular, female IDPs are screened by female police and female members of the Civilian Joint Task Force, with a view to ensuring respect for IDPs' dignity and integrity.

Also, in Nigeria the establishment of police units responsible for law enforcement activities within IDP camps in Yola and Maiduguri (including solving disputes among IDPs, such as theft, marriage-related issues and others) is a good example of a community-based initiative. These police units are composed of police officers who are themselves displaced, and reproduce the structure that was previously in place in their local government areas.

Key Challenges

Complex challenges may arise in striking the right balance between humanitarian and security considerations in regulating the movement of IDPs. This is valid with respect to IDPs' movements both *en route* to the place of displacement and at the place of displacement (particularly movements in and out of IDP camps), as well as in the screening of IDPs. The rights of IDPs are not always fully understood or respected in practice, with the result that consideration of these rights, when faced with security concerns, may be less rigorous than is required.

One very real and practical challenge during armed conflicts is that of maintaining the strictly civilian and humanitarian character of IDP camps and other settings.[72] For example, the permanent presence of national armed forces inside a camp, which may be triggered by security concerns, may increase the risk of attacks on the camp.

National armed forces engaged in armed conflict may have legitimate reasons under IHL for considering the evacuation of civilians, namely when imperative military reasons or the security of the civilians involved so demand.[73] However, in practice, their decision-making does not always take national law and international obligations with respect to civilians into account, particularly with regard to conditions of displacement (e.g. access to adequate food, shelter, water, respect for family unity) and to the fact that an evacuation can only last as long as the conditions warranting it exist. Thereafter the right to return voluntarily should be respected, though this is sometimes not the case in practice.

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72 United Nations High Commissioner for Refugees, *Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum*, UNHCR, September 2006: www.refworld.org/pdfid/ 452b9bca2.pdf, consulted 29 September 2016.

73 Customary IHL Database, *op. cit.*, Rule 129.

Additional challenges can be found in some countries where authorities fail to establish a systematic approach to family reunification. In such circumstances, public officials – especially at the local level – sometimes refer cases to humanitarian organizations. However, this remains ad hoc and falls short of the State's obligations in this regard.

It is imperative to highlight that, in armed conflicts, internal displacement exacerbates the vulnerability of IDPs to certain types of abuses, which underscores the importance of upholding IHL rules. In particular, it increases the risk of sexual violence, whether in IDP camps or elsewhere.

Experience indicates that, in several contexts, IDPs face difficulties in obtaining official documents – whether regular personal identity, residence documents or special documents which recognize their displaced status and facilitate access to services accordingly. The causes for this can vary, from insufficient personnel in public offices in regions crowded with IDPs, to an overly strict reliance on rules concerning provision of documents, e.g. that they be issued only in the IDP's habitual place of residence. Whatever the causes, the lack of official documents can limit IDPs' freedom of movement and access to livelihood options. In addition, the lack of documents can restrict access to education for IDP children and youth, and can also, as noted elsewhere in this report, impede family reunification.

Recommendations

For States

> Recommendation 17: States should ensure that all relevant public authorities – including armed and security forces – are fully informed of their obligations and instructed to facilitate freedom of movement and residence of IDPs.

- Freedom of movement involves both the ability to reach a safe place and then, once there, the ability to move freely in and out of the displacement location to access essential services, goods, employment and to restore or maintain family links.
- While there is a recognized need to strike a balance between humanitarian considerations and security concerns, the right to freedom of movement and residence needs to be considered fundamental for IDPs, just as it would be for other citizens or residents of any State.
- Greater freedom of movement increases the capacities of IDPs to move according to their own priorities and to become self-reliant.[74] This potentially

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74 Internal Displacement Monitoring Centre, *Protracted Displacement: Uncertain Paths to Self-Reliance in Exile,* IDMC, Geneva, September 2015: www.internal-displacement.org//publications/2015/protracted-displacement-uncertain-paths-to-self-reliance-in-exile, consulted 29 September 2016.

reduces the burdens on host communities, camp facilities and, ultimately, State authorities.

– Conversely, undue restrictions on freedom of movement of IDPs can increase the humanitarian needs of IDPs and host communities alike.

> Recommendation 18: Public authorities should develop adequate capacities at central and local levels to create and maintain an updated register of all IDPs. This can provide an agreed-upon baseline for all actors concerned. (See also Recommendation 9 on the importance of data collection.)

– For protection purposes, reliable data on vulnerable individuals and families in the form of a register is vital. [75]
– Personal information collected in relation to the register must be compiled and handled in accordance with all relevant protection of personal data laws and standards, as well as due regard for the security and dignity of the IDPs and, where relevant, their hosts.

> Recommendation 19: Public authorities should endeavour to allocate adequate efforts and resources to ensure that IDPs are able to obtain personal identity documents and other official documents within a reasonable time.

– This can help reinforce the agency and self-reliance of IDPs. It can make it possible for them to move more freely (e.g. in order to seek assistance and to get access to employment opportunities), and also to demonstrate eligibility for assistance and protection programmes.
– It helps a State fulfil its obligations to maintain a register of IDPs and to facilitate family reunification. It also contributes to accurate data collection, by allowing a State to have and analyse up-to-date information on the extent of an IDP crisis. This in turn helps a State ensure more effectively targeted assistance and protection activities.

> Recommendation 20: Public authorities should strengthen their laws, policies and concrete measures to ensure that the civilian and humanitarian character of IDP sites is maintained.

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75 See, for example, Internal Displacement Monitoring Centre, *Getting on the List: The Registration of Children Born to IDPs*, IDMC, Geneva, May 2015, available at: www.internal-displacement.org/publications/2015/getting-on-the-list-the-registration-of-children-born-to-idps, consulted 24 October 2016.

– This is a critical action to help ensure the protection of highly vulnerable people in IDP camps and other settings.
– International and humanitarian actors can assist States in this regard. For example, responsibilities may be shared between national armed forces and any UN forces operating in the country.

For other actors

> Recommendation 21: International and humanitarian actors should provide coordinated support to States to ensure a practical and effective system to address family tracing and family reunification needs.

– Displacement often causes separation between family members.
– Many States recognize the importance of family tracing and family reunification activities, but a number of them lack specific mechanisms to carry out these activities.
– Many States are willing to receiving support and advice from international and humanitarian actors to ensure that contact can be restored between family members separated because of displacement.
– NSs are usually well placed to assist with this, often in cooperation with the ICRC. Their involvement helps to build a system to ensure that people separated from their families receive sufficient attention.
– Under humanitarian law, everyone has the right to know what has happened to his or her missing relatives and to communicate with members of their family from whom they have been separated. States bear the main responsibility for ensuring that the rights of families who have become separated are respected.
– Certain groups of people are particularly vulnerable and have specific needs to be addressed. These include children who may find themselves separated from their parents, and elderly and disabled people who may have lost contact with their care-givers and not be able to fend for themselves.

5. Durable solutions for IDPs

Summary of key obligations

(*a*) *Allow IDPs to make an informed choice on whether to return, integrate locally or relocate by consulting them on these and other options and ensuring their participation in finding sustainable solutions (Art. 11.2);*
(*b*) *Promote and create satisfactory conditions for voluntary, safe and dignified return, integration or relocation on a sustainable basis and in circumstances of safety and dignity (Art. 11.1);*
(*c*) *Protect IDPs against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk (Art. 9.2(e)).*

Lessons learned

One usual prerequisite for durable solutions is an adequate and timely response during a crisis phase and early recovery. An inadequate response, particularly during ongoing armed conflict, can mean that the safety and protection of IDPs are not effectively guaranteed, which may result in further displacement. It may also mean that IDPs are not sufficiently supported in their efforts to re-establish their self-reliance, thus prolonging their dependence on humanitarian assistance. An inadequate crisis response may create and magnify tensions between host communities and displaced people. It can lead to security and economic problems, which in turn can limit options for durable solutions, notably, by hampering local integration. In some case, inadequate responses may be symptomatic of ineffective coordination between humanitarian and development actors.[76]

It is valuable for a State to anticipate and integrate durable solution considerations from the outset when responding to a situation of internal displacement. Some decisions taken in the initial stages of a displacement crisis (for example, concerning where and how to accommodate IDPs) can, at a later stage, have an impact on efforts to achieve durable solutions. From this perspective, the adoption of a comprehensive law/policy instrument in which assistance, protection and durable solutions for IDPs are simultaneously and comprehensively addressed, could be a very useful step towards ensuring a holistic approach. In the same vein, attention to durable solutions for IDPs may in some cases be most effectively addressed as part of a broader national development strategy.

Some States invest in the promotion and creation of satisfactory conditions for voluntary, safe and dignified return, integration or relocation. In general, these States achieve greater success and more sustainable results. Oftentimes, this is realized through coordinated strategies by State authorities – including the armed and security forces. It is important to highlight that sustainable results are most often achieved through realistic schedules and consultation with international, regional or national partners.

Experience has also shown that adequate and genuine consultation and dialogue with internally displaced communities are essential prerequisites for durable solutions. Without this, initiatives such as the simple closure of camps are often artificial solutions that do not result in truly durable solutions, instead leading to renewed or protracted displacement. Examples of properly planned assistance to help returnees or relocated IDPs to meet their immediate basic needs and to foster the early recovery of their livelihoods, have proven more efficient.

To be effective, consultation and dialogue on durable solutions must be based on sufficient and reliable information as to the prospects and conditions

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76 See Inter-Agency Standing Committee (IASC), *IASC Framework on Durable Solutions for Internally Displaced Persons*, The Brookings Institution-University of Bern Project on Internal Displacement, April 2010: www.unhcr.org/50f94cd49.pdf, consulted 2 October 2016.

for each durable solution. In this perspective, it is critical that IDPs be given access to information on conditions in their habitual place of residence in order to be able to assess realistically the viability of return. "Go-and-see" visits, where feasible, can prove useful in this regard. Threats to security in the habitual place of return (e.g. landmines and unexploded ordnance) need to be explained to IDPs and addressed by the authorities before IDPs are encouraged to consider return.

The inclusion in a peace agreement of key provisions on the protection of IDPs and durable solutions can help improve the possibilities for IDPs to have effective access to durable solutions, once core political issues are addressed.

The importance of official documents comes up again in efforts to identify and realize durable solutions. At this phase, it is often documents relating to housing, land and property that are of most concern. Here again, national authorities need to anticipate and respond to the needs of IDPs.[77]

Some examples of good practices

Legal protections for IDPs at the constitutional and ordinary domestic law levels are important elements in creating an environment conducive to durable solutions. For example, in Ethiopia, the constitution, the Criminal Code and the Land Administration Policy all potentially provide important protections for IDPs, which are essential for dignified durable solutions. These fundamental legal protections lay the groundwork for the more specific legal and policy measures that are required in each case.

Uganda's National Strategy contains detailed provisions regarding voluntary return and resettlement for IDPs, including on the need for "objective and accurate information relevant to their return or reintegration to their homes."[78]

In Central African Republic, ad hoc structures were created by the new government to study the eventual closure of IDP camps in M'poko and the return or relocation of IDPs accommodated there. This is an expression of political will to tackle the issue of durable solutions, which hopefully will give impetus to future strategies in this regard.

In Liberia, a 2014 workshop gathered key stakeholders to address how they could implement the Kampala Convention better in post-conflict Liberia. They identified a range of follow-up actions. This included a call on the Liberian government to strengthen its capacities and commit more resources to reintegration and reconciliation programmes for long-term displaced persons, including a sustainable low-cost housing programme to facilitate returns.[79]

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77 For more information, see Centre on Housing Rights and Evictions (CHRE), *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons*, CHRE, Geneva, 2005: http://reliefweb.int/report/world/pinheiro-principles-united-nations-principles-housing-and-property-restitution-refugees, consulted 24 October 2016.
78 Republic of Uganda, *The National Policy for Internally Displaced Persons, op. cit.*
79 Internal Displacement Monitoring Centre, *Domesticating the Kampala Convention: Law and Policy Making – Workshop Report* (Liberia), *op cit.*

The Peace and Reconciliation Agreement for Mali contains a chapter dealing with humanitarian issues, in which the parties undertake to create the necessary conditions for facilitating the rapid return, repatriation, and reintegration of internally displaced people and refugees. Humanitarian organizations and agencies are invited to support the parties' efforts in this regard.[80]

Key challenges

States may lack financial resources to adequately and comprehensively address the issue of durable solutions for IDP communities. In addition, States that demonstrate a readiness to assist IDPs in the short term, may not sustain interest to develop mid-to long-term solutions.

Specifically, in cases of protracted armed conflict, government policy-making may be focused mainly on the short/mid-term, making long-term solutions for IDPs a very low priority. In such circumstances, donors and international partners may become reluctant to provide funding and technical assistance where a State has no comprehensive strategy for durable solutions for IDPs. Yet, the longer a conflict lasts, the more necessary it becomes to engage with displaced people and other affected communities at a structural level, to reinforce their ability to live in dignity in deteriorating conditions. At times, medium and long-term activities to support infrastructure and services are the most appropriate response to meet the urgent needs of individuals.

