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Realising protection
The uncertain benefits of civilian, refugee and IDP status

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Overseas Development Institute

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Chapter 1
Introduction: the uncertain benefits of protected status

James Darcy and Sarah Collinson

1.1 Introduction

Protecting civilians from the worst effects of violent conflict, human rights abuses and persecution lies at the heart of the humanitarian agenda. Central to this endeavour is the attempt to secure respect for the protected status conferred on civilians and displaced people by international law and custom. The laws and norms that define protected status make demands on a range of duty-bearers – armed actors, state authorities and others – to observe rules of behaviour towards those with such status. Yet while this normative aspect of protection is fundamental, the protection afforded by legal and other rules remains notional unless acted upon. It is the 'real-world' significance of these rules that is the focus of this report. It considers the meaning and implications of three categories of protected status for non-combatants – 'civilian', 'refugee' and 'internally displaced' – and the changing forms of protection associated with them, in theory and in practice.

Each of these status categories emerged in particular historical circumstances and has changed over time. Civilian status has the longest history, though as Keen and Lee point out in chapter 2, it has not been uncontested. The obligation to distinguish between those who bear arms and those who do not is an ancient one, codified in more recent history in the Geneva Conventions. Similarly, the concept of *sanctuary* long predates the modern doctrine of asylum and related refugee protection regimes. In both cases, the basic pillars of current legal protection were established in the aftermath of the Second World War and were shaped by that experience.

Subsequent legal and policy developments have gone some way to broadening and updating the content and application of civilian and refugee status, but competing policy priorities and the dynamics of contemporary conflicts pose serious normative and practical challenges. This is reflected in the third status category considered here – 'internally displaced person' (IDP) – which has gained international recognition only quite recently as a consequence of perceived gaps in the prevailing normative and operational protection frameworks that were established to respond to refugees displaced across international borders, rather than the many millions of people forcibly displaced within their own countries.

IDP status is not a distinct legal category in international humanitarian or human rights law, though the status has become formalised in law and/or policy in some countries, and recently at regional level in the context of the Great Lakes Pact.[1] It is a sub-set of the broader civilian category, but unlike refugee status it does not carry with it specific entitlements other than those conferred by law on civilians in general. Chapter 4 explores the significance of 'IDP' as a distinct status category and considers the implications of attempts to establish basic protective norms for those forced or compelled to leave their homes who have little or no recourse to formal international protection.

The policy backdrop to this report is the recent rise of 'protection' on political and organisational agendas, notably in the adoption of the 'Responsibility to Protect' (RtoP) doctrine at the 2005 UN World Summit. Yet while the protection of civilians – and IDPs in particular – is now a regular item before the Security Council, and in the policy statements of aid agencies and donors, refugee protection and asylum policy has been strikingly absent from these deliberations. As international awareness and recognition of the protection needs of IDPs and other civilians has increased, concern with refugee protection appears to have waned, despite the fact that refugee protection is supported by a far more elaborate and developed regime of international laws and institutions. Increasingly, questions related to the treatment of refugees, including access to asylum, *non-refoulement* and burden-sharing, are considered in policy fora concerned with matters of immigration control rather than civilian protection.

The nature of contemporary conflict seems to have led some to assume (openly or tacitly) that the old rules governing warfare no longer apply.[2] Yet whatever gaps there may be in the existing instruments, the same fundamental rules are applicable to all armed conflicts, and it is the observance or otherwise of these basic rules that has by far the greatest impact on civilian security.[3] Alongside attention to the problems of providing effective international protection by force, there is a need for greater scrutiny of more basic questions concerning the application in practice of established norms. This provides the main rationale for this report. In particular, we believe that issues surrounding refugee status and internal displacement

1 International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons (November 2006), which entered into force in 2008. See also IDMC (2008).
2 For a review of challenges to the application of IHL to modern warfare and particularly the 'war on terror', see Rona (2003).
3 For a useful summary of current thinking on the definition of armed conflict, see ICRC (2008).

must be placed more centrally in discussions about civilian security and protection. These protected status categories need to be considered together, not least because developments in one policy sphere (for example, in asylum policy) can have significant knock-on effects on other spheres of protection concern. In this first chapter, we consider broadly some of the global factors shaping the way these 'protected' categories are understood and their significance in practice.

1.2 Protection as an international policy issue

International humanitarian, human rights and refugee law provide a strong normative protection framework, but in practice policy and agenda-setting is made against a backdrop of shifting political priorities and engagement by governments and regional and international actors. As Collinson explains in Chapter 4, in the early 1990s the massive population displacements and associated refugee flows caused by conflict in Iraq, the former Yugoslavia and Rwanda led to forced displacement being viewed increasingly as an issue of international peace and security within the international community. Preoccupation in the West with containing refugee movements drove a growing interest in protecting people within their own countries – as reflected in attempts to create so-called 'safe havens' for displaced and other civilian populations in the midst of ongoing conflicts. The removal of superpower veto in the Security Council and shifting conceptions of state sovereignty away from non-interference towards 'sovereignty as responsibility' brought a growing consensus, at least among Western states, that the international community had an interest in the internal affairs of states and a responsibility to ensure that civilians were properly protected by their governments.

The failure to prevent massive and unimaginable atrocities in Rwanda, former Yugoslavia and elsewhere during the 1990s signalled the extreme weaknesses and inconsistencies in the prevailing doctrine and practice of 'humanitarian intervention'. Even where Western security appeared directly threatened, the international community appeared ill-prepared to engage effectively or decisively in the complex governance crises and severe political and humanitarian challenges that these situations presented. In light of these protection failures, the UN Security Council started to demand international access to displaced and other populations affected by conflict and massive human rights abuse (Cohen, 2006a: 90; MacFarlane and Khong, 2006), authorising operations to 'protect civilians under imminent threat' or similar peacekeeping missions in Sierra Leone, the Democratic Republic of Congo (DRC), Liberia, Haiti, Burundi, Côte d'Ivoire and Sudan, and sometimes including explicit directives to protect or facilitate the return of IDPs (Holt and Berkman, 2006: 22; see also Holt, 2006). In 2004 and 2005, the Secretary-General affirmed that military peacekeepers have a crucial role to play in providing physical protection for civilians, including refugees and IDPs (ibid.: 46–47).

These strengthened mandates have not delivered what they promised. The peacekeeping missions and broader international engagement in eastern DRC, Darfur and many other contexts have faced immense problems, including severe under-resourcing and military 'overstretch', limited mandates and the numerous distortions and contradictions in regional and international strategies that result from competing or conflicting political or strategic objectives. Current international efforts in different crisis contexts – including the delegation of international responsibility to ill-equipped and poorly resourced regional organisations in situations deemed of lesser strategic significance (principally in Africa) – indicate a highly inconsistent and constantly shifting landscape of international engagement, with diversity, fragmentation and overall weakness in associated humanitarian protective action.

At the same time, perceptions of new and emerging security threats in the South – crystallised by the events of 9/11 – have triggered a further evolution of Western foreign policy. Priorities have shifted from the establishment of a new international humanitarian order to the containment of new and novel threats, such as terrorism and extremist ideologies emanating from turbulent, contested or 'fragile' states. It is now not only refugee flows out of these countries, but also the complex political and humanitarian crises unfolding within them, that are cast as direct threats to international peace and security. The international 'stabilisation' operations in Iraq and Afghanistan, and the escalating demands being placed on UN and regional peacekeeping and peacebuilding in many other countries, reflects this broadening of the global security agenda, as does pressure to 'deepen' the RtoP concept to encompass capacity-building in a range of areas 'from development, good governance and human rights to gender equality, the rule of law and security sector reform' (UN Secretary-General, 2008). The new international counter-terror and counter-insurgency campaigns have opened the door to restrictive and politically-motivated interpretations of international humanitarian law that question the treatment of insurgents and 'terrorists' as combatants, and hence the applicability of international protection norms in these contexts.

Despite the international stabilisation rhetoric, the heavy toll that the Iraq and Afghanistan interventions have exacted on Western military resources and capacities, and a lack of global support for an interventionist interpretation of RtoP, cast serious doubt over how robust a role the international community will be able or willing to play in the face of future humanitarian and political crises. It is no accident that the focus of the RtoP agenda has shifted substantially from a focus on international responses to emphasise national governments' responsibilities to protect their own citizens. Where the international community is most engaged, the conflation of state and human security agendas has led to policies and strategies that sometimes risk trading short-term human security for anticipated longer-term gains in state (and hence, it is argued, human) security. The numerous tensions and

challenges faced in the stabilisation operations in Iraq and Afghanistan demonstrate vividly how protection, counter-insurgency, counter-terrorism and state-building can make very uneasy bedfellows. Stabilisation operations in Afghanistan have come in for particular criticism from a number of humanitarian agencies due to the hazards, it is argued, that they pose for 'humanitarian space' – blurring the distinction between civilian and military actors, instrumentalising humanitarian relief to support military and political objectives and restricting the areas in which affected populations have safe and protected access to impartial assistance.

These tensions are symptomatic of the ambiguity that surrounds what constitutes 'humanitarian action', and of potential contradictions between, on the one hand, the priorities and modalities of humanitarian *assistance* and, on the other, political or military engagement or interventions aimed (directly or indirectly) at achieving humanitarian protection or assistance outcomes. Many humanitarian agencies and actors that have been dominant in delivering emergency relief on the basis of principles of neutrality and impartiality have tended to define humanitarian action in terms that largely exclude, or even reject, more openly political, military or justice-led responses to protection crises. Yet, as Holt and Berkman observe, the experience of the 1990s exposed 'where traditional humanitarian action and traditional peacekeeping *could not* effectively protect civilians'. The principles of traditional humanitarian action – neutrality, impartiality and consent – 'proved difficult to uphold in situations of severe insecurity', and 'in dozens of situations, humanitarians delivered assistance, often heroically, only to witness the beneficiaries face injury or death at the hands of armies, militia groups, or thugs' (Holt and Berkman, 2006: 18).

The greatest threat to millions of people suffering or fleeing violence, persecution and abuse is the lack of requisite will, capacity and appropriate responses on the part of both international actors and national authorities to ensure that they are physically protected. In the final analysis, it is the observance or otherwise of basic protection rules and norms by national and international duty-bearers that has the greatest impact on people's safety, security and wellbeing. This report is principally concerned with highlighting the importance of the application and observance of established protection norms by belligerents, governments and international actors – a crucial part of the broader protection picture which calls for far closer scrutiny within civilian security and protection agendas, including debates surrounding RtoP. How in practice is the civilian–combatant distinction being observed? How are military planners interpreting the requirement to exercise 'due precaution' and 'proportionality' in the use of force? How are would-be refugees helped or hindered in their efforts to find sanctuary in other countries, and how are they protected? What is meaningful about the IDP label in protection terms for people who have fled or been forced to move within their own countries? What are the implications of a restrictive application of refugee protection for civilian protection more broadly?

The following chapters show that, in practice, the recognition of 'protected status' depends on multiple factors: on law and custom, on official policy and its implementation, on social and political interpretations and on the interests of warring parties. The meaning and significance of protected status is largely the result of formal (legal, policy) definitions and the way these are interpreted in practice. This is mostly external to the humanitarian system, and is shaped by the dynamics and politics of war and forced displacement.