In protracted armed conflicts, bringing parties to comply with IHL and limit the destruction and deterioration of services during the hostilities is also a key challenge. Such destruction not only leads to further deterioration of people's living conditions, but also impedes the eventual return of IDPs.

Another challenge concerns donors themselves, who may unwittingly contribute to the premature return or relocation of IDPs. This may arise where their funding terms and schedules inadvertently create pressure on State authorities to show rapid results on durable solutions. Donors' decisions to curtail "emergency funding", without ensuring effective transition to development programmes, may also lead to the same result. The importance of responding to urgent needs and long-term needs to minimize the cumulative impact of armed conflict and prevent development reversals is, however, increasingly recognized. Ensuring such humanitarian continuity requires changes to funding allocation processes, so that multi-year humanitarian financing becomes viable and reliable.

It is clear that, without regular consultation and dialogue on available solutions and an understanding of their rights and obligations, IDPs will not be able to make choices as to possible options.

In this regard, challenges can arise from decisions made to close camps without due regard for the security and wishes of IDPs. This may occur because

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80　*Accord pour la Paix et la Réconciliation au Mali*, Chapter 15, Articles 47 and 48, p.13: https://bamada.net/document-de-laccord-pour-la-paix-et-la-reconciliation-au-mali-issu-du-processus-dalger, consulted 28 October 2016.

not all government branches and agencies (e.g. the ministries responsible for national security, social services and the armed forces) have the same understanding of the State's obligations towards IDPs. Under such circumstances, considerations other than those related to the IDPs' rights may influence decision-making that has implications for IDPs. Similarly, challenges can arise if IDPs are encouraged to return prematurely, including through offers of assistance, without adequate information or sustainable support.

The process of achieving durable solutions often requires dealing with complex issues, such as that of land/property restitution or compensation. This can contribute to delays in the durable solution process. An additional obstacle is created by the fact that the preferred durable solution in some cases may not be feasible for the time being. This is the case, for example, where IDPs wish to return to their home, but the area is still not safe because the conditions from which their displacement originated, continue to exist.[81] Sometimes, national authorities may be overly focused on promoting return without giving due consideration to other possible durable solutions, such as local integration or relocation in another part of the country.

Recommendations

For States

> Recommendation 22: States should ensure that all branches and agencies of the public authorities are fully informed of the need for meaningful consultation with and active engagement of IDPs and host communities in decision-making on durable solutions. (See also Recommendation 10 on the importance of consultation with and active engagement of IDPs in decision-making).

– In crises generating internal displacement, there is most often a great deal of confusion and misinformation about the root causes and/or the way internal displacement is dealt with. There can be mistrust on the part of displaced communities as to the State's motives and priorities in responding. Regular consultation and meaningful dialogue with IDPs will enable them to better assess their options and exercise their right to make an informed choice on durable solutions, in addition to generating trust in authorities. It will also help State authorities to better understand the concerns and wishes of IDPs and communities and to address those issues of mistrust or misinformation.
– When consulted, internally displaced communities may be able to propose viable solutions that are both cost-effective for the State and sustainable.

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81 Internal Displacement Monitoring Centre, *Home Sweet Home: Housing Practices and Tools that Support Durable Solutions for Urban IDPs,* IDMC, Geneva, March 2015: www.internal-displacement.org/publications/2015/home-sweet-home-housing-practices-and-tools-that-support-durable-solutions-for-urban-idps, consulted 29 September 2016.

– Where the preferred durable solution is not feasible at a given time, the authorities should seek to facilitate transitional solutions to improve the circumstances of IDPs, in dialogue with them. In such cases, the authorities should remain mindful that IDPs do not lose their right to achieve their preferred durable solution when this becomes accessible.

> Recommendation 23: States should proactively initiate dialogue with international and national partners and donors on issues related to durable solutions in order to fulfil their own international obligations.

– It is incumbent on the State in question to ensure the voluntary, safe and dignified character of all possible durable solutions. At the same time, it is recognized that international assistance may be required to realize appropriate responses.
– A proactive approach increases States' possibilities of benefiting from the experience and resources of international partners and donors and from best practices.
– In particular, this can help a State experiencing challenges with internal displacement to connect the urgent humanitarian response to a longer-term development agenda. This can often help address some of the causes and outcomes of displacement.
– The financial resources required for effective solutions can be considerable, and this needs to be openly acknowledged by all stakeholders.

> Recommendation 24: States (and other relevant stakeholders) should ensure that any peace agreement contains specific provisions and recommendations on addressing and solving existing IDP-related situations, as necessary, taking into account the challenges of the context.

– This would be important to help resolve internal displacement-related problems arising from an armed conflict.
– A key aspect to be dealt with in the peace agreement and any post-conflict transitional justice processes would relate to durable solutions, such as voluntary return for IDPs.[82]
– Other issues may be land reform, reparations, etc., depending on the conflict.

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82 For an extensive collection of peace accords, with analysis of their implementation and their content, including IDP issues such as durable solutions, see the Peace Accords Matrix Project at the University of Notre Dame: https://peaceaccords.nd.edu/about, consulted 25 October 2016.

For other actors

> Recommendation 25: The UN and other international actors that are in a position to do so, should contribute to monitoring conditions of return, with particular attention to the perspectives and concerns of the IDP communities in question. They should also help ensure the voluntary and safe character of return and other durable solutions, as well as safety, dignity and adequate conditions for IDPs in their current places.

– Public authorities may experience difficulties in establishing a meaningful dialogue with the displaced communities. In these cases, the UN and other international actors can play a useful role in engaging with IDPs to understand their perspectives and concerns.
– By doing so, important issues can be brought to the attention of the authorities. This includes the possible lack of sufficient and clear information on durable solution options that are provided to IDPs. Additionally, situations where IDPs may feel that a durable solution is being promoted prematurely by authorities, or without adequate consideration for their wishes, can also be addressed.
– Donors can often exert a positive influence by assisting States to develop realistic, mid- to long-term strategies to phase out IDP sites and facilitate return or other durable solutions.

Conclusion

The comprehensive legal framework of the Kampala Convention offers African States the opportunity to improve the daily quality of life for IDPs across the continent by addressing their protection and assistance needs effectively. States can prevent, address and reduce displacement by methodically and comprehensively implementing the Convention. They can ensure that, when displacement occurs, IDPs are provided with assistance and treated with respect for their human dignity and their rights.

This report contains more than 80 Findings and 25 Recommendations. The ICRC hopes that these will be of interest to States, depending on their own approach to the Kampala Convention. A number of major cross-cutting themes emerged in the formulation of the Findings and Recommendations, of which three merit particular mention:

1. The importance for States and other actors of engaging in dialogue with IDP communities in order to ensure their meaningful participation in decision-making on law, policies and programmes that affect them;
2. The urgent need for ensuring access of IDPs to essential services such as health care and education;

3.   The vital roles the AU – and RECs and RMs – will play in the future in supporting the efforts of AU Member States to fully implement the Kampala Convention.

While considerable momentum in upholding States' primary responsibility and obligations to the plight of IDPs has taken place, the Kampala Convention can only truly realize its full potential once all States across the continent have not only joined it, but have also taken the necessary steps to fully implement it. It is hoped that this report will serve to support and expedite States' ratification, implementation and operationalization of the Convention and the promise it holds for current and future IDPs in Africa.

Acknowledgements

REPORTS AND DOCUMENTS

Forced to flee: A multi-disciplinary conference on internal displacement, migration and refugee crises

London, 7–8 November 2016, SOAS University of London, Arts and Humanities Research Council, University of Exeter, British Red Cross and ICRC

Conference report*

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Executive summary

"Forced to Flee" was a multidisciplinary two-day conference on internal displacement, migration and refugee crises, jointly organized by SOAS University of London, the Arts and Humanities Research Council, the University of Exeter, the British Red Cross and the International Committee of the Red Cross (ICRC). It brought together some sixty researchers, independent and UK government policy-makers, and senior humanitarian practitioners.

The central principle and premise of the event was that looking to past mass displacement crises can provide insights for the present, as forced displacements have been a frequent phenomenon in human history. Today, the numbers of people being forced to leave their homes have reached levels that have not been seen since the end of the Second World War. Forced displacement affects men and women, the old and the young, people on their own or in large groups – all can be forced to flee their homes and seek refuge elsewhere.

History can teach us about the roots causes that produce refugee flows, the responses of destination countries and the changing status of refugees, internally displaced persons (IDPs) and migrants. To that end, the ambition behind the "Forced to Flee" conference was to use history to inform current debates on forced displacement and bring in a different perspective to public discourse in which refugees, IDPs and other migrants have been subject to wider political pressures that have served to undermine human rights and humanitarian norms.

Over the course of two days, experts addressed the stubborn realities of how best to protect those forced to flee their homes, seek sanctuary and rebuild their lives. They examined and reflected on several issues: the experiences of the forcibly displaced, the root causes of mass displacement from the First World War until today, the evolution of humanitarian and development policy and practice when responding to crises of mass displacement, and the evolution of legal mechanisms that have provided a regulatory framework for refugees over the past hundred years.

Many conclusions were drawn by the speakers – among others, that the vulnerabilities of refugees, IDPs and migrants have repeatedly served as a catalyst for new thinking about emergency relief and development aid. The conference included an accompanying high-level public panel which focused on taking stock of how the international community, faced by millions of people displaced from their homes every year, can do better.

Introduction

On 7–8 November 2016, SOAS University of London, the Arts and Humanities Research Council, the University of Exeter, the British Red Cross and the International Committee of the Red Cross (ICRC) brought together some sixty researchers, independent and UK government policy-makers, and senior

humanitarian practitioners for a multidisciplinary conference examining mass migration crises via the lens of history.

In 2015, there were reportedly some 20 million refugees and 40 million internally displaced persons (IDPs) worldwide.[1] In addition, there are many so-called "economic" migrants, who are also vulnerable to violence – including kidnapping, human trafficking, extortion and sexual violence – along the route to their destination, and many are detained or interned. History can help us to understand the realities that the international community struggles with today, including the roots of the crises that lead to displacement, responses in destination countries, and the statuses of refugees, IDPs and other migrants.

The "Forced to Flee" conference looked at the evolution of State, humanitarian and development policy in responding to mass displacement over the past hundred years, as well as the legal mechanisms protecting people who are forced from their homes. It gathered researchers and policy-makers to discuss these issues more than a hundred years since the first regulatory frameworks were developed and international agencies were established to respond to the needs of refugees. Participants included Marc Bosch Bonacasa, Médecins Sans Frontières; David Cantor, School of Advanced Study, University of London; Sarah Collinson, Overseas Development Institute; Michael Collyer, University of Sussex; Robert Fletcher, University of Warwick; Maria Framke, University of Rostock; Peter Gatrell, Manchester University; Laura Hammond, SOAS University of London; Laure Humbert, University of Manchester; Clea Kahn, British Red Cross; Jo Laycock, Sheffield Hallam University; Paolo Novak, SOAS University of London; Ilan Pappé, University of Exeter; Jonathan Prentice, International Crisis Group; Ruba Salih, SOAS University of London; Heike Schmidt, University of Reading; Ronald Skeldon, Maastricht University; Claudena Skran, Lawrence University; Ashley South, Chiang Mai University; Fiona Terry, Independent Researcher; Andrew Thompson, University of Exeter and Interim Chief Executive of the UK Arts and Humanities Research Council; and Myles Wickstead, King's College London and University of Exeter.

As part of the conference, there was also a public event featuring a high-level debate entitled "With Millions on the Move, the World Must Do Better. But How?".[2] The debate was moderated by Lauren Taylor from Al Jazeera and featured Valerie Amos, Director of SOAS University of London and formerly UN Undersecretary-General for Humanitarian Affairs and Emergency Relief Coordinator; Kelly Clements, United Nations (UN) Deputy High Commissioner for Refugees; Abdurahman Sharif, Director of the Somalia NGO Consortium, Nairobi; and Dominik Stillhart, ICRC Director of Operations.

Participants considered developments in the way the international community responds to waves of mass displacement by looking back in time over

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1   Figures taken from Office of the UN High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2015*, 20 January 2016, available at: www.unhcr.org/576408cd7.pdf (all internet references were accessed in June 2017).

2   The event's website is available at: www.soas.ac.uk/cas/events/07nov2016-forced-to-flee-with-millions-on-the-move-the-world-must-do-better-but-how.html.

the past century, starting with the period 1914–1939, where population flows during and after the First World War led to the birth of today's regulatory and protection frameworks for addressing displacement. The definition of "refugee" was still quite loose at this time, and assistance was provided to displaced persons based on sympathy for a particular group, thus tying receipt of assistance to group identities such as nationality or religion. Conference participants then looked back to 1940–1959, the period covering the Second World War and the beginning of the Cold War. During that era the international legal regime for refugees was established, notably through the negotiation of the 1951 Convention relating to the Status of Refugees (Refugee Convention). This time period also saw the rise of organizations dedicated to providing humanitarian relief. The period between 1960 and 1989 saw decolonization, postcolonial civil wars, neo-colonialism, economic "miracles" in the West and the effects of proxy wars associated with the Cold War, which acted as drivers of displacement. The high visibility of mass migration driven by these multiple causes led to the expansion of humanitarianism.

Next, the participants looked at the period beginning with the fall of the Berlin Wall in 1989 and watershed events of the 1990s and 2000s such as the Rwandan Genocide and the Balkan Wars, the September 11 attacks in the United States and the ensuing era of instability, chaos and insecurity that the "September 11 wars" have created. This was a period that saw the pendulum swing from a breaking down of borders at the end of the Cold War to their reinforcement as attitudes changed in the wake of the September 11 attacks. For the period covering 2003 through to the present, the conference looked at the dynamics spawned by Western interventions in Afghanistan and Iraq, the tumultuous changes that have rocked the Middle East since 2011, and the brutal realities that migrants endure in Central America and Africa. The participants analyzed the challenges we are faced with today and discussed ways of better understanding and engaging with forcibly displaced populations, evaluating the continued relevance of the Refugee Convention and looking toward the future.

By tracing the evolution of the international response to waves of mass displacement over the past century, we can draw lessons for the present. The report below is a summary of the main points that were debated during the conference.

Assistance based on group identity and a loose definition of "refugee"

In the period during and after the First World War, population flows caused by the world war led to the birth of today's regulatory and protection frameworks for addressing displacement. At the time of the First World War, the term "refugee" had yet to evolve into a concrete legal concept. Humanitarian assistance was provided to displaced persons based on the identity of the group they belonged

to, rather than out of a feeling of sympathy, and thus was not necessarily impartial or neutral in character.

For example, when campaigns waged by British and Ottoman forces triggered desperate movements of displaced nomadic groups, with governments unable to police movements across porous borders, displaced Bedouins faced different treatment depending on the sympathy of the assisting power. Some of the powers in the Middle East favoured the relocation of the "refugee tribes", while others saw them as political instruments. The various official responses to displaced nomads show how the politics of definition and categorization affected refugees at the time. Nomadic peoples were particularly exposed to this, with cultural assumptions about their rootlessness blurring the line between the categories of "refugee", "raider" and "rebel".

The origins of today's refugee protection regime can arguably be traced to the former Russian Empire, where the forced displacement of civilians during the First World War saw more than 14–15 million people being uprooted. Yet, this mass movement is absent from the orthodox "refugee canon", as the better-known flight of anti-Bolsheviks after 1917 has diverted attention from it, and from its momentous consequences. Precisely because this crisis of forced mass displacement is less well known, historical analysis of it can shed light on the issues involved – that very lack of familiarity can disturb our views about the origins, causes and outcomes of refugee crises.

These early refugee crises gave birth to the response patterns observed a hundred years later. In some instances, private, voluntary organizations (PVOs) formed to assist particular displaced groups based on national identity. PVOs were the precursors to today's NGOs, though with some differences – important among them being the fact that many were not professional organizations. Between 1921 and 1922, PVOs were able to exert influence by helping to set the agenda through their own initiatives, and by being political actors in national governments. They thus played a vital role in establishing the refugee activities of the League of Nations.

Another example is that of Russian refugees stranded in Constantinople in 1921 – very much seen as the "first" "international refugee crisis" – where some of the millions that fled the Russian civil war received international press coverage and captured the attention of international aid organizations, governments and the newly formed League of Nations. Similar attention was garnered in 1922 when refugees fled from Turkey to Greece. Together, these two crises helped shape the first international refugee regime, centred around a High Commission for Refugees appointed by the League of Nations, but with funding from PVOs playing a vital role.

Once the League of Nations High Commission for Refugees was created in 1921, the term "refugee" was increasingly used solely to designate people outside their own country. However, they were also largely defined by membership of a group, such as a national or religious group. The term "refugee" was still relatively loosely applied, and there was little concern for the motivations of individuals within these groups in deciding to leave.

The establishment of the international legal regime for refugees and the rise of organizations providing relief

The displacement caused by the Second World War and the setting-in of the Cold War saw the establishment of the Refugee Convention, and with it a legal definition of the term "refugee",[3] as well as the creation of an international apparatus for responding to displacement crises through the UN. The ways in which mass population movements were dealt with during this period shaped the legal, practical and research lenses through which the international community understands and responds to displacement.

International organizations in Allied Occupied Germany, including the UN Relief and Rehabilitation Administration (UNRRA) and later the International Refugee Organisation, greatly influenced the drafting of the Refugee Convention. Although these organizations worked for the benefit of refugees, it is worth examining the degree of continuity and rupture in relief policy and humanitarian assistance in the aftermath of the Second World War. For instance, UNRRA provided psychological rehabilitation, considering not only the physical needs of refugees but also their mental state. This could be seen as marking a new form of humanitarianism, although it was not entirely new – the League of Nations had already included an agenda to help refugees recover from the trauma of displacement and become full-fledged members of society. There were different visions of relief in the various Occupied Zones.

Also during this time period, large-scale violence resulted from the partition of the Indian subcontinent following independence, causing the displacement of some 12 million people. Initially, governments were unable to cope with the needs of the refugees, and the setting-up of government-sponsored relief was slow. Various regional, national and international NGOs worked to provide aid for refugees and other victims of partition, including many Indian branches of non-State organizations, such as the Indian Red Cross, Young Men's Christian Association and St John's Ambulance, which often needed to set up separate Pakistani branches as well as Indian ones. Many other organizations providing relief did not understand themselves as humanitarian, but rather were political, religious or cultural organizations. As seen in the mass displacement crises in the post-First World War period, aid was still often selective, with relief provided not necessarily on an impartial basis but rather based on membership of a particular group, such as a religious group. Even for larger non-State organizations, neutrality and impartiality were not necessarily a given.

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3   See Convention relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entered into force 22 April 1954), Art. 1(A)(2), which defines "refugee" as a person who was either already considered a refugee under previous conventions or 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". The definition was subsequently revised by the Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967). Both the Convention and the Protocol are available at: www.unhcr.org/1951-refugee-convention.html.

Multiple drivers of displacement and the expansion of humanitarianism

Mass displacement crises from the 1960s to the end of the 1990s were shaped by the intersection of three political forces – new and accelerating forms of globalization, the Cold War, and decolonization. The dynamics of global decolonization set in motion a whole matrix of mobility, some of it voluntary, some coerced, and much not clearly one or the other. Decolonization exposed the limitations of the Refugee Convention, since its way of separating refugees, IDPs and economic migrants bore little resemblance to what was happening on the ground. The multiple drivers of displacement during the various wars of liberation and nationalist resistance during this period included chronic poverty, land expropriation, violence, racial hostilities, secessionist movements and postcolonial civil wars. The forms of displacement were also many and varied – from relocation into what were euphemistically called "protected" or "consolidated" villages in Zimbabwe to the expulsion of non-white populations with links to the former colonial power, such as the Ugandan Asians. Then there were the large-scale movements of formerly colonized peoples to Europe after independence (often these were technically not immigrants, but internal migrants), and the migration of former soldiers, for example from Mozambique and Angola to Portugal.

Moreover, decolonization complicated the question of who was a refugee and who was a migrant. It was difficult to distinguish those who had no choice but to leave from those who were violently displaced, those moving in search of opportunity or asylum-seekers fleeing persecution. Patterns of flight followed the "grooves of memory" as people fled to the places they knew or had heard about.

During this time, aid organizations were largely relegated to refugee camps on the borders of conflict areas, and these camps were often highly militarized. Refugees were welcomed by host States as political pawns, showing the savagery of their opponents. The politicization of refugees was hard to escape, and aid agencies often had to choose who to support. The end of the Cold War also brought an end to this – refugees were no longer political emblems, and the UN Security Council also was no longer constricted by the constant threat of a veto. There was optimism that things would get better, with organizations now able to come into the heart of conflict zones and subject to fewer constraints. There was expansion among agencies set up to respond to mass displacement crises, as well as in the UN's role. However, these organizations were often plunged into direct political involvement in conflict situations. Cold War considerations, in particular, politicized the emerging international human rights regime. At the sharp end of action, humanitarian organizations could find themselves working in militarized refugee camps or being pitched into counter-insurgency campaigns.

The restoration of borders

The post-Cold War period saw international crisis and geopolitical change associated with watershed moments such as the fall of the Berlin Wall, the dissolution of the Soviet Union and the end of the Cold War proxy conflicts. The year 1989 was a turning point in the migration debate, when "forced migrants" became "economic migrants".

The optimism of the new world order discourse that characterized the early 1990s came already to a grinding halt in Somalia in 1993. With the failure of US military intervention, the purpose of which was humanitarian, the idea of the United States as the world policeman died. Then came the defining moment during the genocide in Rwanda, when aid became a tool for foreign policy disengagement, given the lack of appetite for intervention. Since then, the international community has slowly crept back to humanitarianism and foreign policy being linked. Kosovo was the first example, with NATO troops setting up refugee camps. This raised concerns for humanitarians, as it went against the idea of aid as neutral and impartial. Humanitarian organizations began to seriously examine the ethical issues raised by the role of aid vis-à-vis politics.

Contemporary dynamics spawned by the Western interventions in Afghanistan and Iraq, the tumultuous changes that have rocked the Middle East since 2011 and the brutal realities that migrants endure in Central America and Africa have led many States to adopt policy approaches that seek to limit migration. During this period it has become increasingly clear that borders are far more complex than lines on a map. Migration control has extended beyond State territory, and continues, in many respects, once individuals arrive in their host countries. When nation-States came into being, they were made and unmade at the border; now, with the nation-State model in crisis, States have fortified their borders.

More recently, migration control organizations have started to rescue migrants in distress at sea, particularly in the Mediterranean, as public anger at the loss of life has grown. This "humanitarian border" is complex, but continues to operate as a formal barrier or filter. "Humanitarian border management" refers to border management policies that are specifically designed to meet humanitarian objectives. There are contradictions built into this concept. Border management has a dual imperative: it is concerned on the one hand with the security of States, and on the other with the needs of people requiring protection. This conflates views of migrants both as people at risk and as people posing a risk, compounded by the mobilization of law enforcement and the military in border management. More reflective analysis of humanitarian border management is needed, in particular on what challenges it poses to migration and how it could be politicized.

Given the role of the border as a filter, the location of the border is no longer as relevant as the function of the border – "bordering" now takes place in a range of locations. This process is widely described in terms of a "networked

border", in which control has moved in, out, up and down. The networked border covers a vast area, including the use of development aid to prevent people from moving and the use of humanitarianism as a direct tool of border control or a way of preventing migration.

At the same time, there has been a return to physical borders – there are now more border walls around the globe than at any time since the fall of the Berlin Wall. Such border walls are essentially a public relations exercise, designed to reassure people and show that governments are "doing something" despite evidence that they do not stop migration.

States currently seem to prefer a politics of containment for mass displacement. The trend in EU policy towards investing in the regions that refugees come from, through development, border management, the building of barriers or the externalization of borders, is meant to cause a net reduction in people on the move. There is little evidence for this, however – even development is not having a measurable impact on migration. The evidence shows that where people have more economic wherewithal, they use it to move. Furthermore, the goal should not be to force individuals to make particular decisions, but to enable them to make safe choices.

Relevance of the Refugee Convention today: Is the law sufficient?

The Refugee Convention is seen by some as a high point for international refugee law, while others suggest that it is not fit for purpose. In fact, its definition of a "refugee" is still the rule under international law, a very clear statement that is still entirely relevant. However, the Convention is only designed to cover refugees as defined in its Article 1, part of a much larger category of people on the move.

The Refugee Convention's definition of "refugee" is centred around the lack of the protection of a State and the fear of persecution. The lack of protection of a State applies to perhaps a billion people, not only migrants but also victims of bonded labour and others for whom migration could be the only way out. Some resist any clear distinction between refugees and migrants, in particular given the tone of public debate, which has introduced the idea that migrants are unprotected, while refugees are morally unassailable. Nevertheless, labels like "refugee" remain significant in that they entail a set of legal protections, but at the same time the validity of the Refugee Convention is under scrutiny. This is perhaps due to a fundamental problem in attitudes toward migration: the international system does not see things from the perspective of vulnerable migrants, but instead attempts to attach labels to people on the move that are sometimes meaningless to the people themselves. It is important to control the terms used in this debate and to choose them carefully, as labels can frame the debate for good or for ill.