There seem to be two opposing trends here. As already noted, the concern with civilian protection has become more prominent in the rhetoric of international politics. Yet existing protection regimes relating to civilians and refugees appear to be increasingly under challenge. As the following chapters demonstrate, the tendency towards the containment of refugee flows has not been matched by the development of viable or reliable models of 'internal' protection, not least because national governments or other local authorities are often the primary source of threat and international will or capacity to respond is often weak. The civilian–combatant distinction has been eroded by the focus on counter-insurgency and counter-terror campaigns in many current conflicts and stabilisation operations. Meanwhile, refugees are increasingly equated with 'undeserving' economic migrants, criminals or even potential terrorists. These perceptual trends are shaping new policy responses at global, regional and national levels.

In summary, recent protection-related policy has been made against a backdrop of growing but inconsistent political engagement at the international level.The endorsement at the 2005 World Summit of the 'Responsibility to Protect' doctrine, confirmed the following year in UNSC Resolution 1674, set a high-water mark of rhetorical concern, and represented a significant diplomatic achievement at the time; but opinion is highly divided on what responsibility this actually implies for international actors. Even where there is consensus on principle the question of how best to act on it remains unanswered. Intervention with armed force remains an option of last resort, and its track record is mixed. Diplomacy and sanctions have met with variable success, depending as they do on the degree of effective political leverage that can be exerted. In the face of insecurity that is increasingly a function of criminal violence as much as structured conflict, the challenges to protected status are greater than ever. The older humanitarian notion of protection – involving *restraint* in the use of force and the provision of sanctuary to those fleeing violence – deserves to be put back at the centre of this agenda. Respect for protected status lies at the heart of this.

The language of the 'Responsibility to Protect' clearly overlaps with that of conflict prevention and conflict resolution, peace-building and state-building (UN Secretary-General, 2008). Few

would argue with the intrinsic desirability of such goals, but crucially the 'protection' implied by protected status is not contingent upon political progress towards them. Protected status and the associated legal and institutional arrangements aim to limit the use of force and mitigate its effects – not to prevent it. Action to establish protective norms during conflict or in its aftermath forms an essential part of most protection strategies. But as the following chapters show, even the most basic of these norms are challenged. The point at issue is therefore not just the problem of securing recognition of protected status, but the meaning of protected status itself.

1.3 Status, identity and protection

The *Oxford English Dictionary* defines 'status' in two ways: (i) as a person's standing such as determines his or her legal rights; and (ii) as a position or standing in society, an indication of relative importance. The two strands of meaning in this definition point to an important relationship between legal, social and political status. While protected status in the formal sense is a legal concept, its application in practice often depends on the social and political status of the individuals or communities in question. Groups like the Rohingya, Karen and Shan refugees from Burma have long suffered from their relative political marginalisation and 'insignificance', both in their country of origin and in the eyes of the world. They are, in the terms of the above definition, 'relatively unimportant'. Similarly, the social and political isolation of groups like the Roma of Eastern Europe has left them vulnerable to persecution. More generally, the relatively low status of women and girls in many societies can make them particularly vulnerable in spite of formal legal status. A lack of formal political status, particularly citizenship and its associated rights, is a potential source of vulnerability. But the possession of such formal status rights may not be enough to protect people from discrimination on grounds of age, gender, ethnicity or even health (e.g. HIV status). The availability of protection through the legal system is both highly dependent on context and insufficient to guard against social ostracism.

The circumstances in which people find themselves may cause them to be ascribed a status by third parties for the purposes of defining entitlements to assistance or special protection. As the following chapters show, this is particularly true of forced displacement – though the assumption that displacement itself is the *primary* cause of vulnerability may not be warranted. As Refslund Sorensen points out, it is important to remember that displacement *per se* may not represent the most significant determinant of people's identity or vulnerability: religion, ethnicity, gender, age, occupation or other aspects of identity may be equally or more significant in shaping or determining people's circumstances (Refslund Sorensen, 2001: 6).

More generally, the attribution of 'qualifying' status to particular groups because of their presumed vulnerability (widow, orphan, landless labourer, etc.) is common practice in humanitarian operations. Such status categories may be based on socio-economic distinctions or otherwise; what they have in common is an assumption about future vulnerability and exposure to risk. These assumptions may be well-founded in a given context, and are a useful starting point for defining priorities; but they can also be false generalisations that lead to inappropriate targeting of interventions and a failure to recognise the importance of other vulnerability factors. The point in relation to protected status is that the attribution of vulnerability to all those within a protected status category may fail to highlight particular vulnerabilities within that category relating to other identity factors; equally, it may lead those who *fail* to meet the qualifying criteria to be (falsely) assumed to be less vulnerable.

In short, targeting humanitarian operations at specific status categories may lead to blind-spots in programming. It may also provoke social consequences of ostracism and resentment, and it is important to be aware of the change in social status that goes along with being put within a humanitarian 'category' – something that brings entitlements but potentially also stigma or resentment. Refugee programmes have often faced problems when concentrating exclusively on refugees to the detriment of surrounding areas, and similar issues arise in the targeting of assistance to IDPs.

One of the functions of formal protected status categories is to counter the negative connotations of other forms of status or identity. In legal terms, protected status recognises the vulnerability of particular groups and defines safeguards for the protection of their vital interests. In the broadest sense, all human beings have protected status under human rights law, and this 'universal status' has significance even where other status categories are applied. Civilians and combatants alike have human rights, some of which (like the prohibition of torture) are non-derogable and so always applicable. International humanitarian law provides specific protection for civilians and those combatants (the sick, wounded or prisoners of war) who are no longer taking part in hostilities. The specific vulnerability of refugees is recognised in the 1951 UN Refugee Convention and other refugee treaties, in which the basic safeguard is provided by the principle of *non-refoulement* – that no refugee should be sent back to a situation where their life or liberty would be threatened. IDPs, for their part, have protected status as civilians (under IHL), and more generally under human rights law.

A perennial issue in the perception of victims of conflict or disaster, not always helped by the way they are portrayed by aid agencies themselves, is the attribution of helplessness and lack of capacity. As Rony Brauman has observed, sympathy for victims with much of the Western public appears to depend upon 'victim status' being total: 'the symbolic victim must be seen as entirely lacking in agency; s/he must be both unable to help her/himself and an unequivocal non-

participant in the political events from which his/her misery results. In short, the victim must be unambiguously "innocent"' (Carpenter, 2005: 316).

Globalisation has led to images and groups being connected in new and immediate ways. Attribution of assumed status and identity is not only quicker, but broader: 'Arabs' become terrorists, Americans everywhere become identified with soldiers in Iraq. Asylum-seekers become economic migrants. Here, the conflation of protected status with 'innocence', discussed further by Keen and Lee below, is highly problematic. As boundaries blur, the identification duties of those wanting to claim protected status seem to expand: not only must civilians not engage in combat, but they must not show political sympathies – or must show the right sympathies. Thus, in Afghanistan US troops demanded active collaboration from civilians in detecting Taliban fighters. Refugees too appear to have to fulfil more and more qualifying conditions for the grant of asylum: they must not have crossed another country, not used false papers or entered the country illegally, and so on.

Finally, it is important to bear in mind that protected status serves a political as well as a humanitarian or human rights function. The following chapters show how protected categories and their associated rules are in part a reflection of political interests. The formally non-political nature of asylum, for example, serves not just to protect refugees but also to reduce inter-state conflict, specifically between refugee host and sending states. The codification of civilian status sets useful political limits on the conduct of war and, insofar as the related rules are observed, makes conflict at least notionally more 'predictable' for warring parties. The political factors behind the recognition of IDP status are more difficult to discern, but states have been increasingly prepared to formalise that status. Apart from the recognition of the particular vulnerability associated with displacement, recognition of the 'special' status of IDPs perhaps also helps obviate the problems associated with local integration (and local opposition to it) on the one hand, and those associated with return, reintegration or resettlement on the other.

In some ways there is nothing new in any of this. The targeting or reckless destruction of civilians and civilian objects is not a new phenomenon; one only has to think of wars like those in Algeria and Vietnam in the 1960s and 1970s to remember the part that insurgency and counter-insurgency have played in the international history of the past 50 years. But with the rise of transnational networks and modern communications, terrorist/insurgent 'targets' have become even more elusive and harder to distinguish, while their capacity to operate beyond borders has grown. Meanwhile, the battle for hearts and minds is waged on many fronts, including – for the US and its allies in the erstwhile 'war on terror' and in current 'stabilisation' efforts in Afghanistan, Iraq and elsewhere – the domestic political front. As Keen and Lee point out below, the growing Western public reluctance to accept deaths among its military personnel is one part of this, exacerbating the asymmetry of the conflicts concerned. In war zones themselves, the parties to conflict may need to be seen to be responsive both to the subsistence needs and the physical security of the civilian population whose support they may depend upon. Non-state actors like Hizbollah and Hamas have derived a significant part of their political support from their perceived responsiveness on this score. At the same time, the civilian and neutral status of those who seek to assist (e.g. the ICRC) has come increasingly under threat. The blast from the bombs that shattered the lives of UN and ICRC staff in Baghdad in late 2003 continues to reverberate today.

1.4 Three forms of protected status

The following chapters look in detail at three forms of protected status (of civilians, refugees and IDPs) and the protective regimes and practice associated with them. Here we summarise the main arguments presented in each of those chapters and the links between them.

1.4.1 Civilian status

The two displacement-related status categories discussed in this report are a sub-set of the broader category of civilians – and civilian status provides the anchor for our analysis. Chapter 2 describes the emergence of the notion of civilian status, its codification in IHL as a protected category and the scope and meaning of civilian status in official policy and in the practice of belligerents. Keen and Lee describe the ambiguities surrounding the labels *civilian* and *combatant*, particularly in relation to so-called 'new wars'. The answer to the question 'who is a civilian?' is essentially 'anyone who is not a combatant'. But defining who is a combatant in an age of increasingly complex and fragmented forms of conflict is not simple. From both a legal and policy perspective, the problem is less one of distinguishing combatants from civilians in theory, and more one of drawing the distinction in practice in ways that effectively protect civilians while allowing the legitimate targeting of combatants. The report of a recent ICRC-led expert process examining civilian participation in hostilities and the implications for civilian status acknowledges that the continuous shift of the conduct of hostilities into civilian population centres has led to an increased intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations. In addition, increased outsourcing of traditionally military functions has inserted numerous private contractors, civilian intelligence personnel and other civilian government employees into modern armed conflict. The report notes that civilians may support armed groups in many different ways, including by directly participating in hostilities (ICRC, 2009). Consequently, civilians are more likely to fall victim to erroneous or arbitrary targeting, while armed forces run an increased risk of being attacked by individuals they

cannot distinguish from the civilian population. This trend has highlighted the importance not only of distinguishing between civilians and armed forces, but also between civilians who do not participate directly in hostilities and those that do. Both insurgency and counter-insurgency strategies, for example, have notoriously exploited the practical problems of distinction in order to justify indiscriminate tactics. Ever since Mao Zedong's description of the Chinese people as the 'sea' in which the revolution's guerrillas swam as 'fish', military strategists concerned with counter-insurgency (notably US strategists in the Vietnam war) have spoken of 'draining the sea from the fish'. The same charge has been made in regard to counter-terrorist strategies, some of which are essentially counter-insurgencies 'rebranded' (Slim, 2007).

For civilian status to carry tangible protection benefits depends in part on the *idea* of civilian status mattering enough in public consciousness. While 24-hour news reporting and eyewitness video footage make atrocities much harder to conceal than in the past, the deaths of individual (Western) combatants are far more newsworthy in an age where battlefield fatalities are considered avoidable; civilians – or foreign combatants – have to die in larger numbers to make the news, particularly in less visible conflicts like that in the DRC. Meanwhile, the failure to record numbers of civilian casualties in any systematic way in contexts like Iraq is a symptom of a dangerous ambivalence about civilian status if it appears to impede military necessity. While estimates of civilian casualties in Iraq vary widely, they are all high.[4] To show more than rhetorical respect for protected status, military planners need to take far more seriously the obligation both to account for civilian casualties and to find much better ways of limiting them.

Clearly, the significance of civilian status is far from being simply an academic question. Drawing on the work of Slim and others, Keen and Lee review the history of attitudes to civilians, and the ethical and religious underpinnings to IHL. They consider the popular notion of the 'innocent civilian', and highlight the problems inherent in this idea. As they point out, the concept of the 'innocent' civilian not only distorts the core legal precept (civilians are not defined by their presumed 'innocence' or 'guilt'); it potentially also conditions official and popular attitudes towards civilian populations, leaving the way open for whole communities to be considered 'non-innocent' and hence perhaps not deserving of assistance. The Hutu refugee population in eastern Zaire in the 1990s is one prominent example of this tendency. Civilians, the authors argue, cannot be divorced from their social and political context. They have political views, may support rebel factions, may even provide material backing to them. Yet they remain civilians if they take no active part in armed hostilities. To treat them otherwise denies both their protected status and their significance as political actors (Slim, 2007).

The ICRC's new Interpretive Guidance on civilians in hostilities advises that persons can be said to directly participate in hostilities when they carry out acts aiming to support one party to the conflict by directly causing harm to another, either by directly inflicting death, injury or destruction, or by directly harming the enemy's military operations or capacity. But it notes that the vital distinction between 'direct' and 'indirect' participation can be difficult to establish. For example, the delivery by a civilian truck driver of ammunition to a shooting position at the front line would have to be regarded as an integral part of ongoing combat operations and, therefore, as direct participation in hostilities, but transporting ammunition from a factory to a port far from a conflict zone would be considered too remote from the actual use of that ammunition to be seen as 'directly' causing harm. Meanwhile, a violent act, if representing direct participation, must not only be objectively likely to directly cause harm, but it must also be specifically designed to do so in support of one party to an armed conflict and to the detriment of another (ICRC, 2009). In order to avoid the erroneous or arbitrary targeting of civilians, parties to a conflict must take all feasible precautions in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack (ibid.).

Keen and Lee place particular emphasis on the importance of understanding belligerents' interests in seeking to ensure compliance with basic protective norms. Drawing examples from a number of different contexts, they illustrate the ways in which combatants may have particular reasons for attacking civilians – or for not doing so. Theirs is more a realist than an idealist approach to the issue of protection, stressing the value of norms while questioning some of the more traditional ways of seeking compliance. Particular stress is put on an appreciation of the political economy of conflict in order to understand the real-world status of civilians in a given context.

1.4.2 Refugee status

Refugees are civilians whose particular circumstances entitle them in law and custom to specific forms of protection. They are individuals, or sometimes whole communities, who are unable to secure protection from their own government and who seek international protection in the most direct way possible – by fleeing across national boundaries. In her chapter on refugee status, Collinson reviews both the experience of those who flee across borders and the legal and policy frameworks designed to protect their vital interests. The practice of granting asylum to those seeking sanctuary has an ancient history, but the grounds on which asylum is granted, and the terms on which it is provided, have changed substantially since they were codified in the 1951 Refugee Convention.

4 A survey published in the *Lancet* in October 2006 (Burnham et al., 2006) estimated that the Iraq conflict had led to 655,000 'excess' deaths since 2003, over 90% of which were attributable to violence. The Iraq Body Count puts the figure of violence-related deaths up to the end of 2006 at around one-tenth of that number (65,000), and around 97,000 to date (August 2009).

The author considers some of the relevant trends in both asylum-seeking and asylum policy. One immediately striking trend is the fluctuation in numbers of recognised refugees in recent years. The global population of refugees 'of concern' to UNHCR more than doubled during the 1980s, reaching a peak of 18 million in 1992. Refugee numbers fell over the following decade, to under ten million by 2004/5, but they have since increased again, to an estimated 15 million in 2008, partly due to the refugee movements caused by the war in Iraq. Does this overall decline reflect a decline in the *demand* for international protection, related to the resolution of existing conflicts and a decline in the incidence of new ones? Or does it reflect a decline in people's ability to access such protection? Collinson tends towards the latter view, attributing the reduction in the number of refugees in the world to an overall trend in both North and South towards containing refugee flows. This, she argues, is linked to national and transnational security agendas, and domestic political concerns about asylum-seekers and immigration, concerns which have been reflected in the increasingly restrictive terms on which asylum is provided.[5] Even in Africa, where states have historically adopted a comparatively generous approach, a combination of factors – including the failure of the international community to share enough of the financial burden of hosting large refugee populations – has led to an increasingly restrictive environment. Meanwhile, the primary role that UNHCR has assumed for delivering and coordinating support and protection for refugees has weakened the notion of 'state responsibility' for refugee assistance and protection in many contexts (Crisp and Slaughter, 2009).

The grant of asylum in the fullest sense envisaged in the 1951 Refugee Convention has increasingly been denied in favour of other, lesser forms of protection – notably different forms of 'temporary' protected status. As practiced by the signatories to the 1951 Convention, this device has had the benefit of making mass influxes of externally displaced persons – for example to Germany from the former Yugoslavia – acceptable to a domestic political audience. At the same time, however, it has contributed to an erosion of some of the basic norms of asylum and refugee status.[6] This trend has to be seen alongside the growing emphasis on protecting internally displaced people, numbers of which have increased in parallel with the overall decline in refugee numbers since the early 1990s.[7] As Collinson demonstrates, arguments about the need for international protection have centred on the issue of 'safe internal flight options', with refugee status increasingly denied to those who (it is said) could have found safety in another part of their own country.

Chapter 3 is structured around an analysis of the refugee 'cycle' – from flight through exile to return or settlement. The author concentrates particularly on recent practice as it relates to large-scale cross-border movements of people. The recognition of whole populations as having *prima facie* refugee status is one of the ways in which the laborious task of individual status determination has been circumvented in such situations. While it has significant drawbacks, including the problem of identifying and separating combatants, it has been a very important mechanism for providing security to such populations. Here too, however, security and political concerns among receiving countries have been reflected in a growing reluctance to grant *prima facie* recognition to groups of asylum-seekers. The same concerns, Collinson argues, have led to the dilution (and sometimes deliberate flouting) of the core principle of *non-refoulement*. Meanwhile, the conditions under which refugees are encouraged to return home – typically to situations described as 'post-conflict' – have not always been conducive to achieving the kind of durable solution that repatriation is supposed to represent.

Some of the issues raised in this chapter relate to the operational approaches of relief agencies, and the way in which these connect with the protected status of refugee populations. Up until the late 1990s, much of the international relief effort was directed towards large refugee populations encamped just beyond the borders of the country from which they had fled. While this caseload remains significant – and neglected – the agenda is now shaped more by the messier business of working with displaced and non-displaced populations *within* conflict zones. This includes working with returning refugee populations, and the issue of assistance and transition is often related to the question of 'ceased circumstances'. To what extent does the significance of refugee status depend on the willingness of relief agencies and their donors to continue to provide assistance? More generally, what is the relationship between refugee assistance and refugee protection? For a period in the 1990s, the two agendas appeared to be conflated, as though assistance were protection. Certainly, effective sanctuary depends on people being able to access the means of subsistence and other basic requirements, but this is far from being a sufficient condition for effective protection. The political commitment involved in hosting large refugee populations is considerable, and cannot always depend on the existence of strong social and cultural ties between refugees and the host population.

1.4.3 'Internally displaced' status (IDPs)

In the final chapter, Collinson completes the picture by considering the 'emergent' form of protected status that relates

5 The trend is not just a recent one. As UNHCR's *State of the World's Refugees* noted in 1995: 'States are increasingly taking steps to obstruct the arrival of asylum seekers, to contain displaced people within their homeland, and to return refugees to their country of origin'. According to the US Committee for Refugees in its 1997 *World Refugee Survey*: 'Never was asylum in more doubt in more places than in 1996 … the challenge to asylum did not start in 1996. The principle of asylum has been eroding for years. And the erosion did not start in Africa. It started in Europe and the United States'.

6 To set against this, many non-signatories to the 1951 Convention (including Pakistan, Jordan and Syria) have been relatively generous in their treatment of asylum-seekers in recent years, while the *ad hoc* provision of asylum on religious and other grounds remains an important safeguard for many.

7 The difficulty of giving precise numbers for IDPs reflects in part the uncertainty over the classification of 'IDP' noted in Chapter 4.

to internal displacement. To be recognised as an 'IDP' has become increasingly significant, both as it determines access to relief assistance and as it relates to protection. The years since the end of the Cold War have seen the rise of this agenda, driven by the escalating numbers of people forcibly displaced by conflict but unable or unwilling to cross an international boundary and claim asylum. Estimates of numbers of IDPs worldwide show a dramatic increase, from around 1 million in the early 1980s to some 25 million by the end of the 1990s (albeit the first figure almost certainly reflects a large degree of under-reporting). Such people have been increasingly recognised as having particular need of protection and assistance, yet the basis for providing it has been uncertain. The lack of formal institutional responsibility for the welfare of IDPs amongst international organisations (UN or other) led to the adoption of a 'collaborative approach' amongst agencies, and latterly a designated responsibility under the 'Cluster' system for the protection of conflict-related IDPs by UNHCR.

This throws up multiple questions, many of which are explored in Chapter 4. Who is an IDP? What characterises internal displacement, and what particular forms of vulnerability does it entail? What is the significance of being recognised as an IDP, and what kind of 'status' does this confer? Answering these questions requires an exploration of the distinction between the general civilian population and IDPs, and the relationship between internal and external displacement. Beyond that, it requires some account of the effectiveness of the protective regime for IDPs and the entitlements that go with this status. To the extent that this regime is international, it raises particularly difficult questions about sovereignty and what it means to provide international protection (beyond that provided by normative frameworks) to people who remain within the boundaries of their own country and at least notionally under the protection of their own government. Despite the increased willingness of the international community – and the UN Security Council in particular – to intervene in internal conflicts on the ground that they constitute a threat to international peace and security, it has proved extremely difficult in practice to protect populations in contexts like Iraq, Bosnia, Rwanda, Darfur and the DRC. Not all of these failures to protect can be put down to lack of political will, inadequate resources or weak mandates.