It can be easy to point to failures of the law, but there are also positives that the legal system has brought into play over the last century, contributing to the protection of hundreds of millions of people. If the criterion of success is that the

law is never broken, then all laws would have to be thrown out. In order to consider whether refugee law has been successful, one must look to factors extraneous to the law itself. To the extent that States do not apply refugee law, it is not necessarily the law that is the problem, but rather other factors, such as political ones.

There may be another way to evaluate the effectiveness of the law: by asking whether it is sufficient. There are clear problems with the current legal regime – for example, the notion of burden-sharing is non-existent, and the means of reaching a place where it is possible to claim asylum are criminalized. Furthermore, States seemingly have impunity for non-compliance with refugee law, such as "pushbacks" to refugees' States of origin that happen in Europe. Since being present outside the territory of the State of origin is a requirement for refugee status, there is also the question of physical access to the protections written into the main instruments of refugee law. The bottom line is that the body of law on asylum is well developed and codifies the protections that asylum-seekers should benefit from, but it is becoming harder and harder to access those protections.

Looking ahead

In German, the word *Heimat* transcends the ideas of "home" and "homeland", evoking a deep sense of social and cultural belonging, and amounting to safety and security. Refugees, IDPs and other vulnerable migrants have lost their *Heimat*. Some 65 million people are forcibly displaced and vulnerable today, with 40 million of these being internally displaced – and of course, there are individual tragedies behind every number. There needs to be accountability for States to ensure that they live up to their obligations. The international community needs to invest in (1) diplomatic efforts to end conflict and alleviate the impact of conflict while it is raging, (2) financial efforts to assist communities affected by conflict and to protect vulnerable migrants, and (3) political efforts to give forcibly displaced people a chance to build new lives, to build a new *Heimat*.

History can inform the present on the current challenges and dynamics surrounding mass displacement, and help us to take stock of the current crisis. With record numbers of forcibly displaced people, especially within countries that are ravaged by armed conflict – and confronted by an international system that has frequently failed to find a solution to protracted conflicts – humanitarian practitioners and policy-makers must decide how to respond. Coverage of migration in the media over the past ten years shows an increasing tendency to "blame" refugees.[4] However, seen through the lens of history, this crisis is not more alarming than the others encountered by the international community in

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4   For example, an IPSOS poll has found that 40% of people think that immigration is *the* main problem now facing the UK. See "Immigration One of the Biggest Issues for Wavering EU Referendum Voters", Ipsos MORI, 10 May 2016, available at: www.ipsos.com/ipsos-mori/en-uk/immigration-one-biggest-issues-wavering-eu-referendum-voters?language_content_entity=en-uk.

the past. In pure statistical terms, a world of 7.5 billion people should be able to care for a population of 65 million forcibly displaced.

Today, 86% of refugees are in developing countries; the top six host countries in Africa have three times the number of refugees as the top six in Europe. One example is the Dadaab refugee camp in Kenya, home to some 350,000 people, which the Kenyan government has announced that it will close. The options for residents of the camp are voluntary repatriation back to Somalia, local integration, or resettlement in another country like the United States or in Europe. Of the people in the camp, most want to return to urban centres in the south of Somalia, but there are already thousands of IDPs there. From an NGO perspective in Somalia, return is not a "durable solution" – reintegration is. This is about a multi-stakeholder approach: it requires collective responsibility, involving development actors, humanitarian actors and human rights actors, and with a legal framework to protect people who return. This has to be an integrated approach that looks not just at people going back from Dadaab, but at people displaced within Somalia, and host communities. There need to be strong channels of communication to keep people informed.

Unilateral action is not enough in responding to mass displacement. There is a need for a truly comprehensive, collective approach. Developing countries bear the greatest economic and social burden in hosting refugees, and they need support. Global efforts to protect the forcibly displaced culminated in the New York Declaration, adopted in September 2016 by 193 countries at the UN General Assembly.[5] Faced with a global crisis of forced displacement, the New York Declaration commits nations to solidarity in combating abuses. Its language is all-encompassing, from the causes of flight to solutions, with repeated reference to long-term development. The development of a Global Compact, setting out key elements of effective response to large waves of displacement, is now under way. The Global Compact is to be presented to the General Assembly and adopted in September 2018.[6]

The plight of IDPs, who have not crossed an international border and therefore are not subject to the same legal protections as refugees, should get more attention, and so should the root causes of displacement, in particular the relevance of international humanitarian law in addressing those root causes. It is not only warfare that causes refugees to flee, but repeated violations of international humanitarian law: the targeting of civilians, for example. A greater respect for the laws of war would address some of the root causes of displacement.

States can do more. They support armed forces (both State and non-State), and that gives them opportunities to influence these parties' behaviour. The bottom line should be no support without compliance with international norms.

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5   New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1, 3 October 2016, available at: refugeesmigrants.un.org/declaration.
6   For more information on the two Global Compacts envisioned by the New York Declaration, namely the Global Compact for Safe, Orderly and Regular Migration, and the Global Compact on Refugees, see: refugeesmigrants.un.org/migration-compact and refugeesmigrants.un.org/refugees-compact.

In the last few years in Europe, the public has begun to understand the scale of migration, especially with the arrival of Syrian refugees. At the same time, the level of inaction in everyday reality is staggering. There must be greater accountability for States to make the international protections that we have meaningful. The targeting of schools and hospitals, forcing children to become combatants – these are things that everyone can agree are unacceptable, and States can shame other States into being more responsible. Additionally, the international community can be tougher on countries that are themselves in conflict; for example, when governments say that no aid can go to areas where there are opposition groups.

The discussion that took place over the course of the "Forced to Flee" conference provided a sobering reminder of how the past tends to repeat itself. Former UN High Commissioner for Refugees Sadako Ogata once famously remarked that "there are no humanitarian solutions to humanitarian problems".[7] There are only political solutions. Over centuries people forced to flee have been used as pawns for political objectives, relocated against their will, parted from their family members, induced to return under false pretences and pushed back across borders. History is full of reminders that there was never a golden age of respect for the rights of refugees, or of IDPs.

Perhaps, despite the tendency to focus on the plight of people once they are on the move, it is the root causes of displacement that should be seen as key. However, consideration of root causes and the dynamics of refugee displacement is fundamentally political, and addressing them is a step into the realm of international intervention, regime change and stabilization, which are themselves major causes of conflict. The current refugee crisis as seen from Europe is not only about root causes, but also about what happens to people along the way. People can start off as economic migrants and become vulnerable during the journey. In fact, it is not the movement of persons that is the problem, it is the movement of persons without the protection of fundamental rights and norms.

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7   Vivian Tan, "Ogata Calls for Stronger Political Will to Solve Refugee Crises", UNHCR, 27 May 2005, available at: www.unhcr.org/news/latest/2005/5/4297406a2/ogata-calls-stronger-political-solve-refugee-crises.html

REPORTS AND DOCUMENTS

Aide-memoire: Operational guidance on maintaining the civilian and humanitarian character of sites and settlements

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Introduction

In light of the growing complexity of humanitarian crises today and the continued need for effective cooperation among humanitarian actors, the International Committee of the Red Cross (ICRC) and the Office of the United Nations High Commissioner for Refugees (UNHCR) launched a consultative process in September 2016 to collect operational practices with regard to maintaining the civilian and humanitarian character of sites and settlements for internally displaced persons (IDPs) and refugees. Exchanges with field staff from both organizations targeted five ongoing operations – in the Central African Republic (CAR), the Democratic Republic of the Congo (DRC), Iraq, Nigeria and South Sudan – and included a one-day workshop in Geneva on 20 April 2017 in which the UN Department of Peacekeeping Operations (DPKO) also participated.[1] A wider set of stakeholders was consulted as well, during a roundtable organized under the auspices of the Global Protection Cluster (GPC) on 21 April.

This aide-memoire draws on the above-mentioned consultations to provide operational guidance for humanitarian actors in maintaining the civilian and humanitarian character of sites and settlements (hereinafter referred to as sites)

in situations of armed conflict.[2] Part 1 of this guidance sets out the necessary context and principles with regard to the civilian and humanitarian character of sites. It provides a description of the main operational challenges and dilemmas that humanitarian actors confront and examines the content of applicable legal frameworks. Part 2 offers measures for humanitarian actors to consider – within the remit of their respective expertise, experience and mandates – when working toward maintaining the civilian and humanitarian character of sites. These measures include efforts to engage actors beyond the humanitarian community in the spirit of complementarity and in respect of humanitarian principles.

Part 1: Understanding the context and principles

Operational challenges and dilemmas

Humanitarian actors are often confronted with difficult choices, for which there are no clear-cut solutions. These difficulties are compounded, particularly with regard to preserving the civilian and humanitarian character of sites, when the primary duty-bearers are unable or unwilling to fulfil their responsibilities, or are themselves the source of a threat. It is therefore important to identify and acknowledge operational dilemmas and associated protection risks arising in armed conflict as well as the potential and limitations for humanitarian action.

For instance, sites can turn into environments where propaganda or recruitment activities are carried out. In highly polarized contexts, where an armed conflict is fought along ethnic or religious lines, civilians inside sites can be partisan and can have close connections with armed groups. Although remaining off the battlefield, these civilians can be regularly engaged in recruitment and training in support of one side of a conflict, thereby contributing to spreading an armed group's influence. Dealing with scenarios such as these is delicate. Humanitarian actors involved in managing sites should prevent propaganda and recruitment activities from taking place within those sites. In practice, however, this can be complicated as individuals involved in those activities, if not admitted or expelled from sites, could be exposed to serious security threats. In addition, operationalizing the criteria for identifying people involved in recruitment and training can be difficult if a large number of civilians is involved.

Another dilemma arises with regard to disarmament and demilitarization of sites. In the chaos of ongoing hostilities and large-scale displacement, refusing armed persons from entering sites may be the only feasible option to maintain

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1   The inclusion of the DPKO at this stage of the dialogue stemmed from the recognition of the key role that peace operations (in particular those with a protection of civilians mandate) can play in ensuring the civilian and humanitarian character of sites. Engagement between peace operations and humanitarian organizations on this matter is therefore essential, although often complex, and needs improving.

2   However, the aide-memoire can also be relevant for other actors involved on the ground, e.g. UN missions, other international organizations and governmental entities in charge of camp management.

the civilian and humanitarian character of sites. However, keeping sites weapon-free, while ensuring a certain level of safety, is not enough to maintain their civilian and humanitarian character because it does not guarantee that all people who may constitute a threat to civilians are identified and separated.[3] Disarmament and demilitarization of sites is furthermore particularly complex when the civilian and humanitarian character has already been compromised, including when a non-State party to an armed conflict controls the site.

Additional complications arise when civilians may be carrying weapons for their own defence. When no authority is there to protect sites, should weapons be authorized inside sites? If people may be put at higher risk if disarmed, not disarming *at that time*, until conditions improve, may be considered the only safe option. At the same time, the risk of violence erupting within sites must also be taken into account. In some contexts, the presence of State armed forces or members of an organized armed group may be perceived by civilians in sites as a form of protection, rather than a threat. Civilians themselves may ask for armed groups or forces to be present in sites for their own security. Here, advocating for a reasonable proximity of armed groups or forces near sites and the establishment of weapons depositories where combatants/fighters visiting a site could leave their arms may become necessary.

In practice, there are inevitable challenges in aligning humanitarian imperatives (i.e., providing protection and assistance to people in need) with principled action (i.e., humanitarian, neutral, impartial and independent). For example, to what extent should humanitarian actors be involved in supporting sites where prolonged security screening occurs or which have become *de facto* places of deprivation of liberty? In such situations, providing material assistance could contribute to extending the screening process longer than absolutely necessary. In the same vein, the question arises as to what extent being present (e.g. for monitoring purposes) can amount to condoning or attesting to safe conditions within sites.

Finally, the provision of humanitarian assistance to sites where combatants/fighters are known to be present can also constitute a dilemma. Assistance can be misused to support a party to the conflict and thus perceived as contributing indirectly to maintaining the conflict. In some cases, suspending assistance could be contemplated as leverage to preserve the civilian character of sites. Such an approach, however, can give rise to additional protection risks or be counter-productive when civilian populations in sites may have few, if any, alternatives to meet their basic needs and thus may be compelled to resort to harmful coping strategies.

3   See the section on "Separation", below.

Unpacking the notion of the civilian and humanitarian character of sites

Drawing largely from international humanitarian law (IHL), and to some extent international refugee law, the sections below define the conditions necessary for sites to be considered civilian and humanitarian, as well as the protection and security benefits derived from such status.

Civilian character

Sites typically aim to shelter displaced populations and facilitate their access to humanitarian assistance. As such, they are or are made of civilian objects under IHL, entitled to protection against direct attack in situations of armed conflict, unless and for such time as such objects become military objectives.[4] Even when sites, or parts of them, are used for military purposes in a manner that would turn the concerned parts into military objectives, parties to the conflict must respect all rules related to the conduct of hostilities, including the principles of distinction, proportionality and precaution.[5] Parties to the conflict must notably take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to sites or civilian objects located within sites.[6] The mere presence of combatants or fighters within sites does not yet, in itself, turn sites or parts of sites into military objectives.