In asking the question 'Who is an IDP?', some of the same ambiguity is found as with the question 'Who is a civilian?'. 'IDP' does not constitute a distinct legal status, and the 1998 UN *Guiding Principles on Internal Displacement* describe rather than define who is an IDP. Displacement, of course, represents only one aspect of a person's situation and identity. In conflict situations, IDPs are protected by law, as are all civilians. The questions addressed by Collinson are: what makes IDPs *particularly* vulnerable, and does the fact of being recognised as an IDP make them less vulnerable? In seeking an answer to these questions, the author stresses the diversity of situations under which people may find themselves internally displaced, from overnight refuge in the bush to years of relocation. Different protection needs arise from different forms of displacement, and the author grounds her analysis in a recognition of this diversity and the different causal factors involved – contrasting, for example, deliberate displacement as part of a policy of 'ethnic cleansing' with flight as an incidental consequence of conflict.

Collinson surveys the availability of national protection for IDPs, noting the range of new legislative and policy commitments related to their welfare. She goes on to review international efforts on behalf of IDPs. On this score, despite progress in strengthening peacekeeping mandates and improving the coordination and delivery of humanitarian assistance to IDPs in some contexts, such efforts have been largely unsuccessful. The author considers examples of intervention with force, through the UN or otherwise. What emerges is a dispiriting picture, in which a combination of factors – political vacillation, weak mandates, under-resourcing – has too often hampered effective action. But perhaps the larger question concerns whether such interventions can *ever* succeed in the absence of cooperation from the government in question. To take on the sovereign role of civilian protection requires a degree of presence and control which, even where it occurs, is no guarantee of success, as we have seen in Iraq and Afghanistan.

A wider question addressed in this chapter is whether the focus on IDPs as a distinct vulnerable group is appropriate in humanitarian terms. For the ICRC at least, they are best considered as part of the wider civilian population, displaced and non-displaced alike. In this view, IDPs should not be treated as uniquely vulnerable, though they may be vulnerable in quite specific ways. Those who have been unable to flee may be in greater danger, though they may be harder to reach – as may dispersed as opposed to encamped populations of IDPs. For WFP, too, 'IDPs are much better targeted through assistance programmes aimed at broader segments of the food-insecure population' rather than being targeted as a specific group. Yet the trend in recent years has been towards an increasing focus on camp-based IDPs, both in terms of protection and assistance. This carries with it multiple dangers, not least of which concerns the perpetuation of camp environments that are often themselves highly dangerous and unhealthy.

Recent developments in the humanitarian architecture tend to reinforce this tendency. Thus, the new global 'cluster' on protection is focused on 'conflict-related IDPs', setting the terms in which 'protection' tends to be discussed. In this context, Collinson briefly touches on the protection 'cluster' and the role of UNHCR in leading it, raising important questions about its design and application while recognising its potential significance for humanitarian operations on behalf of IDPs.

The author concludes that the problems besetting any effort to ensure the protection and rights of IDPs mean that protection often comes down, in practice, to the relative absence of immediate threats rather than the comprehensive protection of rights. Whatever protection is actually available for IDPs in any particular situation remains more or less contingent upon what the national government or local authority, humanitarian agencies and any international forces present are willing and able to provide. Being recognised as ‘displaced’ is rarely the most decisive factor in determining protection outcomes.

Chapter 2
Civilian status and the new security agendas

David Keen and Vivian Lee

2.1 Introduction

This chapter discusses the significance of civilian status for the protection and security of people caught up in conflict.[8] It examines some of the factors and trends shaping the way political and military actors define civilian status in practice, and looks at how this in turn impacts on civilian security. It considers factors that might lead belligerents either to respect or disregard IHL in relation to civilians, and some of the difficulties of implementing international law in recent conflicts. The chapter concludes by considering some of the humanitarian implications of trends in the policy and practice of states, belligerents and humanitarian agencies.

Central to this discussion about civilian status is a stark truth: while civilians are protected in law, in practice they continue to be casualties of war on a massive scale. While the legal frameworks of IHL – embodied principally in the 1949 Geneva Conventions and their Additional Protocols of 1977, and in the 1899 and 1907 Hague Conventions and other provisions concerning the use of inhumane weapons – attempt to limit the more direct impacts of war on civilians and other protected categories, the protected status conferred by law has obvious limitations. It is restricted both in its scope – it was never designed to protect against all the perils of war – and in its application and observance. The significance of legal protected status forms one part of the discussion in this chapter.

Contemporary wars have often been characterised by a proliferation of factions, a prevalence of economic agendas, an absence of clearly identifiable ideologies and a preponderance of attacks against civilians. Mary Kaldor has argued that recent violence against civilians is one of the manifestations of ‘new wars’. The ‘new wars’ idea is controversial, however.[9] The common claim that 90% of the casualties of modern war are civilians has been questioned; so too has the assertion that levels of civilian casualties represent a change in the historical norm (Mack et al., 2005). Civilian status has always been complicated, contested and violated, and historically the idea that civilians should be immune has been repeatedly discarded, abused or simply ignored. Indeed, as Hugo Slim notes, ‘the ideology of civilian immunity arose precisely because of a predominant theory and practice of war that recognized everyone on the enemy side as an equal enemy and legitimate target of war’ (Slim, 2003a: 486).

Whatever one’s view on the historical trends, the familiar question of how to protect civilians has been posed with renewed urgency. Claude Bruderlein and Jennifer Leaning have argued that:

> *in recent wars the warring parties have shown an increasing tendency to flout the fourth [Geneva] convention entirely. The problem is no longer a failure to abide by the rules but a failure to acknowledge that the rules even exist* (Bruderlein and Leaning, 1999: 12).

Several features of recent wars have made the implementation of IHL and human rights law particularly problematic. First, civilians have repeatedly been the primary targets of violence, rather than simply being caught in the crossfire.[10] Second, international wars between states have often been less prominent than internal wars. This creates significant difficulties when trying to implement a body of law that was originally developed in relation to international conflicts. It also creates a problem of leverage: whilst states can in theory be pressed to respect IHL, the relevant pressure points are often unclear in internal wars, particularly where chains of command are loose. Third, it has become increasingly difficult to draw a definite line between combatants and civilians – a distinction that lies at the heart of IHL. Civilians may support armed factions in various ways, may themselves take up arms in the name of self-defence or ‘civil defence’, or may have been forcibly recruited, many as children. Fourth, the conduct of post-9/11 international anti-terror and stabilisation operations have seen IHL and human rights norms themselves come under increasing strain. Finally, the conduct of many recent wars has significantly jeopardised the fragile ‘civilian’ character and perceived neutrality of humanitarian agencies, eroding these agencies’ security and their access to civilian populations.

Section 2.2 of this chapter looks at the norms, laws and responsibilities relating to civilian status, beginning with a short account of the evolution of the idea of the civilian. It goes on to note the dangers in linking civilian protection to their ‘innocence’ rather than to their non-combatant status. Linking protection to innocence risks opening a Pandora’s box in which the justice or otherwise of attacking civilians lies in

8 In the course of the discussion, it is worth keeping in mind that the category of ‘civilian’ may refer to an individual or to a group of civilians (with much of ICRC’s work, for example, centering on civilian populations); it may also refer to civilian *objects* like hospitals, dams or bridges (which may be vital to livelihoods, culture, education and so on), or to civilian *organisations* (including aid agencies).

9 See for instance Kalyvas (2001).

10 See, for example, Kaldor and Weissman (2004b) and Keen (2005).

the eye of the beholder. Section 2.3 looks at key trends, dilemmas and policy challenges in relation to civilian status. The section examines the 'new wars' hypothesis in more detail, before looking at some of the challenges to the idea of 'civilian status' that arise from modern warfare.

Section 2.4 looks at belligerents, their motives and their interests. Rather than simply condemning belligerents for not following IHL, the discussion highlights the need to explore the perceptions and interests of the parties concerned, and whether (and how) the idea of the civilian as a distinct category has significance for them. This section emphasises that discussions of normative frameworks and mandates have to be complemented with an analysis of belligerents' perceptions and agendas. This means understanding belligerents' goals, beliefs and codes of behaviour.[11] The section first looks at the reasons belligerents might have for ignoring IHL and attacking civilians. These may be military or economic; they may also arise from a desire to exercise personal power, particularly when fighters have themselves been neglected or abused. On the other hand, there are many reasons for respecting IHL and civilian immunity; where, for example, belligerents have political or 'hearts and minds' objectives. In these circumstances, there may be significant opportunities to appeal to belligerents' interests when trying to persuade them to abide by international law. Section 2.4 also questions the usefulness of condemning abuses in the absence of understanding or without attempts to remedy the conditions giving rise to abuse.

Section 2.5 looks at some of the humanitarian implications of this argument. It discusses the dangers of linking civilian protection to their civilian 'innocence', and looks at some of the dangers in subdividing the category of civilians (notably in relation to IDPs). The difficulties in distinguishing between combatants and civilians when distributing aid are highlighted, as are contemporary threats to aid agencies' own 'civilian' status. Finally, the conclusions of the study are summarised.

2.2 Law, politics and responsibilities to protect

2.2.1 Historical and conceptual foundations of civilian status

The notion that civilians should be distinguished from combatants, and that these two categories should be treated differently, is an old one. Codes of warfare that confer protective status on civilians long predate the establishment of the ICRC in 1863 and the subsequent formulation of the Geneva Conventions. Geoffrey Best summarises the thinking of Hugo Grotius, the seventeenth century pioneer of international law and the laws of war, on the subject of non-combatant immunity: 'Rulers and commanders may respect the non-combatant because there are no practical military reasons why they should not do so and because there are good religious and ethical reasons why they should' (Best, in Klabbers, 2003: 312). This gives a clue to one important aspect of what subsequently became international humanitarian law: that it involves a significant degree of accommodation to the interests of war-makers. IHL says nothing about the legitimacy or otherwise of military action or the resort to armed force per se, but prescribes that war must be fought by just means.[12]

Grotius' formulation also reminds us that IHL has strong underpinnings in ethical and religious traditions. Islam, for example, imposes a number of important restrictions on the conduct of war. According to Ali and Rehman (2005), Islam distinguishes between 'combatants and enemy non-combatants. Those non-combatants who are unable to participate in hostilities are classed as protected persons and cannot be attacked, killed or otherwise molested'. In this context, 'protected persons' are generally taken to include 'children, women, the very old, blind, crippled, disabled (mentally and physically disabled) and sick'. In the Christian world, widespread attacks on civilians and on Church property in the Middle Ages encouraged clerical resistance in the form of new codes of canon law. Meanwhile, an increasingly Christianised ideal of European knighthood articulated specific laws of war and codes of chivalry, and there was at least some idea that civilians ought to be spared violence (Watkin, 2005).