Additionally, parties to the conflict must take all feasible precautions to protect sites under their control, including the civilian population residing in those sites, against the effects of attacks, notably by avoiding, to the extent feasible, locating military objectives inside sites or in their vicinity.[7]

In the context of managing sites and maintaining their civilian character, it is essential to distinguish combatants and fighters from civilians, as well as civilians who participate directly in hostilities from those who do not. This is of vital importance because combatants, fighters and civilians who participate directly in hostilities may be subject to direct attack, thereby presenting a threat to sites and their inhabitants.

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4   See Additional Protocol I (AP I), Art. 52; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 7–10. IHL defines civilian objects, *a contrario*, as "all objects that are not military objectives": see *ibid.*, Rule 9. In order to qualify as a military objective, (i) an object must make an effective contribution to the adversary's military action by its "nature", "location", "purpose" or "use", and (ii) the object's total or partial destruction, capture or neutralization must offer a definite military advantage in the circumstances ruling at the time (cf. AP I, Art. 52(2); ICRC Customary Law Study, Rule 8).

5   On the principle of distinction, see AP I, Arts 48, 52; ICRC Customary Law Study, above note 4, Rules 1, 7. On the principle of proportionality, see AP I, Art. 51(5b); ICRC Customary Law Study, above note 4, Rule 14. On the principle of precaution, see Geneva Convention IV, Art. 18(5); AP I, Arts 57, 58; ICRC Customary Law Study, above note 4, Rules 15–24.

6   AP I, Art. 57; ICRC Customary Law Study, above note 4, Rules 15–21 (principle of precautions when launching an attack).

7   AP I, Art. 58; ICRC Customary Law Study, above note 4, Rules 22–23.

- Under IHL, civilians are all persons who are not members of the armed forces of a party to the conflict.[8]
- In international armed conflicts, members of a State's armed forces (other than medical personnel and religious personnel) party to the conflict are **combatants**.[9] Membership in State armed forces is generally defined by domestic law and expressed through formal integration into permanent units (distinguishable by uniforms, insignia and equipment).[10]

  In non-international armed conflicts, members of State armed forces or organized armed groups of a party to the conflict are generally described as **fighters** for the purposes of the principle of distinction.[11]

  The most important consequence associated with combatant/fighter status is the loss of civilian status and of protection against direct attack. Civilian protection is restored as soon as membership in regular State armed forces ceases, namely when a member disengages from active duty and reintegrates into civilian life (e.g. a full discharge from duty or a deactivated reservist). Similarly, membership of an organized armed group of a party to the conflict ends when an individual expresses disengagement openly or through a conclusive behaviour, such as lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combatant function (e.g. political or administrative activities).[12]

- Civilians lose their protection against direct attack for such time as they take direct part in hostilities. In other words, only for such a time may they be directly attacked as if they were combatants/fighters. Once they end the specific act that amounts to taking direct part in hostilities (that is, lay down, store or hide their weapons and return to civilian activities), they regain their protection against direct attack.[13]

  However, civilians who contribute to the general war effort of a party to the armed conflict without directly harming another party to the conflict (such as recruiters, trainers, financiers or propagandists) do not, as such, directly

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8   ICRC Customary Law Study, above note 4, Rule 5.
9   Geneva Convention III (GC III), Art. 4; AP I, Arts 43–44; ICRC Customary Law Study, above note 4, Rules 3–4. Participants in a *levée en masse* are also regarded as combatants without being members of the armed forces: Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 2; GC III, Art. 4(A)(6).
10 Membership in *irregular* forces belonging to a State party to the conflict can only be reliably determined on the basis of functional criteria such as those applying to organized armed groups in non-international armed conflicts. See: ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009 (ICRC Interpretive Guidance), p. 25.
11 ICRC, *Commentary on the First Geneva Convention*, 2016, paras 530, 532–534; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 31IC/11/5.1.2, October 2011, p. 43. For further information about the determination of membership, see ICRC Interpretive Guidance, above note 10, pp. 30–36.
12 ICRC Interpretative Guidance, above note 10, p. 72. This includes notably the resumption of such exclusively non-combatant functions (e.g. political or administrative activities) for the non-State party to the conflict to which the organized armed group belongs.
13 *Ibid.*, pp. 65–73.

participate in hostilities. They, therefore, do not lose their protection against direct attacks according to IHL.

Humanitarian character

Preventing combatants/fighters from entering sites is essential for maintaining the civilian character of those sites, but it may not be enough to preserve the humanitarian character of sites and, ultimately, for ensuring effective protection of IDPs/refugees hosted therein. It is therefore necessary to identify other categories of persons who could pose a risk to the humanitarian character of sites.

First, there may be civilians who sporadically take a direct part in hostilities *while being accommodated in sites*. Their situation needs to be distinguished from that of civilians who sporadically took a direct part in hostilities but *have ceased to do so when entering sites*. While the latter must not be barred from entering a site on the basis of their past direct participation in hostilities, the risk posed by the former should be considered and appropriate measures taken to tackle that risk, while bearing in mind that they are civilians and not combatants/fighters.

Secondly, some activities undertaken by civilians hosted in a site who support a party to the conflict without directly participating in hostilities could also endanger the safety of other civilians and undermine the humanitarian character of sites – although not affecting the civilian character of sites or their protection under IHL. Notably, activities such as recruitment and training of or for armed forces are considered incompatible with the humanitarian character of sites. Such activities are also incompatible with the institution of asylum under international refugee law.

That said, it is also necessary to identify the potential protection risks arising with non-admittance or expulsion of individuals from sites. Civilians who are not admitted or are expelled from sites on account of their contribution to the general war effort, for example, could be assumed (erroneously) by an opposing party to the conflict to be combatants/fighters (hence, targetable) under IHL. Importantly, individuals expelled from sites (including combatants/fighters) may still need to be protected from *refoulement* in accordance with international law,[14] and thus require specific attention.

Part 2: Applying operational measures

Drawing from current-day operational practice and responding to the operational challenges and dilemmas described in Part 1 of this document, the sections below

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14 *Non-refoulement* is the principle of international law that prohibits an authority (State or other) from transferring a person to another authority where there are substantial grounds to believe that this person would be in danger of being subjected to violations of certain of his or her fundamental rights. The principle of *non-refoulement* is found expressly in IHL, international human rights law and refugee law, though with different scopes and conditions for each of these bodies of law. The principle of *non-refoulement* has become customary international law.

propose measures humanitarian actors can consider with a view to maintaining the civilian and humanitarian character of sites. In doing so, the role of other actors is also explained, alongside the challenges humanitarian actors need to anticipate and the steps they can follow when engaging with these actors.

Ensuring a broad protection approach

Humanitarian actors need to ensure that sites provide an effective protective environment for people fleeing the effects of armed conflicts. First and foremost, this means ensuring the physical safety of displaced populations hosted in sites by preventing the presence of combatants/fighters. It also entails preventing civilians who contribute to the general war effort from intermingling with the population hosted in sites when their activities undermine the latter's protection. Equally important are measures that prevent civilians from participating directly in hostilities in a spontaneous, sporadic or unorganized manner. Finally, humanitarian actors need to assess the potential protection risks for individuals who are not admitted into sites as well as those who are separated, expelled or deprived of liberty.

In view of the foregoing, a broad protection approach that draws on all bodies of international law is necessary to achieve the best protection outcome for all individuals in need of protection. Such an approach must be supported by a holistic analysis that looks at: (i) the threats that have triggered displacement; (ii) the protection risks posed to persons residing in sites, including those caused by the presence of militants; and (iii) the protection risks posed to those not admitted to sites. In the present document, we use the term "militants" to encompass combatants, fighters, civilians who, while accommodated in sites, directly participate in hostilities (either inside or outside those sites), and civilians who contribute to the general war effort without directly participating in hostilities.

Concrete measures

Screening

States have the primary responsibility to protect and assist persons within their jurisdiction, including by taking measures to ensure that sites located in their territory remain secure, and that their civilian and humanitarian character is maintained.[15] This includes the engagement of border security personnel, police and immigration authorities as well as the armed forces, as required.

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15 Similarly, non-State organized armed groups who are party to an armed conflict are bound by IHL and must respect sites and refrain from launching direct attacks against civilians and civilian objects (ICRC Customary Law Study, above note 4, Rule 7). Furthermore, if armed groups control the territory where a site is located, they also have a certain responsibility to ensure the safety and well-being of the population within this territory (*ibid.*, Rules 22–23).

Nonetheless, States may be unwilling or may lack the capacity to discharge their responsibilities fully, particularly when large-scale displacement or an emergency occurs, and may therefore request assistance from the international community.

When a government takes up its role and screening procedures are in place, humanitarian actors should monitor the situation to ensure that the authorities strike the right balance between security and humanitarian considerations, in particular when dealing with large influxes of IDPs or refugees. Protection concerns may arise in relation to the way the screening is conducted, ranging from inadequate treatment and material conditions during screening to restrictions on freedom of movement during lengthy screening processes which, in some cases, can amount to arbitrary deprivation of liberty; family separation; persons going missing after screening; and forced return or *refoulement*. These concerns may become acute in situations where IDPs/refugees tend to be stigmatized and perceived to have a particular political opinion or as complicit with an actor in the conflict. Lastly, humanitarian actors should ensure that authorities take into account the particularly vulnerable situations of women and children associated with armed forces or armed groups – the latter should benefit from special protection and assistance measures appropriate for their gender and age, regardless of how they were recruited.

When a UN peace operation is deployed, in particular one with a protection of civilians mandate, it may also put in place screening mechanisms and seek to ensure the security of sites. UN missions will typically seek to empower the government to undertake screening, rather than take on this responsibility. Where UN missions do perform screening, however, it should be recognized that they are only one protection actor amongst many. They will likely seek the expertise and capacities of other UN and humanitarian partners with more experience in managing sites. Other actors can also provide support or technical advice on specific aspects of the screening (e.g. identification of children associated with armed forces or armed groups, or the establishment of screening procedures and criteria).

Humanitarian actors can also seek appropriate inter-agency mobilization and support to governments. They cannot, and should not, however, be expected to replace the primary duty-bearers, as they do not have the means or the mandate to undertake security operations. The role of humanitarian actors is rather to advocate for the State to ensure effective and transparent screening based on clear standard operating procedures (SOPs) for the identification of militants, and, when required and appropriate, their separation from the rest of the civilian population, consistent with applicable norms and standards.

In performing such a role, and advising those in charge on what would be adequate screening procedures, humanitarian actors must base their actions on a good understanding of the extent of the threats, the consequences and the protection needs that a situation may create. This must be considered from the viewpoint of the safety of the people sheltered in the site *and* in light of the risks someone may face if not admitted inside, separated, deprived of liberty, or expelled. Understanding the perception of the displaced community, as well as

that of the host community, with regard to possible threats and what may pose a concern for their safety and well-being within (and around) the site, is crucial.

A comprehensive protection response by humanitarian actors with regard to the screening process would include the following steps, among others:

- **Registering persons with specific protection risks** (e.g. disengaged combatants/fighters, men and women of recruitment age) and documenting missing persons (including in relation to allegations of arrests), with a view to preventing disappearances and re-establishing family links.
- **Engaging in a protection dialogue** with the authorities and the UN mission on screening procedures, providing practical recommendations on procedural safeguards (e.g. *non-refoulement*) and general treatment during such exercises (e.g. reasonable timeframes and preserving family unity) as well as other more specific issues (e.g. searches of females by female officials).
- **Maintaining a presence** close to sites in order to monitor protection risks and to gather evidence for a more concrete dialogue with the authorities.
- **Visiting screening sites** (in accordance with each actor's mandate and working modalities).
- **Monitoring screening procedures** when full and transparent access is given by the authorities and a channel to the authorities has been established to ascertain concerns identified by humanitarian actors.
- **Advocating for priority in identifying children** who are or have been associated with armed forces or armed groups. Once identified, the child's welfare should be monitored and the right balance needs to be found between enabling the child to benefit from special programmes that address his or her specific needs and support reintegration into the family and community, and avoiding stigmatization.
- **Advocating for special attention to women** associated with armed forces or armed groups, such as gender-sensitive screening procedures, separate screening facilities for women, and particular consideration for women who are pregnant, lactating and/or accompanied by infants or newborns. Screening procedures should give priority to women and children, and incorporate their specific protection and assistance needs, including as a consequence of sexual and gender-based violence.

Separation

Following screening, persons identified as militants and posing a serious threat (i.e., either because they continue to engage in hostilities or because their activities pose other protection risks) should be separated from the rest of the population as early as possible. Separation preserves humanitarian space as well as the humanitarian character of assistance and the security of humanitarian personnel working in sites.

Separation can include expulsion from a site, transfer to another place, reporting to authorities and, in exceptional circumstances, deprivation of liberty. The measure chosen should also address the security threats and protection

concerns that separated individuals may have. In particular, any expulsion or transfer to another authority must be in strict compliance with international law, including the principle of *non-refoulement*. Failure to find appropriate responses for separated individuals may result in them hiding among the civilian population in sites, thereby compromising the civilian and/or humanitarian character of those sites. Lastly, in principle, effective responses must not only ensure the safety and humane treatment of separated individuals but also contribute as much as possible to decreasing the level of violence at community level.[16]

It is therefore necessary for humanitarian actors to map the potential responses for identified militants, and to play a role in advising the authorities and other stakeholders on the best way to implement separation in a specific situation.

In exceptional circumstances, based on an individual and case-by-case basis, identified militants may be detained for the purposes of criminal proceedings or interned/administratively detained.[17] Any deprivation of liberty must be carried out in accordance with applicable international and domestic laws and standards.

In practice, deprivation of liberty may give rise to a number of concerns, in particular: a lack of legal basis or grounds and procedures for deprivation of liberty; inadequate conditions of detention and treatment; violation of the principle of *non-refoulement*; and lack of access to humanitarian actors.

When any of the above-mentioned situations arise, humanitarian and human rights actors with a specific mandate to visit persons deprived of liberty may consider, according to their mandate, working modalities and expertise, the following:

- **Engaging in a protection dialogue** with the authorities to advocate *inter alia* for: access to places of detention and individuals deprived of liberty to monitor conditions and treatment; the adoption of remedial measures to prevent abuses; and the adoption of and compliance with relevant procedural safeguards or judicial guarantees.
- **Providing material assistance** (basic hygiene items, blankets, clothing, water and sanitation etc.) to support the authorities in ensuring adequate conditions

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16 For example, this is about providing opportunities for rehabilitation and reintegration into civilian life to former combatants/fighters so that they do not resort again to violence, and creating mechanisms for social cohesion and dialogue at community level. See the following section on disarmament, demobilization and reintegration programmes.

17 The terms "internment" and "administrative detention" refer to non-criminal detention for security reasons, occurring, for the former, in time of armed conflict, and for the latter, outside an armed conflict (i.e., in other situations of violence, or in peacetime). For more information on internment under IHL, see ICRC, "Internment in Armed Conflict: Basic Rules and Challenges", Opinion Paper, 25 November 2014, available at: www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges. In certain specific circumstances, where combatants involved in an international armed conflict enter a neutral State's territory, internment will be required by IHL. See Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, USTS 540, 18 October 1907 (entered into force 26 January 1910), Art. 11; GC III, Art. 4(B)(2).

of detention, based on a thorough assessment of the situation and the pros and cons of such an approach.

● **Advocating for the specific protection and assistance needs of women and children**, such as preservation of family unity or visits, psycho-social assistance and medical care.

Disarmament, demobilization and reintegration (DDR) and other alternative programmes

Alongside screening and separation, disarmament, demobilization and reintegration (DDR) programmes can enhance the protection of civilians and the civilian and humanitarian character of sites while, at the same time, providing longer-term solutions for combatants and fighters.

DDR is a voluntary process, based on a political agreement, which consists of reintegrating combatants/fighters into civilian life after removing their weapons. It offers access to protection and reintegration measures (e.g. education, vocational training, income-generating activities, psychosocial support) to combatants/fighters who wish to disengage and return to civilian life. The ultimate objective of DDR is not just to provide an effective solution to deal with separated combatants/fighters, but to contribute to a significant reduction in violence and destabilization. DDR should not be confused with screening, separation, weapons searches or other measures to maintain the civilian and humanitarian character of sites.

Two key conditions are necessary to implement DDR programmes: (i) a peace agreement which has the buy-in of the parties, and (ii) a minimum level of security in place in the area. In the absence of these conditions, alternative programmes have been developed and implemented by the UN DPKO and partners in the CAR, DRC, Haiti and Mali, such as:

● **Community violence reduction programmes**: Flexible, community-based programmes containing elements of reconciliation, dialogue, prevention and conflict resolution/peace-building. They aim at reintegrating former combatants/fighters into society with the involvement of the community. These programmes have increased social cohesion by promoting a stronger, more stable community and thereby contributing to an overall decrease in violence. Such programmes may entail focusing on areas particularly prone to violence, engaging with at-risk youth-at-risk and community members, and working with reliable partners.

● **Pre-DDR programmes:** Designed in the CAR for fighters who do not fulfil the eligibility criteria of a DDR engagement (i.e., have not formally disarmed, weapons are being temporarily stored) and can benefit from vocational training and income-generating programmes.

In order to find effective solutions to handle separated combatants/fighters, it is important for humanitarian actors to:

- identify which programmes offered by the DPKO and partners are the most feasible for the specific operational context and the special needs encountered;
- explore, through cooperation and coordination with the DPKO and partners, the extent to which such programmes contribute to maintaining the civilian and humanitarian character of sites by offering a tool and a perspective to former fighters to renounce lastingly their military activities; and
- consider options for advocating for realistic programmes (vis-à-vis the DPKO and partners) to be put in place in certain cases, without compromising humanitarian principles.

Mitigating consequences of the presence of militants and armed elements in sites

The civilian and humanitarian character of sites is compromised when militants find their way into sites. Sites or parts of them can be used as bases by combatants/fighters and the civilian population can be used as human shields; or sites can be transformed into "rest and recuperation" places for combatants/fighters visiting family members. Government armed forces entrusted with managing sites or ensuring their security can likewise compromise the civilian character of sites by virtue of their armed presence in and around sites. More generally, the presence of any persons carrying weapons (armed elements), whether or not such weapons are intended for military use, may generate certain protection risks.[18]

Under such circumstances, the protection and security of sites and their civilian populations may be seriously undermined. Attacks against sites, harassment, forced recruitment and sexual and gender-based violence are some of the protection concerns that may arise from the presence of militants in sites. Additionally, government authorities might perceive the entire population of a site as being complicit with other parties to the conflict. As such, they may push for camp closure, thus leading to premature and/or forced return. Humanitarian actors could therefore explore the following measures and approaches, in accordance with their expertise and mandate:

- **Prevent and mitigate risk exposure** with the following measures: locating (or relocating) sites away from military bases and border areas when possible or needed; ensuring to the maximum extent feasible physical protection in and around sites by security actors not involved in the ongoing armed conflict or, should such actors be involved in an armed conflict, locating them at the outskirts of sites; identifying people at risk of recruitment (both voluntary and forced) and informing them of the implications of recruitment on their civilian (and, if applicable, refugee) status; adopting particular measures to ensure the protection of children (including from recruitment); increasing

18 The term "armed elements" thus refers to all individuals carrying weapons irrespective of their legal status, including civilians who carry weapons for reasons of self-defence or reasons unrelated to military activities.

security measures (such as community policing or police posts) with the active involvement of camp managers; and establishing SOPs for managing incidents in relation to specific threats, including the presence of militants or armed elements.

- **Pursue community-based protection approaches**, starting with actively engaging a site's civilian and host populations in a dialogue to understand their perspectives and perceptions, including priority concerns and existing coping mechanisms.[19] Assess the role these populations can play in advocating and negotiating directly with militants or armed elements for their own protection, and empower these efforts. Other useful steps may include raising people's awareness of their rights, basic protection principles and key messages; putting in place channels and processes for people to report their concerns related to the presence of militants or armed elements in the camp and other protection issues (e.g. through camp managers); and implementing activities aimed at strengthening people's resilience by reducing their exposure to threats and the need to resort to harmful coping mechanisms.

- **Engage in a protection dialogue with government authorities and non-State parties to the armed conflict**. Humanitarian actors should reach out to all concerned actors at all levels (e.g. the State, organized armed groups, individuals or groups engaged in criminal activities) in order to leverage different entry points and centres of power and decision-making. A variety of approaches can be pursued (e.g. bilateral and confidential dialogue, public advocacy) and complemented by capacity-building and training activities, which can be mutually reinforcing (e.g. engaging the authorities on technical issues such as developing SOPs can build trust and open communication channels). They should seek to leverage actors such as special rapporteurs, donors, regional actors and, depending on the context, religious leaders and faith groups).

In pursuing the above-mentioned measures, humanitarian actors need to understand and leverage their complementary mandates, roles and working modalities. It is equally necessary to share information, while respecting working modalities (including confidentiality and data protection), for the purpose of joint analysis and to agree on the operational challenges that need to be addressed as a matter of priority. Finally, close collaboration is important for developing key protection messages for dialogue and advocacy with other actors.

Conclusion

Confronted with multiple challenges in preserving the civilian and humanitarian character of sites during armed conflict, humanitarian actors need to draw on all applicable legal frameworks to ensure a broad protection perspective and to find

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19   Coping mechanisms may include voluntary recruitment for survival or income-generating purposes.

practical solutions. Identification and separation mechanisms need to be transparent. Security safeguards must integrate the perceptions that civilian populations sheltered in sites have vis-à-vis their own security and possible sources of threats. Humanitarian actors need to be sensitive to the security concerns of militants once identified and separated, including by pursuing, for example, voluntary community violence reduction programmes.

Importantly, preserving the civilian and humanitarian character of sites demands reinforced complementarity and greater cooperation among humanitarian actors. This in turn should serve the larger aim of enhancing the protection of persons affected by armed conflict, particularly IDPs and refugees. An ongoing protection analysis needs to be systematically shared to inform a common understanding among humanitarian actors of the issues at stake. Humanitarian actors must likewise find effective ways to coordinate their negotiation and dialogue with primary duty-bearers at all levels, building upon their respective mandates and expertise, and respecting inherent constraints.

The challenges and dilemmas associated with preserving the civilian and humanitarian character of sites often exceed the capacity of humanitarian actors. As such, it becomes necessary for humanitarian actors to reach beyond their community in order to engage a broader network of stakeholders, leveraging and, where feasible and appropriate, mobilizing action on the part of political, security, human rights, peace-building and development actors. In doing so, however, the focus needs to be on complementarity, and humanitarian principles need to be preserved alongside distinctions with regard to mandates, roles and responsibilities. Voluntary violence reduction programmes for organized armed groups belonging to a party to a conflict offer one example of joined-up and innovative action. Such initiatives require humanitarian actors to develop a deeper understanding of the added value and limitations that actors beyond their community can have on the protection of affected populations, and accordingly, the most appropriate ways these actors can be integrated into the operational response.

Acknowledgements

REPORTS AND DOCUMENTS

What's new on *How Does Law Protect in War? Online*

Annual update on case studies published from January to December 2017*

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How Does Law Protect in War? Online

How Does Law Protect in War? Online is a platform adapted from the original reference Casebook published by the ICRC.[1] It was originally intended to support teaching of international humanitarian law (IHL) in universities in an interactive way, based on contemporary practice. The section on "The Law" features a general outline presenting IHL in fourteen chapters. It contains comprehensive bibliographic resources and links each theme to a range of related case studies and documents. The section on "The Practice" comprises more than 300 case studies and documents regrouped by theme, region or type of document. They allow practice-oriented learning of IHL rules and interactive discussions through a series of questions. The "Pedagogical Resources" section provides useful advice on how to teach IHL, as well as twenty-nine model course outlines and other useful resources. The "A to Z" section presents 422 notions linked to IHL, their legal sources, the case studies where they are addressed, and bibliographic resources for delving further into those notions. A search engine allows users to find rapidly the relevant pedagogical material they need on the platform.

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*   This selection of case studies has been prepared by Matthieu Niederhauser, ICRC Academic Sector Associate.

The annual update on *How Does Law Protect in War? Online* presents the new case studies and international humanitarian law (IHL) teaching materials published in 2017 on *How Does Law Protect in War? Online*.[2]

Eighteen new case studies were published in 2017, along with three thematic highlights. Those new teaching materials are presented below. Case studies are prepared by students of the University of Geneva, Faculty of Law, and the Geneva Academy of IHL and Human Rights, under the supervision of Professor Marco Sassòli and Ms Yvette Issar, Research Assistant, both at the University of Geneva. The International Committee of the Red Cross (ICRC), through its Law and Policy Forum, provides technical and promotional support for this content and manages the platform.

Using case studies in IHL teaching

Teaching IHL with case studies offers many benefits. First and foremost, learning is acquired and integrated into long-term memory more easily when the methods used encourage participants to be actively involved. The fact that a case study is drawn from the realities of armed conflicts holds the students' attention because they can link it to daily life. It also allows them to understand the practical implications of the law. Moreover, discussions in class or group work on case studies develop skills that are in high demand in the labour market and too rarely trained in universities, such as critical thinking, problem-solving, negotiating and accepting diverse opinions. Finally, this method enriches the teacher–student relationship, which additionally stimulates the learning process.