2.2.2 The legal framework of civilian protection

The protected status of civilians is codified in IHL – notably in the Fourth Geneva Convention of 1949 and the two Additional Protocols of 1977. Under IHL, civilians and other protected categories are immune from attack, with the proviso that they must not engage in combat, will lose their immunity if they do so and may then be punished under criminal law. Combatants are granted the privilege (so to speak) of fighting, and immunity from criminal sanction for engaging in combat so long as they keep to the rules of IHL and other applicable provisions. But they are also, by the same token, legitimate targets of war (see, for example, Kretzmer, 2005).

Who is a civilian, in legal terms? The short answer is 'everyone who is not a combatant'. In the case of international armed conflicts, combatants are defined in IHL (Additional Protocol I (API) Art. 43) as follows: 'Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains…) are combatants, that is to say, they have the right to participate directly in hostilities'. Combatants may be either active, or *hors de combat* because they are sick, wounded, are prisoners of war or have laid down their arms. API expresses the principle of distinction (distinguishing between combatants and civilians and between military and non-military targets, with operations to be directed only at combatants and military targets). It also expresses the principle of proportionality. Article 51 precludes any 'attack which may be expected to cause

11 A rare attempt at such analysis is the report *Ends and Means: Human Rights Approaches to Armed Groups* by the International Council on Human Rights Policy (2000); see also Munoz-Rojas and Fresard (2004).

12 IHL focuses on *jus in bello* (just conduct of war) not *jus ad bellum* (whether a war is just).

incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. Finally, API expresses the principle of precaution – that attacks should be planned in such a way that constant care is taken to minimise civilian casualties. Where those making targeting decisions have some doubt about whether a person is a civilian, that person should be considered as such. Article 51 of API stipulates that 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'. Part of the context here was unease at the strategic bombing campaigns of the Second World War (HRW, 2003). While most states are party to API, some (notably the US) are not.

The law governing internal conflicts is less extensive and developed than the body of IHL for international conflicts, reflecting the fact that states and their representatives, who have played the major role in developing IHL, have a stronger interest in limiting conflict between themselves than in constraining their own ability to deal with insurgency or other internal disorder (Fenrick, 2005). In the case of non-international conflict, Common Article 3 of the Geneva Conventions uses the less precise formula of 'persons taking no active part in the hostilities' to characterise individuals (either civilians or combatants who are *hors de combat*) who are to be protected. By implication, those who *do* take an active part in hostilities either lose their civilian status or (if they are combatants) cease to be *hors de combat* and so lose their immunity. Article 13 (Part IV) of Additional Protocol II states: 'Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities'.

All this raises as many questions as it answers, especially in civil conflicts, where determining who is taking an active part in hostilities may be particularly difficult. In practice, however, the distinction between civilian and combatant is routinely made – perhaps by the communities involved, perhaps by the belligerents and perhaps by third-party observers. As one senior ICRC official puts it: 'We stick to common-sense and the principle of distinction. If you have a weapon and contribute significantly to the war effort, then you are considered a legitimate target. If not, you are not' (interview, March 2006). A five-year expert process led by ICRC has sought to provide greater clarity and consistency under IHL as to who is considered a civilian for the purpose of conducting hostilities; what conduct amounts to direct participation in hostilities; and what modalities govern the loss of civilian protection against direct attack (ICRC, 2009). In practice, the rules of engagement prescribed for a given military force may be as significant as the laws of war (or more so) in determining how that force relates to the civilian population, and who or what is deemed to be 'non-civilian' and so a legitimate target.

Apart from the Geneva Conventions and Additional Protocols, a number of other important elements of international law impose an obligation to protect civilians. Following the Second World War and the Nazi Holocaust, there was an international effort to put in place a system that would prevent a recurrence of genocide. The principal instrument here was the 1948 Genocide Convention, which imposed on the international community an obligation to prevent genocide, which it defined as 'acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such'. This convention has often not been enforced (most

Box 1: Common Article 3 (extract)

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Box 2: Articles 43 and 44 of Additional Protocol I

Art. 43: The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates…2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains…) are combatants, that is to say, they have the right to participate directly in hostilities. 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Art. 44 (Extract): In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly.

notoriously in the case of Rwanda); it has also sometimes acted as an incentive for denying that genocide was taking place (notably in Bosnia and Rwanda), since the existence of genocide would imply an obligation to act. 'Intent' may be difficult to prove, and the words 'in part' do not give much idea of how many people or what proportion of people from a particular group would have to be targeted for this to constitute genocide.[13]

2.2.3 The concept of 'innocence'

In *Les Faites d'armes et de chivalrie* (1408), a French widow called Christine de Pisan argued for the protection of the poor on the grounds of their unarmed status and non-involvement in high politics: ordinary people should not 'bear the penance of that wherein they meddle not themselves' (Slim, 2003a: 494). This alludes to the concept of the innocence of civilians, and the idea that civilians should be protected has often subsequently been linked to their innocence (see Slim 2003a; 2007). However, an emphasis on the 'innocence' of civilians carries significant dangers. First, it may imply that civilians will be spared violence only so long as they remain neutral and 'above' politics. Civilians, in this view, may be deemed legitimate targets if they are politicised and therefore not 'truly' innocent at all. Linking protection to 'innocence' may also encourage a depoliticised approach to contexts where a long-term solution may depend precisely on a *politicisation* of the broad mass of people. The emergence of popular sovereignty means that responsibility for war can no longer simply be pinned on leaders, but must instead be shared by the polity as a whole. According to the moral philosopher Igor Primoratz:

> *If she [a citizen] actively supports the government and the war – if she votes for the ruling party, gives allegiance to the government that is pursuing the war, expresses her support for the war effort on appropriate occasions – then she is fully responsible for the war. She is therefore a legitimate target of deliberate military attack* (Primoratz, 2002: 236).

Primoratz (p. 238) argues that those who do not protest are 'passive supporters' of the war and may also be attacked. The ICRC's new guidance on the direct participation of civilians in hostilities notes that civilians may support armed groups in many different ways, including by directly participating in hostilities on a spontaneous, sporadic or unorganised basis (ICRC, 2009). Barry Buzan has suggested that, in the case of Afghanistan, the militarisation of society made it very difficult to draw a clear distinction between civilians and soldiers, and that 'some Afghans clearly deserve the government they got' (i.e. the Taliban). This is of course very dangerous territory. In a video recorded before the bomb attacks in London in July 2005, one of the bombers, Mohamed Siddiq Khan, argued that civilians in the West were 'directly responsible' for the deaths of Muslims caused by the actions of the governments they had elected, and hence were legitimate targets (Dodd and Norton-Taylor, 2005).

A further danger with this discourse is that, if civilians are 'innocent', then combatants are by implication 'guilty'. This might legitimise the mass killing of soldiers even if (as with Iraqi troops on the road to Basra in February 1991) they are retreating. The problem of stigmatising combatants as 'guilty' is heightened when we consider the number of combatants (including children) who are forcibly recruited. The issue of child soldiers also reminds us that, while being a civilian may be one source of vulnerability and 'innocence' in a war, other (cross-cutting) characteristics may be just as significant in determining vulnerability, such as age, gender, poverty and ethnicity. A person's gender may be critical in determining not only their vulnerability to violence, but also the kinds of violence to which they are subjected. Nor is 'innocence' always correlated with civilian status: is a nine-year-old girl soldier who has been raped and forcibly recruited any less 'innocent' than a 50-year-old politician channelling weaponry to the militia responsible? Finally, 'innocence' is in the eye of the beholder, making it an unreliable benchmark for protection. This matters particularly in contexts where members of one ethnic group attribute *collective* 'non-innocence' to members of other ethnic groups from whom they feel under threat.[14]

2.3 Trends in international policy and practice

International political concern for protecting civilians in conflict has increased markedly in recent years. Humanitarian agencies now habitually speak the language of civilian protection, and so does the UN Security Council. In the 1970s and 1980s, international humanitarian intervention was routinely impeded by a concern with national sovereignty, reflecting to some extent the sensitivities of states only recently freed from colonialism. However, from the early 1990s the issue of sovereignty became less of an obstacle; analysts pointed out that prioritising relief over protection was failing to protect beneficiaries from abuse, injury or death at the hands of armed actors and other perpetrators of violence (Holt and Berkman, 2006: 18).

One manifestation of this increased concern was the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS). The report argued that the international community should shift from a preoccupation with

13 A range of human rights and other international legal instruments is also relevant for civilian protection. Apart from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, relevant statutes include the 1948 Universal Declaration of Human Rights, the 1951 Convention Relating to the Status of Refugees, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1979 Convention on the Elimination of all Forms of Discrimination against Women, the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and the 1989 Convention on the Rights of the Child. Other relevant legal mechanisms include the international criminal tribunals for Rwanda and Yugoslavia and the International Criminal Court in The Hague.

14 Personal communication, Hugo Slim.

a ‘right to intervene’ to a ‘responsibility to protect’. Though the primary responsibility was located clearly with the sovereign state, protection was understood to entail a responsibility on the part of the international community to prevent, react and rebuild, employing a range of measures including political and economic sanctions and, as a last resort, military action. Four years later, in 2005, the World Summit Outcome Document emphasised a responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity (UN General Assembly, 24 October 2005). The international military interventions in Iraq and Afghanistan have pushed the issue of civilian up the international agenda. To some extent, new technology such as guided cruise missiles raised expectations of ‘bloodless’ and ‘humanitarian’ wars, whilst heavy (if selective) media coverage added to the pressure to minimise civilian casualties.

With protection becoming a major concern for humanitarians in general during the 1990s, there was growing interest in aid as both an incentive for violence and a resource for peace, as in Mary Anderson’s Do No Harm framework (Anderson, 1999; Macrae, 2000). Many NGOs began to incorporate some kind of ‘protection element’ into their humanitarian assistance and to enter into various kinds of partnership with other NGOs and UN agencies with a view to improving protection.[15] Women’s protection needs were more explicitly addressed, including in relation to mass rape, trafficking and enforced prostitution (Slim, 2003b). An increased concern with rights found expression in the Sphere project, which set standards for humanitarian assistance and presented these as meeting certain minimum entitlements derived from human rights, IHL and other legal provisions.

2.3.1 New wars?

To what extent have ‘new wars’ been a factor in violence against civilians? The first point to emphasise is that large-scale civilian casualties in wartime are not a new phenomenon. The Western tradition of war offers a long and tragic history of the killing of civilians and the rejection or ignorance of the civilian idea. This history includes predatory civil war in medieval Europe in the tenth and eleventh centuries, as well as raiding by underpaid soldiers in the Hundred Years War in the fourteenth and fifteenth centuries (Slim, 2003a). Indeed, today’s so-called ‘new wars’, to the extent that they are manifestations of collapsing states, may actually constitute *reinventions* of patterns of warfare prevalent in Europe in the period before strong states were established (van Creveld, 1991; Keen, 1998). In the mid-nineteenth century, at a time when Clausewitzian ‘political’ war is often assumed to have been at its peak, German-American jurist Francis Lieber (author of the Lieber Code, which regulated the conduct of troops during the American Civil War) identified a number of irregular actors involved in warfare: the partisan and the free corps, the freebooter, the marauder, the brigand, the robber, the spy, the war-rebel, the conspirator, the rising *en masse* and the armed peasant (Watkin, 2005). Civilian immunity has been violated throughout the twentieth century. Warlord factions in early twentieth century China tended to avoid each other and to concentrate attacks on civilians, while the Second World War involved massive civilian casualties, as did subsequent Cold War conflicts in Vietnam, Ethiopia, Mozambique and Angola, to name just a few (Frohardt et al., 1999).