New case studies, January–December 2017

Africa

- *Central African Republic: Sexual Violence by Peacekeeping Forces* discusses the implementation of IHL by multinational forces not directly under the command of the United Nations (UN), the definition of sexual violence according to the UN and according to IHL, and the responsibility to investigate allegations of rape and other forms of sexual violence in armed conflict.
- The case study *Libya, NATO Intervention 2011* explores IHL rules governing the conduct of hostilities, as well as repression of possible violations. It also deals with the complex implications of multinational operations for the application and implementation of IHL.
- *Libya, Report of the Office of the UN High Commissioner for Human Rights* discusses several alleged violations of IHL throughout 2014 and 2015,

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1   Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, 3rd ed., ICRC, Geneva, 2011.
2   Available at: casebook.icrc.org.

including attacks on densely populated residential areas in a number of Libyan cities.

- *Mali, Accountability for the Destruction of Cultural Heritage* concerns the destruction of mausoleums in Timbuktu in 2012 and the International Criminal Court's first trial on destruction of cultural property.
- In *Somalia, Traditional Law and IHL*, the question of universality and cultural relativism of IHL is explored, as well as the use of traditional law to disseminate IHL's main protective messages so that they can be known and respected.

Asia and the Pacific

- *Afghanistan: Attack on Kunduz Trauma Center* comes back to the question of identification of medical facilities, conditions for their loss of legal protection, IHL rules on precautions before attacks, and requirements for investigations of possible violations.
- *Myanmar, Forced Population Movements* examines the situation faced by Muslim communities in Myanmar and in neighbouring countries. It analyzes the way in which many reported practices are addressed by different potentially applicable legal frameworks.

Europe and Central Asia

- The 2016 ICTY judgment *Prosecutor v. Radovan Karadzic* examines the legality of various shelling and sniping incidents during the siege of the city of Sarajevo, between 1992 and 1995.
- In *Sweden/Syria, Can Armed Groups Issue Judgments?*, a Swedish District Court discuss whether non-State armed groups have the capacity under IHL to establish courts and impose penal sentences under certain specific circumstances.
- In *United Kingdom, G4S Contracts in Israeli-Occupied Territories Face Major Investigation*, a security company provided Israel with surveillance equipment at its checkpoints in the occupied territories. This allows for a discussion on the legal basis for IHL to apply to business enterprises and on the actual situations in which it applies.

Middle East

- *Iraq, Forced Displacement and Deliberate Destruction* focuses on the legality under IHL of major displacements and actions taken to prevent the return of displaced persons in northern Iraq in 2014 and 2015.
- *Israel/Palestine, Operation Protective Edge* analyzes the conflict that took place in 2014 in Gaza. It allows many discussions about IHL rules on the conduct of hostilities in one of the most densely populated areas on earth.
- *Syria, Destruction of Cultural Heritage* shows that heritage sites are sometimes being used for military purposes or have been transformed into battlefields, including the Aleppo Citadel, the Damascus Citadel and the National Museum of Damascus.

- The case study *Syria, Press Conference with French President Francois Hollande and Russian President Vladimir Putin* focuses on the Syrian conflict and deals with complex classification issues, the territorial scope of application of IHL, the definition of military objectives and the protection of humanitarian assistance under IHL.
- *Yemen, Naval Blockade* highlights some of the (in)direct effects of conflicts. Disruptions of the food, water and medical supply chains have an impact on the civilian population and on hospitals, which are often located in cities, as is the case in Yemen.

Others

- The *ICRC 2015 Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* summarizes various challenges faced by IHL, including but not limited to multinational forces, detention, new technologies and terrorism. It also communicates the ICRC's position on many of those issues. The Index (A–Z) allows readers to find the exact paragraph in this long report dealing with a certain issue (e.g., internationalized internal armed conflict, military necessity, equality of belligerents, private military and security companies, humanitarian assistance, proportionality).
- The case study *UN, Report of the Secretary-General for the World Humanitarian Summit* addresses the crucial question of implementation of IHL in the beginning of the twenty-first century, as well as the related responsibility of States, and the roles of the International Red Cross and Red Crescent Conference, the ICRC and Switzerland.
- *UN, Security Council Resolution 2286 on Attacks on Hospitals* discusses the purpose and effects of that Resolution and compares its prescriptions with IHL requirements, in particular with regard to the protection of medical personnel, medical objects and the emblem.

New thematic highlights, January–December 2017

IHL, Protecting Human Life and Dignity in XXI Century Wars highlights six new case studies, allowing teachers, students and professionals to explore some of the most salient aspects of IHL in today's armed conflicts through interactive discussions. The twenty-first-century challenges presented here include multinational operations, legal protection of hospitals and sexual violence in armed conflict.

War in Cities presents eight new case studies that illustrate the ways in which wars are fought in cities and the challenges such trends raise in recent and contemporary contexts. These cases allow teachers, students and professionals to dig into three challenges related to urban warfare, namely the conduct of hostilities, the reverberating effects of violence on vital services and the threat to cultural heritage.

The "A to Z" section may now be used as a kind of online IHL "dictionary": this highlight presents a major enhancement to the "A to Z" section of *How Does Law Protect in War? Online*. Ninety-seven new definitions have been added, and several hundred changes have been made to improve its content. The "A to Z" section now contains references for 422 key IHL terms. This work has been conducted in partnership with the University of Geneva, Faculty of Law, and the Geneva Academy of IHL and Human Rights.

BOOK REVIEW
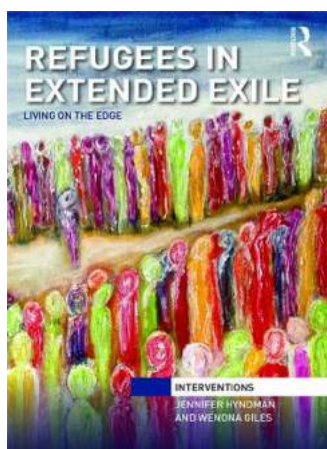
Refugees in Extended Exile: Living on the Edge

Jennifer Hyndman and Wenona Giles*

Book review by Catherine-Lune Grayson, PhD, Policy Advisor for the International Committee of the Red Cross and author of *Children of the Camp: The Lives of Somali Youth Raised in Kakuma Refugee Camp, Kenya* (Berghahn, New York and Oxford, 2017).

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Statistics show that long-term displacement is the new normal.[1] In the absence of solutions to their exile, people remain trapped in permanent temporariness for years – or decades in the case of Somalians, Afghans or Palestinians. The traditional "durable solutions" bringing exile to an end are elusive: only a few hundred thousand refugees return home every year, few States hosting refugees in the global South are willing to allow them to settle permanently in their country, and less than 1% of the refugee population are being offered resettlement in a third country.

In *Refugees in Extended Exile: Living on the Edge*, Jennifer Hyndman and Wenona Giles analyze the global politics that lead to protracted displacement and argue that the normality of extended exile is not coincidental, but results from containment policies that have made the international refugee regime and its "durable solutions" increasingly irrelevant. States generally agree that refugees deserve protection – albeit minimalist protection that ensures their bare survival, but not a dignified living – but they also believe that such minimalist protection should be provided in regions of origin, rather than in the global North. The will to keep refugees in the global South has translated into the implementation of measures to prevent people from crossing borders and claiming asylum, or, when

* Published by Routledge, London and New York, 2016.

they do manage to cross borders, to keep them in camps in marginal regions.[2] Such exclusionary policies and practices have been legitimized by being presented as critical to national security. Refugees who have been forced to move because of threats to their own security have themselves been cast as a security threat that must be contained. Such depiction is contingent on the othering of people trapped in extended exile. Refugees are hardly seen as fellow humans. They have been turned into (potentially threatening) beneficiaries rather than political and right-bearing subjects, an observation that resonates strongly with Hannah Arendt's poignant writings on the exclusion of refugees from the human race, their reduction to bare life and their ensuing marginalization from the political sphere.[3] Throughout their book, Hyndman and Giles show that such politics of exclusion must be deciphered in light of broader political and historical dynamics and the constellations of power in which they are embedded – with the end of the Cold War, refugees have lost their "geopolitical valence"[4] and have therefore stopped being of great interest to major powers. The global war on terror has turned them into a potential threat, justifying their exclusion. This is a thread that already runs through Hyndman's earlier work.[5]

In examining the connection between long-term displacement and the containment of populations in remote areas of the global South, and the will of countries of the global North to keep populations deemed undesirable away from their borders, Hyndman and Giles powerfully complement critical writings on the politics of displacement. Hyndman herself has convincingly studied the geopolitics of displacement and humanitarianism in her seminal book *Managing Displacement: Refugees and the Politics of Humanitarianism*,[6] in which she notably explores how the international refugee regime has evolved from protecting the right to seek asylum to a focus on the right to stay home. The politics of asylum have also been considered by authors such as Hannah Arendt,[7] Peter Nyers,[8] Michel

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1 Between 2010 and 2016, the proportion of refugees under the mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR) who have been in exile in a given country for five years or more has varied between 41% and 68% (see UNHCR's annual *Global Trends* reports for 2010 to 2016). Variations in proportion are mostly related to new displacement and not to vast numbers of refugees having found a lasting solution to their exile.

2 Hyndman and Mountz have coined the potent term "neo-refoulement" to describe the bundle of geographical tactics that prevent would-be asylum-seekers from reaching the territory of a signatory to the Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954); and the Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967). See Jennifer Hyndman and Alison Mountz, "Another Brick in the Wall? Neo-refoulement and Asylum in Europe and Australia", *Government Opposition*, Vol. 43, No. 2, 2008.

3 Hannah Arendt, *The Origins of Totalitarianism*, Meridian Books, Cleveland, OH, 1968 (first published 1951).

4 *Refugees in Extended Exile*, p. 9.

5 See Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism*, University of Minnesota Press, Minneapolis, MN, 2000; Jennifer Hyndman, "The Geopolitics of Migration and Mobility", *Geopolitics*, Vol. 17, No. 2, 2012.

6 J. Hyndman, *Managing Displacement*, above note 5.

7 H. Arendt, above note 3.

8 Peter Nyers, *Rethinking Refugees: Beyond States of Emergency*, Routledge, New York, 2006.

Agier[9] and Liisa Malkki.[10] Hyndman and Giles' book takes stock of this scholarship, and reads like a compelling conversation with several of these authors on the need to question the salient language of "protracted refugee situations" and "durable solutions" that has delivered limited results, and to rethink the refugee regime in "ways that might allow us to imagine different futures, politics and policies".[11] The authors, a geographer and an anthropologist, draw on research across disciplines and significantly build on their own work and research conducted mostly between 2006 and 2010 with Somalian and Afghan refugees in Kenya, Iran and Canada, as well as key informants in humanitarian organizations in Europe and North America, to attempt to better grasp the effect of global politics on the intimate life and ontological (in)security of refugees. In doing so, they reflect on the question of security from the perspective of States, but also, and most importantly, from that of people. Although these two perspectives are enmeshed, refugees' perception of (in)security has often been neglected in discussions related to security and displacement and migration, as this question tends to be addressed through the narrow prism of national security.

Hyndman and Giles flesh out their argument in five insightful chapters that intend to make refugees themselves visible, bringing texture and nuances to their lived experience, and analyzing the political, historical and geographic factors that have confined them to remote areas. They navigate between several sites of prolonged displacement and large- and small-scale perspectives, a trajectory that takes the reader from sites of protracted displacement in Iran and Kenya (Chapter 3), to the politics of management of refugees in Kenya, Uganda, Tanzania and South Africa (Chapter 4), to sites of resettlement in Canada (Chapter 5), in light of tensions between refugee protection and securitization, externalization and the exclusion of asylum-seekers (Chapter 2). Hyndman and Giles' premise is not new, but their will to stimulate new thinking leads them to challenge the established order and language in a thoughtful way. Their people-centric considerations on security, their recognition of people's agency and their critical reflection on resettlement are especially stimulating.

In discussing the tension between securitization and refugee protection, the authors contrast and connect the existential insecurity of the global North in the face of terrorism or migration with refugees' profound legal, material, intimate and quotidian insecurity in sites of protracted displacement. They productively rework the concept of "ontological security", coined by Giddens in 1991, to illustrate that the absence of a legal status, belonging, livelihoods and perspectives for the future characterizing extended exile produce "an acute sense of not knowing what comes next"[12] that shapes people's lives and behaviours. They observe that this ontological insecurity is closely related to the depiction of

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9   Michael Agier, *Gérer les indésirables: Des camps de réfugiés au gouvernement humanitaire*, Flammarion, Paris, 2008.
10   Liisa H. Malkki, "Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization", *Cultural Anthropology*, Vol. 11, No. 3, 1996.
11   *Refugees in Extended Exile*, p. 7.
12   *Ibid.*, p. xiv.

refugees as vectors of insecurity – because refugees are perceived as an existential threat by the global North, they are trapped in a permanent temporariness that produces ontological insecurity.