Civilians have always been casualties of war, both directly and indirectly. But whether or not we adopt the term ‘new wars’, a major factor feeding into the violation of civilian immunity today seems to have been the prevalence of relatively decentralised and often economically-oriented violence in the context of failed or failing states and proliferating small arms. Even where states retain considerable ability to control processes of violence, they may have an interest in creating the impression that violence has become irredeemably decentralised. Sudan is a prime example of this. Where criminal agendas gain prominence, profitable attacks on civilians may be favoured over dangerous attacks on other combatants. With criminal groups, accountability may be particularly hard to achieve: telling criminals that they have an obligation to respect the law may yield little reward when they have already shown their lack of respect for law by becoming criminals.[16] In some cases, criminals may be deliberately recruited; in Sudan, for instance, the government has released criminals from prison and turned them over to the *janjaweed* militia (Kristof, 2006).

2.3.2 Deciding on civilian status

While the civilian/combatant distinction is central to IHL, making this distinction is often difficult. In circumstances where civilians are being attacked, the incentive for them to arm themselves has been high. According to the Centre for Humanitarian Dialogue (2005), some 60% of firearms worldwide are now held by civilians. A 2003 study in the DRC notes that one factor attenuating the violence in the north-east of the country was ‘popular resistance through the organisation of militias for the community’s self-defence’ (Kayembe Shamba et al., 2003: 15). In the DRC (as in Sierra Leone and elsewhere), the absence of an effective state has encouraged self-protection (*ibid.*: 25). Does this need for self-defence turn civilians into combatants? When does a self-defence group become another armed militia? It may be very difficult to draw the line. During the civil war in Sierra Leone, to give another example, ‘civil defence’ groups performed an important service in standing up to the twin threat of rebels and abusive government soldiers. However, as these groups (often called *Kamajors*) acquired more arms and increasing access to political power, they came to be seen as a threat by rebels and rogue government soldiers alike, contributing to an increase in violence against civilians (Keen, 2005). At the same time, civil defence groups were themselves increasingly drawn into abuse of civilians. Elsewhere, ‘civil defence’ groups in Guatemala and

15 On these partnerships, see Minear (1999).

16 Even so, criminals often have their own ‘morality’, and laws they are and are not prepared to break.

'village guards' in Turkey have also been involved in abuses. In Rwanda, the use of ethnic militias – originally constructed out of civilian work-gangs – was part of a strategy of genocide. In such circumstances, the idea that civilians are *hors de combat* may become very tenuous indeed.

Another area of difficulty when drawing a dividing line between civilians and combatants is deciding on the status of insurgents. In particular, states may have an interest in defining insurgents as civilians (when they want to refuse prison-of-war status) or as combatants (when they want to target them with violence). Israel is a case in point. In 2000, the Israelis routinely described Hizbollah members as 'terrorists', and never referred to captured guerrillas as prisoners of war (Turns, 2000: 197). In 2005, by contrast, the Israeli authorities redefined the situation in the West Bank and Gaza Strip as 'armed conflict short of war' (Kretzmer, 2005: 207), apparently in order to retain the ability to target armed opponents. Kretzmer observes: 'Some commentators argue that since members of Palestinian armed groups are not recognised as combatants when captured, and as some captured members are prosecuted for killing Israeli soldiers or civilians, they cannot possibly be regarded as combatants who may be targeted' (Kretzmer, 2005: 209–210). Israel did not ratify API, and is therefore not required to treat members of Palestinian armed groups as prisoners of war.

More generally, as Klabbers (2003: 303) points out, 'the law has a hard time making up its mind as to how to deal with insurgents, and vacillates between treating them as combatants or as common criminals'. Insurgents were granted some limited protection in 1977, when API extended the protection of international humanitarian law to situations 'in which peoples are fighting against colonial domination or alien occupation and against racist regimes' (*ibid.*: 304). Although APII deals exclusively with armed conflicts not involving two states, any suggestion of recognition of insurgents seems to have been deleted from the original draft; in practice, APII does little to challenge a government's right to classify freedom fighters as criminals (*ibid.*). Kretzmer (2005: 197) gives the following explanation for the continued scarcity of legal protection for insurgents:

> *States were, and still are, unwilling to grant the status of combatants to insurgents and other non-state actors who take part in non-international conflicts, as doing so would not only afford them an element of legitimacy, but would mean that they enjoy the two 'privileges' of combatants – immunity from criminal liability for fighting, and prisoner-of-war status when apprehended.*

Similarly, the ICRC notes that 'In non-international armed conflict, combatant and prisoner of war status are not provided for, because States are not willing to grant members of armed opposition groups immunity from prosecution under domestic law for taking up arms' (ICRC, 2005a: 2). In practice, states have often been keen to emphasise that their internal problems do not constitute armed conflict; examples include Russia, Turkey and the United Kingdom (Abresch, 2005). According to the ICRC, while members of organised armed groups are entitled to no special status under the laws of non-international armed conflict, nevertheless the rights of detainees in relation to treatment, conditions and due process of law are protected under Common Article 3, APII and customary international humanitarian law – as well as under applicable domestic and international human rights law (ICRC, 2005a: 3; see also ICRC, 2005d).

The 'war on terror' expanded the 'grey area' between civilian and combatant. Francoise Boucher-Saulnier of Médecins Sans Frontières (MSF) notes that the concept of a 'war on terror'

> *opens up a time of long-lasting war, while refusing to respect the legal framework for wartime … Terrorism and non-state actors are not new phenomena. Terror and terrorist methods of war are included in the IHL regulations. But the whole IHL system relies on the distinction between civilians and combatants. If you contest the definition of combatant by calling people terrorists, you also endanger the category of civilians* (OCHA, 2003a).

In practice, the status of terrorist, like that of insurgent, seems to oscillate between common criminal and political actor, and again this oscillation has functions. On the one hand, there are advantages in the language of politics and war. As Klabbers puts it: 'treating the terrorist as a common criminal means that the search can only be relatively low-key. Surely, one does not throw bombs on other nations to find a common criminal: the language of terrorism is necessary in order to justify a large-scale response'. One could add that an intention summarily to kill the terrorists (for example, Osama bin Laden) would sit uneasily with the designation of criminal, where a trial would be more appropriate. On the other hand, treating terrorists not as 'ordinary' criminals but as *illegal combatants* and withholding combatant and prisoner-of-war status serves a function in de-legitimising the terrorist (and indeed the suspected terrorist). It also gives the US in particular a good deal of freedom in how it handles terrorist suspects (prisoners of war are famously obliged to give only name, rank, date of birth and serial number). US officials have also expressed the fear that the Geneva Conventions could allow lawyers acting for al-Qaeda suspects to prolong legal processes and attract publicity. High standards of proof might present a problem, and there have been fears that al-Qaeda could, in the course of court proceedings, obtain information on intelligence-gathering techniques (Roberts, c2002). Then US President George W. Bush decided on 7 February 2002 that the protection of the Geneva Conventions would be withheld both from al-Qaeda and from Taliban fighters in Afghanistan. But in the case of the Taliban at least, 'there was considerable reluctance to accept

that the armed forces of a functioning state could be denied combatant status on a group basis' (Watkin, 2005: 34).

A final major difficulty when drawing a dividing line between combatants (who can be targeted in war) and civilians (who cannot) is that, in practice, killing civilians has often been defended as legal. As Wheeler (c2002: 209) notes: 'the door is left sufficiently open under Protocol 1 that states can justify the killing of innocent civilians as an unintended consequence of attacks against legitimate military targets'. As such, IHL has important *permissive* aspects, including the killing of civilians in circumstances where this is deemed 'incidental' and proportional to anticipated military advantage. But the injunction that civilian lives be weighed against anticipated military advantage is fraught with problems. For one thing, as the committee set up by the International Criminal Tribunal for the Former Yugoslavia to review NATO's bombing campaign noted in 2000:

> *It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective* (Kretzmer, 2005: 200–201).

Such 'indirect' casualties can be extremely high: during the 1991 Gulf War, for example, some 100,000 Iraqis may have died through loss of water supplies, power and sewerage when the US bombed Iraq's power-generating facilities (Wheeler, c2002: 2/7).

Insofar as IHL gives the impression that war is regulated and humanised, it may sometimes play a role in *legitimising* war. Powerful international governments may sometimes take comfort – and deflect criticism – by saying that the ICRC is working behind the scenes to limit violence; this happened in Sudan in the late 1980s, for example, when major international donors played down the extent of famine and the government's role in creating it (Keen, 1994). A related concern is that major suffering – including, for example, among the approximately one million IDPs in Indonesia – may go largely unaddressed in circumstances where a major international response (and ICRC involvement) depends on violence reaching a 'threshold' at which the existence of armed conflict can be formally recognised.

2.4 Belligerents and International Humanitarian Law

A common approach when belligerents contravene IHL is to condemn them for doing so. This can be valuable, and the efforts of Amnesty International, Human Rights Watch and others have been extremely important in documenting abuses and charging them as illegal and immoral. However, condemnation does not in itself provide a solution (Slim, 2007). The best leverage points are increasingly unclear; the political will to exert leverage is often absent; and the leverage that is available (sanctions or bombing, for example) can often be counterproductive. The act of condemnation itself may be actively counterproductive. This section argues for the need to move beyond a narrow legalistic approach to human rights abuses and work towards a better understanding of the reasons why these abuses take place. As noted, there are a number of reasons why belligerents might ignore or break IHL, and a number of reasons why they might comply with it. (Of course, it is possible to break or comply with IHL without being aware of its existence.) Belligerents' interests and ideologies may point them in either direction.

While belligerents might sometimes be influenced by considerations of ethics and law, the treatment of civilians has tended to reflect the political, military and economic significance of the populations in question. Consider first the reasons for attacking civilians and breaking IHL. If the aim of a belligerent is to *win* a given war, there are a number of reasons why attacks on civilians may be seen as useful. Targeting civilians has sometimes offered the prospect of weakening the civilian supporters of an opponent. In Vietnam, for instance, US forces distinguished between 'loyal' and 'disloyal' non-combatants (Munoz-Rojas and Fresard, 2004). Inducing terror in civilians may be seen as militarily advantageous. This was the thinking behind the German and Allied strategic bombing campaigns of the Second World War. Fenrick (2001) observes that one strand of contemporary US military doctrine favours attacks that adversely affect civilian support for the enemy's war effort. Civilians may also be targeted because they are deemed to be making a direct contribution to the war effort, 'as munitions worker, food grower, voter, ideological sympathizer or loyal parent of a fighter' (Slim, 2003a: 497). One rationale for the firebombing of Tokyo in March 1945 was the existence of an extensive 'cottage arms industry', with civilians reported to be making parts for the Japanese war economy (Slim, 2003a).

Respecting civilian security and immunity may also be seen as a constraint on military action, particularly in circumstances where the enemy has no such qualms or imposes no such restrictions (Slim, 2003a: 498). This may be linked, implicitly or explicitly, with the view that 'war is hell', and that civilian casualties are 'inevitable'. This view may extend to civilian infrastructure. During the Kosovo war, for instance, NATO adopted an extensive working definition of what constituted 'military' targets. Military action included the bombing of the Serb Radio and Television Centre in Belgrade, government ministries and the electricity grid. According to Human Rights Watch, around 500 civilians were killed in the air campaign, half of them in attacks against targets whose identification as military was questionable (Bring, 2002).

The tendency to prioritise the lives of one's own combatants over those of civilians in the enemy territory may increase the risk of

casualties. In Kosovo, for example, tactical decisions – particularly the decision to conduct bombing raids at high altitudes beyond the reach of Serb anti-aircraft fire – were a significant factor in increasing the risk of 'collateral damage'. Alex Bellamy notes that such tactics can heighten the risk to civilians because belligerents respond to the reduced accuracy of high-level bombing by increasing the firepower they bring to bear: 'To compensate for the lack of accuracy, a leader may assign more aircraft and more bombs to attack a particular military target, increasing the collateral devastation' (Bellamy, 2004: 848). In Kosovo, deploying NATO ground troops would probably have improved civilian protection (Bring, 2002). During the US-led assault on Afghanistan from 2001, high-level bombing was also designed to minimise Western casualties. By 10 January 2002, several months into the campaign, only two Western personnel had been killed by enemy fire (Conetta, 2002).

Targeting civilians may also serve functions for belligerents whose aims are to gain economic advantage or enhance personal power rather than 'win' the conflict or achieve political goals. In the pursuit of resources, civilians may be looted or they may be ejected from resource-rich areas. Economically motivated attacks on civilians have been a prominent feature of many contemporary wars, including in Colombia, Liberia, Sierra Leone and Cambodia. Economic (and status) incentives *within* military organisations may be an important part of the political economy of war. Civilians may be targeted to give fighters a sense of personal power, particularly in circumstances where the fighters themselves have been subject to abuse and neglect (Lary, 1985; Zur, 1998; Keen, 2005). An excellent MSF study of conflict in Chechnya explained some of the Russian military's violence as stemming from a sense of neglect and injustice among the rank-and-file: 'Humiliated, beaten and starved, Russian soldiers avenge their miserable existence on Chechen civilians by subjecting them to even worse treatment in order to regain a sense of superiority' (Gordadzè, 2004: 191). Something similar occurred in Sierra Leone, where one former hostage of the notorious West Side Boys faction observed of his captors: 'within the army, they feel they are not treated fairly, not receiving sacks of rice, and feel they are being used or bullied ... When they find themselves in the bush, they inflict the same injustice on those under them that they are complaining about' (Keen, 2005). As Munoz-Rojas and Fresard (2004: 196) observe: 'how can we expect combatants to respect the principles of IHL in their behaviour towards their enemies when they have been victims of bullying, humiliation and all kinds of brutality at the hands of their own superiors?'. Such bullying may be seen as essential to training and to the production of soldiers sufficiently tough and ruthless to carry out the job of killing (Osiel, 1999).

In certain circumstances civilians may be targeted because their status as civilians itself constitutes a source of actual or perceived threat. Civilians may be used by 'the other side' precisely because they are not normally suspected of involvement in conflict – using women or children as spies, for instance. Violence against civilians may also grow out of a fear of condemnation or retribution for past abuses. Judith Zur's work on Guatemala shows how post-war violence against women owed a considerable amount to fears that perpetrators of wartime abuses would be held to account on the strength of women's testimonies (Zur, 1998). Psychiatrist James Gilligan, in a study of violent criminals in the United States, suggests that violence may also arise from the impulse to restore self-respect and eliminate a sense of shame – in extreme cases, by physically eliminating the person or persons arousing, or re-awakening, these feelings (Gilligan, 1997). In Sierra Leone, government and rebel factions both seem to have reacted violently to attempts to shame them and hold them legally to account (Keen, 2005).

There may also be many reasons for belligerents *not* to attack civilians and to abide by IHL. If a military victory is the belligerent's primary aim, respecting IHL in relation to civilians may have a number of advantages. In civil wars, attacking civilians tends to radicalise them and attract support to the enemy (Keen, 1994; 1998). Respecting civilian immunity may also allow a belligerent to concentrate resources on attacking military assets (Bruderlein and Leaning, 1999). British Cabinet minutes from the Second World War reveal that one of the main arguments against bombing German villages in reprisal for German forces' atrocities in Czechoslovakia was that this would distract from more purely military missions.[17] A desire to ensure that one's own captured forces are treated well can also encourage respect for IHL (Watkin, 2005: 37). Another motive for respecting IHL is that a belligerent may be looking ahead to some kind of peace or reconciliation (ICRC, 2005c: 2; OCHA, 2003a). Civilian populations may be seen as actual or potential constituents by a warring faction planning in due course to form a government. In Nepal, for instance, Maoist guerrillas aspiring to political power have reportedly placed a high value on being seen to respect IHL.

Winning 'hearts and minds' may be an important part of military strategy, and this will often encourage a degree of respect for civilian security. Among those whose good favour may be sought are local populations in war-affected communities, other domestic constituencies and potential international allies. Democracies may be particularly concerned about their image. In his study of IHL and recent international conflicts, Bring notes that both the 1991 Iraq War and the Kosovo war saw Allied governments paying close attention to IHL: 'legal advice was sought and considered. In both cases it was extremely important, for political and public image reasons, to be seen as acting in conformity with international law' (Bring, 2002: 49; we have seen, however, that this did does not prevent high-altitude bombing, with attendant casualties). A concern with image has often translated into a concern with controlling the media. Indeed, there has arguably sometimes been more concern with limiting *news* of civilian casualties than with limiting civilian

17 British government War Cabinet minutes, 15 June 1942, at http://www.nationalarchives.gov.uk/documents/cab_195_1_transcript.pdf.

casualties *per se*. In Afghanistan, for example, Richard Falk reported that the United States 'explicitly admitted that it was keeping no record of civilian casualties, and there were indications that the American media was encouraged to downplay the issue' (Falk, c2002: 3/6).

Even insurgents who carry out vicious crimes may not be oblivious to the need to be seen to paying some kind of attention to IHL, or at least to the norms that it embodies. In a report on Iraqi insurgents, for instance, the International Crisis Group (ICG) states that 'Even as they engage in brutal forms of violence, insurgents appear increasingly concerned about their image' (International Crisis Group, 2006b: 20). According to the ICG, 'In some instances, insurgents have compensated civilians for war-related losses, including property damage or arbitrary arrests as a consequence of insurgent activity in the area'. Of course, self-interest may encourage a belligerent to *appear* to respect IHL, whilst in fact ignoring it. According to a report by OCHA, Sudanese President Omar al-Bashir established a national commission on international humanitarian law in February 2003; barely a week later, the ICG alleged that Khartoum was continuing to sponsor attacks on civilians in oil-rich areas (OCHA, 2003d). One aid worker reported that a key ECOMOG commander in Sierra Leone seemed interested to learn about IHL as a way of getting around it, notably through 'tortuous' arguments that particular abuses were not against IHL (interview, 2006).

Ideas of fairness and honour – often religiously inspired – can be a powerful reason for abiding by IHL and refraining from attacks on civilians. As we have seen, there is a major concern with limiting warfare within the Islamic faith. The Islamic tradition is not entirely consistent with IHL; the killing of those merely *capable* of fighting is permitted, for example, and adult males may be taken captive if this is necessary to weaken the enemy (Ali and Rehman, 2005). However, as Ali and Rehman point out, the fact that ancient Islamic laws are not identical to IHL should not blind us to the impetus they may still provide for respecting it. Of course, religious conviction may have the opposite effect. Christianity, for example, has often provided a powerful motive for attacks on civilians, as during the Crusades and more recently as part of a 'civilising' imperial project.

Military codes of conduct may also have a role to play. Although such codes are typically associated with highly trained armies, they need not be. In Liberia, for instance, military training is minimal and the country's recurring civil wars are considered among the most vicious in the world, yet there have been striking examples of restraint among particular fighting groups. Former rebel combatants have reported being given strict orders not to harm civilians, and in one rebel group combatants could be executed for rape (Human Rights Watch, 2005). In Sierra Leone, even the most vicious rebel group could sometimes exhibit a strong sense of fairness in relation to a sick child or a pregnant woman, for example. As one witness put it: 'There are ideas of fairness and welfare, as opposed to simply being drug-crazed. There's a belief in justice, but they define it differently' (Keen, 2005).

A final source of respect for IHL and civilian safety may be the traditional conflict resolution mechanisms that limit warfare – for example, through compensation payments. However, such mechanisms have often been eroded by abusive and centralising states, by rebellion among young people or by large influxes of weaponry, underlining the need for some wider system of protection involving the national state and, beyond that, the international community (on this issue in Sudan, see Hutchinson, 1996; Johnson, 2003; and Keen, 1994).

2.5 Conclusion

Securing recognition of the civilian–combatant distinction and the associated protective rules in IHL and elsewhere lies at the heart of the humanitarian concern with civilian protection. As we have illustrated, that distinction is not always easy to make in practice, but the failure to draw it is often as much a matter of wilful disregard as of practical difficulty.

We have argued in this chapter that the way in which civilian status is currently understood is problematic in a number of respects. One aspect of this concerns the pitfalls of making the case for IHL in terms of civilian 'innocence'. Innocence – whether understood in terms of political neutrality or otherwise – is not a condition of civilian (protected) status; it is crucial to insist on this. Where there is any doubt about civilian status, IHL indicates there should be a presumption that the person is a civilian and entitled to protection as such. By extension, the same rule applies to groups of individuals. The law prohibiting collective punishment – say, by imposing a blockade to starve a population into submission – is a reflection of this basic principle. Linking civilian protection to their 'innocence' carries important dangers beyond that of legitimising attacks on civilians who are deemed to support the wrong political causes. These include the corresponding danger of stigmatising combatants as 'guilty', and the danger of enforced *de*-politicisation of civilian populations. Humanitarian agencies need to maintain perceptions of their overriding concern with alleviating and preventing suffering, whilst at the same time refusing to accept the idea that the protection of civilians (including aid workers) should depend on their 'innocence' in the sense of political non-engagement.

This chapter has also stressed the need to take account of belligerents' complex interests and ideologies if we are to understand the circumstances in which IHL – and respect for the protected status of civilians – is likely to be upheld or broken. This should include an understanding of belligerents' attitudes to civilians, including the degree to which belligerents see civilians as a threat. This in turn will be affected by many practical policies, including the de-militarisation (or not) of refugee camps. Crucially, assuming that belligerents that are 'hell-bent' on abusing civilians may be as dangerous as

assuming that they will respect civilian immunity; assuming the worst offers very little room for dialogue and may intensify shame and shame-fuelled violence.