Throughout their book, the authors aim at avoiding broad generalizations. To do so, they introduce nuances in the experience and modes and means of survival of people facing "indefinite stasis"[13] and in the politics of managing people, as the conditions and quality of asylum vary greatly through time and from one place to another – that is, between countries, but also between camps and cities, and rural and urban areas – and from one person to another. In stepping away again from a State-centric lens, they point out that refugees' experience is not only shaped by the response of the host State – cities and communities are also central to the provision of hospitality and security and contribute to people's sense of ontological (in)security. Although it seems obvious that the nature of people's experience is strongly influenced by their individuality and the context, scholarship on forced displacement – just as scholarship on humanitarian action – has often been criticized for focusing on States and institutions and for disregarding people's agency and reducing them to a mass of anonymous victims.

The authors' critical observations on resettlement and exclusionary politics through a discussion of people's experience of resettlement in Canada, one of the world's main refugee resettlement countries, are very interesting given the limited critical scholarship on this question. Hyndman and Giles challenge the rescue narrative in showing that people are not necessarily "saved" by resettlement and that the politics of resettlement are not strictly guided by non-political benevolence. In fact, resettlement programmes for refugees selected abroad have allowed the Canadian government to justify more exclusionary measures towards asylum-seekers trying to reach the country by their own means. It is commonly implied that such asylum-seekers are undeserving or somehow breaking the law, unlike those who compliantly wait for a hypothetical resettlement in their region of origin. There as well, the authors show how the politics of resettlement and asylum cannot be read in isolation and are the manifestation of transnational politics and networks. In considering people's perspective on resettlement, they question the fact that resettlement represents the end of the story, as the language of solutions seems to suggest. They wonder to what extent resettled refugees really experience life as full rights-bearing Canadians. Despite being citizens, many feel socially and professionally marginalized and are ambivalent about their situation. Yet, becoming citizens does reopen pathways for legal mobility, work and education.

In questioning the language of durable solutions itself, in drawing connections between the normality of extended exile and the political will of the global North to contain refugee populations, the authors of *Refugees in Extended Exile* search for new ways of approaching exile and addressing the deleterious effects of protracted displacement. To some extent, their irritation transpires in

13 See Melanie B. E. Griffiths, "Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees", *Journal of Ethnic and Migration Studies*, Vol. 40, No. 2, 2014.

their dissection of the geopolitics of exile as they show that containment – rather than holistic protection – remains core to the management of refugees. Their reflection is engaging and challenging, although their expressed will to imagine different futures, politics and policies pits itself against the fact that States' security focus has commonly supplanted their commitment to protecting refugees. They call for a bridging of the distance between "us" and "them", and indeed, a recognition of our shared humanity seems essential to countering the narrative that depicts asylum-seekers as a threat and justifies their exclusion. They also stress that solutions to long-term displacement must involve the restoration of rights, as displaced people require membership in a State for protection. Humanitarian assistance alone does very little to address the long-term insecurity and protection of persons; hence, it might not be the foreseen "durable solutions" that focus on the restoration of rights that need to change, but the politics surrounding them that have made them unreachable for the vast majority of refugees.

Refugees in Extended Exile should be read not only by scholars, but also by humanitarian and government workers who play a key role in the management of refugee populations. Years ago, Hyndman's writings allowed me to finally grasp my own discomfort in the face of refugee camps of a quasi-permanent nature. They shed light on the connection between such sites and global containment policies, and on the instrumental role played by humanitarian organizations in keeping certain populations at bay. Hyndman and Giles' book must be read for the very same reasons – it is illuminating and shows how people's trajectories are shaped by wider social, political, economic and historical dynamics.

BOOK REVIEW
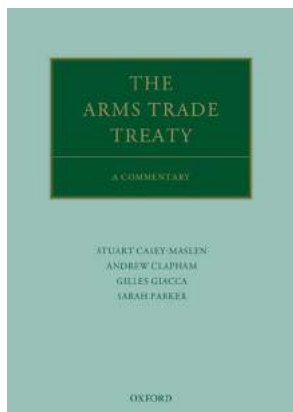
The Arms Trade Treaty: A Commentary

Andrew Clapham, Stuart Casey-Maslen, Gilles Giacca and Sarah Parker*

Book review by Margherita D'Ascanio, Legal Adviser at the International Committee of the Red Cross and PhD candidate at the Law Faculty of the University of Geneva.

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"Weapons are among man's oldest and most significant artefacts."[1] This is how *The Arms Trade Treaty: A Commentary* (ATT Commentary) starts its historical introduction, which makes the volume immediately catch the interest of a wide range of readers and interpreters by bringing them into the journey of past and current international trade of conventional arms and its regulation.

The Arms Trade Treaty (ATT), adopted by overwhelming vote by the United Nations (UN) on 2 April 2013, is the first international treaty aimed at regulating international transfers of conventional arms. The ATT Commentary, written by the world's leading scholars and practitioners, is the most comprehensive existing work for understanding the international law regulating the trade of arms and its practice.

As the introduction to the Commentary explains, it was the American Civil War during the mid-nineteenth century that changed the arms production system.[2] The mass bloodshed that it created was facilitated by industrialization, particularly of interchangeable parts of arms. The exigencies of warfare required production to take this direction. Citing James McPherson, the Commentary notes that it was "no coincidence that interchangeability was first perfected in small arms manufacture. In wartime an army needs a large number of weapons in a hurry and must be able to replace damaged parts in an equal hurry."[3] Today, this interchangeability has evolved into modularity, thus reflecting the need for even more flexible

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* Published by Oxford University Press, Oxford, 2016.

weapons that can be easily reconfigured to meet different operational needs and that can accommodate a range of sophisticated accessories. This evolution has shown the growing need for an adequate regulation of the trade not only of arms and their parts but also of their components,[4] together with a proper understanding of it.

Even during the civil war, the output of arms factories was not limited to supplying the domestic market. In fact, arms transfers were a matter of concern for international law for a very long time. The very first modern instrument to regulate the trade of arms focused on slavery.[5] As explained in the section of the Commentary on "The Historical Precedents of the Arms Trade Treaty", the 1890 Brussels General Act[6] was actuated with the intention of the colonial powers to end the traffic of African slaves and secure peace and security on the continent. To this end, restrictions on the importation of firearms and of ammunition throughout that territory seemed relevant to insert in the act.[7]

Today, we are awash with arms.[8] Each year, \$45–60 billion worth of conventional arms sales agreements are concluded.[9] For more than two decades, the main exporters have been the five permanent members of the UN Security Council. Developing countries are the main recipients of those transfers.

Despite a considerable corpus of international law detailing how arms may or may not be used, until recently there has clearly been much less regulation of their supply. For decades, contrary to most other areas of commerce, the arms trade has not been regulated on an international level, creating fertile ground for robust competition between suppliers – a trend now exacerbated by the global economic crisis.

Traditionally, disarmament efforts have been concentrated on weapons of mass destruction, deemed as the most dangerous for humanity. However, some

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1   Robert L. O'Connell, *Of Arms and Men: A History of War, Weapons and Aggression*, Oxford University Press, New York and Oxford, 1989, p. 4, cited in ATT Commentary, p. 1.
2   ATT Commentary, p. 1.
3   James M. McPherson, *Battle Cry of Freedom: The Civil War Era*, Ballantine Books, New York, 1988, p. 16, cited in ATT Commentary, p. 1.
4   On the distinction between "parts" and "components" of weapons, para. 4.19 of the ATT Commentary states: "'Parts and components' are not defined in the treaty and there is no internationally agreed definition of what constitutes a part or a component. … [W]hile in other fora the terms are generally used interchangeably, in a weapon context, a 'part' can be considered an item that cannot work independently, but is primarily used in the construction of a larger item (e.g. the armoured steel plates that will go into the battle tank chassis) while a 'component' can be understood as an item that has an independent function (such as a gas turbine engine) but that will need to be integrated into a larger item to be used" (footnotes omitted). See also Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, UNGA Res. 55/255, 31 May 2001, Art. 3(b); International Small Arms Control Standard 01.20, Glossary of Terms, Definitions and Abbreviations, Version 1.1, 17 June 2017, p. 14.
5   ATT Commentary, p. 3.
6   General Act on the Slave Trade and Importation into Africa of Firearms, Ammunition and Spiritous Liquors, signed in Brussels on 2 July 1890.
7   Article 1(7) of the 1890 Brussels General Act; ATT Commentary, p. 3.
8   *Ibid.*, p. 7.
9   Marc Finaud, "The Arms Trade Treaty: Half Full or Half Empty?", Geneva Centre for Security Policy, Policy Paper No. 2013/6, August 2013, p. 1, available at: www.gcsp.ch/News-Knowledge/Publications/The-Arms-Trade-Treaty-Half-Full-or-Half-Empty.

major conflicts such as the Balkan wars and the Rwandan genocide, as well as internal violence in Latin America, showed how devastating the unregulated sale of conventional weapons, including small arms and light weapons, could be. The ATT's greatest strength is that it subjects arms transfers to humanitarian concerns and requires that transfers be denied where real risks of serious violations exist.

What are the criteria for assessing whether exports or imports can be authorized? What constitutes legitimate trade and lawful ownership and use of certain conventional arms? How can the rules regulating the trade of arms be implemented and enforced? Written by qualified academics and experienced practitioners directly involved in the treaty negotiation, the ATT Commentary explains in detail each of the treaty provisions, the parameters for denial of transfer and for international cooperation and assistance, and the relevant implementation obligations and mechanisms. Within its material scope, the Treaty and together with it the Commentary deal with the seven categories of heavy armaments contained in the UN Register of Conventional Arms, small arms and light weapons, ammunitions and munitions, parts and components[10] of the weapons covered by the Treaty, and technology transfers.

As States will go through the process of ratification and implementation of the ATT over the next few years, the ATT Commentary provides invaluable guidance to government officials, civil society and international organizations, and scholars on the meaning of its provisions. In addition, given the international media attention that the arms trade receives, anyone interested in exploring the issue can gain a comprehensive overview by reading this volume.

The ATT may appear to be rather technical, and media do not always report the legal considerations that go with the international trade of arms. The ATT Commentary describes the context of past and current international regulations of arms transfers, details the categories of weapons covered by the ATT and explains the different forms of transfer that the Treaty regulates. It covers questions regulated by international humanitarian law (IHL), international human rights law, international criminal law and the *jus ad bellum*, as well as the application of the Treaty to non-State armed groups. Thanks to the structure of the book, even those less familiar with the subject will be able to form their own opinion on the main aspects of the international regulations of the arms trade while benefiting from an analysis based on relevant case law and practice, which shows that the multiple branches of international law involved on the issue are lively and developing bodies of law.

The authors bring a real added value to the clarifications on the rules of the ATT, with expertise ranging from public international law to IHL and arms regulations, and with their professional experience ranging from academia and the governmental sector to civil society and organizations like the International Committee of the Red Cross (ICRC) – the guardian of IHL. The authors manage to address a broad public, and this is certainly due to their diverse expertise.

10   See above note 4.

Their in-depth comprehension of a range of actors, such as academics, industry representatives, international organizations and civil society, underlies the volume and ensures that it realistically presents the international environment in which those actors work.

The wide array of supporting documents presented in the ATT Commentary shows the authors' expertise and commitment to finding the most appropriate texts to support their explanations. Professors, students and laypersons will be able to find the answers and clarifications to the most controversial and difficult questions that the ATT raises. At the same time, scholars and researchers looking for additional sources will be introduced to less commonly cited but equally relevant resources. The wealth of the sources used also lies in their variety, both in terms of the types of documents and their provenance (ranging from international, regional and national courts' decisions and instruments to UN resolutions and positions of the ICRC).

In conclusion, one can only recommend *The Arms Trade Treaty: A Commentary*, as Andrew Clapham, Stuart Casey-Maslen, Gilles Giacca and Sarah Parker offer a well-written, comprehensive discussion and interpretation of the ATT, particularly on its most controversial provisions. The authors have not only succeeded in clarifying the ATT but have also transmitted their interest in the matter. The ATT Commentary has been written in an easy-to-read style, placing different but related branches of law in context through important references from history and economics. As such, it will make a wide range of readers willing to continue the discussions and carry out further work on the subject. In this respect, the ATT Commentary will also constitute a key tool for everyone involved in the important process of ratification and implementation of the ATT by States.

INTERNATIONAL
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BOOKS AND ARTICLES

New publications in international humanitarian law and on the International Committee of the Red Cross

Arms

Books

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The Library of the International Committee of the Red Cross (ICRC) welcomes researchers interested in international humanitarian law (IHL) and the organization's work throughout the years. Its online catalogue is the gateway to the most recent scholarship on the subject, documents of Diplomatic and International Conferences, all ICRC publications, rare documents published between the founding of the ICRC and the end of the First World War, and a unique collection of military manuals. The Library Team also publishes research guides in order to help researchers access the full text of the most relevant and reliable sources in the field of IHL and the ICRC.*

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