The role of abuse and disrespect in fuelling fighters' abuse against civilians should give pause for thought. Condemnation has a role, but so too does understanding and practical attempts to remedy conditions helping to generate abuse. Understanding the incentives for attacking civilians (or refraining from doing so) can help in the design of policies to minimise such attacks. Giving lessons on IHL might be seen as implying moral superiority in a context where such perceived condescension is highly incendiary. Better results may be achieved by recognising that belligerents have their own value systems, which may overlap with IHL in important respects. Understanding the economic incentives for attacking civilians has already pointed the way to a number of policy improvements that condemnation did not facilitate. Since military, political, economic and ideological considerations may all point in the direction of disregarding or respecting IHL, it is vital to gain an understanding of the circumstances prevailing in each conflict, and the particular characteristics of each belligerent party. While economic analysis has a role to play, economistic exercises that find the cause of conflict in 'rebel greed' and dismiss the need to talk with fighting groups are particularly unhelpful in gaining this kind of nuanced understanding.[18]

If particular modes of promoting IHL carry the danger of being counterproductive, this does not of course imply that IHL itself should not be implemented; it does, though, suggest the need for greater awareness of these potentially counterproductive effects and for building into the design of policy some mechanisms for counteracting these effects. For example, where government soldiers are publicly condemned for abuses against civilians, the potential incitement to violence (and message of 'disrespect') could be counteracted with practical improvements in soldiers' living conditions. This might be seen as rewarding violence, but one lesson from Sierra Leone seems to be that such practical interventions can work very well; particularly before the British intervention there, the neglect (and implied disrespect) of government soldiers had played a major role in encouraging looting and other kinds of violence directed at civilians. When invitations to respect human rights have been issued alongside a damaging neglect of the material conditions that help to produce human rights abuses, the consequences may not be good. As a useful report by the International Council on Human Rights makes clear, an alternative (or supplementary) approach to shaming or persuading an armed group to cease abuses is to work with that group to give it the means to do things differently (International Council on Human Rights, 2000). Training in investigative policing techniques could also reduce abuses (ICG, 2006a).

18 For the most explicit and influential statement of this approach, see Paul Collier's chapter in Malone and Berdal (2000).

The ICRC has often stressed the importance of political pressure to implement existing IHL. Another key focus for the ICRC has been strengthening international judicial institutions (Bruderlein and Leaning, 1999: 4/12). It may also be that IHL is inadequate in certain respects; the ICRC has itself pointed to areas of ambiguity in the law, and to 'issues which require further clarification, such as the definition of civilians in non-international armed conflicts, the concept of direct participation in hostilities and the scope and application of the principle of proportionality' (ICRC, 2005d: 197). One major gap, as we have seen, is the continuing uncertainty surrounding the application of IHL to internal conflicts. Categories of actor that IHL does not readily address include rebels, terrorists and armed criminals. Slim (2003b: 13) notes that 'No new international convention or declaration has emerged to clarify the definition and legal responsibility of non-state armed groups in all their various forms'. Another difficulty is that IHL does not give much guidance on how to balance 'anticipated military advantage' with the civilian lives that may be lost in any particular attack. If we accept that wars will continue to be fought, more attention should be given to the question of feasible precautions and the balance of risk between attackers and civilians on the ground. In these circumstances, frameworks other than IHL – for example, the European Convention of Human Rights and the related judgements of the European Court of Human Rights, human rights law in general, the UN's *Guiding Principles on Internal Displacement* – have been gaining increasing prominence. Abresch (2005) observes that the European Court of Human Rights has directly applied human rights law to internal conflicts in Russia, Turkey and the UK, and suggests that this offers a promising way forward in view of some of the failings in IHL.[19] There is a growing recognition that rights accruing in peacetime are not lost in wartime, and part of the advantage of a human rights law approach lies in covering pre-conflict and post-conflict atrocities (Bruderlein and Leaning, 1999: 6/12).

19 The humanitarian community has increasingly seen a number of human rights documents as relevant in conflict settings. These include the 1951 Convention Relating to the Status of Refugees, the 1979 Convention on the Elimination of all Forms of Discrimination against Women, the 1984 Convention against Torture and the 1989 Convention on the Rights of the Child.

Chapter 3
Refugee status in an age of containment

Sarah Collinson

3.1 Introduction

This chapter explores the legal and humanitarian significance of refugee status. How do people access protection as refugees, and what type of protection does refugee status accord them? The chapter considers the main trends in international and national law and policy that affect people's access to protection in asylum countries, and the standards of protection they enjoy. How effective is refugee status in protecting people from the threats that caused them to flee? How well protected are people who, for whatever reason, have not accessed formal refugee status? Under what circumstances do people cease to be refugees, and what are the protection implications of refugee status coming to an end?

The conditions that compel refugees to flee may be identical to those suffered or feared by civilians and IDPs who remain behind in the country of origin. The protected status of those who have crossed an international border, however, is fundamentally different, simply by virtue of the fact that they have entered another country. Like many of those who remain in the country of origin, they lack any effective national protection from their own state or government. But once across the border, they should be able to seek *international* protection as refugees through the institution of asylum. The humanitarian implications of crossing a border, and the challenges that flight across borders presents to asylum countries and to the wider international community, are potentially critical. Whereas IDPs and other vulnerable groups remaining behind in the country of origin are reliant on their own government and the *ad hoc* protection and assistance activities of humanitarian and human rights agencies and the wider international community, the protection and assistance of refugees is, in principle, governed by an elaborate international legal and institutional protection framework (Martin, 2004: 302).

The global population of refugees 'of concern' to UNHCR more than doubled during the 1980s, reaching a peak of 18 million in 1992. Refugee numbers fell over the following decade, to under ten million by 2004/5, but they have since increased again, to an estimated 15 million in 2008, partly due to the refugee movements caused by the war in Iraq.[20] The reduction in refugee populations during the first half of this decade was due in large part to large-scale repatriations to Afghanistan, Sudan and elsewhere, but refugee returns have decelerated substantially since 2004 and are currently at the lowest levels in decades (UNHCR, 2009a). UNHCR estimates that there are 5.7 million refugees trapped in protracted situations in 22 different countries for whom there is little hope of finding a solution in the near future (*ibid.*).

Despite the comparatively well-developed set of international laws and institutions in place to protect refugees, there is a growing sense of crisis in the international refugee regime. Many countries hosting some of the world's largest populations of refugees, such as Pakistan, Jordan and Syria, have not signed up to any international refugee treaties and have little intention of doing so. Among those that have, including many in Africa, Europe, South America and Oceania, security concerns, not least following 9/11, and domestic political pressures to restrict and control immigration and deter refugee influxes have triggered a wholesale retreat from many of the core principles underpinning refugee protection. Heightened awareness of the vulnerability and needs of many people who remain within their countries of origin, and of substantial 'mixed' population flows in which asylum-seekers and refugees are often difficult to distinguish from other migrants, have further challenged the assumption that refugees are a discrete category of people whose assistance and protection warrants a distinct and highly developed set of laws and institutions. According to UNHCR, recent state practice reveals that 'asylum was viewed through a security prism in many parts of the world, resulting in States reinforcing control measures beyond their own territory and at borders. All too often, interception took place without proper scrutiny' (UNHCR, 2009b: para. 22).

These trends mean that it is becoming increasingly difficult for people to seek safety by crossing a border, and increasingly difficult for them to secure effective protection or basic human rights if they do. Many who reach other countries have little chance or opportunity to be recognised as refugees, and those – increasingly the minority – who are granted formal refugee status are less and less likely to enjoy the quality of protection and assistance that is intended by the international treaties on refugee protection. Indeed, it is possible that the overall fall in refugee numbers since the early 1990s is due as much to a reduced commitment to refugee protection as it is to changing patterns of conflict and displacement *per se*.

This chapter begins by exploring the types of situation that compel people to flee to other countries. The discussion then

20 At the end of 2006, there were an estimated 9.9 million refugees globally, the highest figure for five years. This included 2.1 million refugees from Afghanistan in 71 countries, and 1.5 million Iraqi refugees, mainly in neighbouring states. Iraqi refugee numbers more than quintupled in the course of 2006. By mid-2007, the number of Iraqi refugees in neighbouring countries was estimated to have reached 2 million. With a further 2 million Iraqis internally displaced, at least one in seven Iraqis is displaced. UNHCR estimates the number of new displacements at 2,000 per day (UNHCR, 2007a: 5–6; UNHCR 2007b: 1).

moves on to outline the laws, norms and institutions that comprise the so-called 'international refugee regime', and the key trends in international refugee flows and policies. The chapter then explores in more depth what 'protection' means – both in law and in current state practice – for asylum-seekers and refugees threatened by violence or persecution in their country of origin. This question is addressed by looking at different stages in the process of refugee flight, from access and entry into potential asylum countries, through to protection associated with so-called 'solutions' to refugee problems, particularly return to the country of origin. The final section reviews some of the key humanitarian implications of current trends in international refugee protection and the associated challenges for humanitarian actors in crises involving complex population displacements and large-scale refugee flight. The discussion is related throughout to situations of large-scale refugee flow, particularly over the past ten to 15 years.

3.2 Why people flee

Efforts to protect or assist refugees must be informed by an understanding of the factors that cause displacement in the first place. The International Commission of Inquiry on Darfur related a typical account of the extreme violence and persecution that led to the flight, in 2003, of someone who subsequently became a refugee:

> *The village was attacked … It was Government soldiers and Arabs coming on horses and cars. There was a plane behind these people. There were about 200 people with guns. They were shouting 'This is not your land', and were hitting the children with whips. I ran towards my cow and untied it. One of the attackers … saw me … and shot me. I was wounded … People were fleeing from the village. Some people carried me with them to Masteri … 15 days later some people went back to the village, but the Arabs were still around the village. If they saw anyone they whipped the women and killed the men. We first stayed near an IDP Camp in Masteri, and after three months I crossed over to Chad* (International Commission of Inquiry on Darfur, 2005: 85).

The Commission reported that government forces and militias had conducted widespread and systematic attacks on the civilian population throughout Darfur, including killings and massacres, torture, abductions, the deliberate destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement. A report on the experiences of refugees from Mozambique's civil war in the late 1980s tells a similar story of extreme violence and widespread terror – including 'shooting executions, knife/axe/bayonet killings, burning alive, beating to death, forced asphyxiation, forced starvation, forced drownings, and random shooting' – compelling people to flee (Gersony, 1988: 18).

Although many would have fled in circumstances of very direct and immediate threat, their flight was often nonetheless more a process than a single event, resulting from a series of experiences that, at a certain point, compelled them to leave their homes to seek safety and protection elsewhere. Even in situations of mass flight, displacement often happens in stages. In Uganda during and after the overthrow of Idi Amin in 1979, for example, most people reportedly did not try to flee abroad, at least initially, even in the face of the wholesale slaughter of civilians: 'families would move a few kilometres away from their compounds and build a shelter, only to be disturbed again and forced to rebuild. Some refugees report having built as many as eight shelters or more inside Uganda before crossing over the border' (Harrell-Bond, 1986: 8). Many would have been extremely fearful of leaving their communities, anxious to protect their property and other assets, and frightened of the dangers associated with flight itself.

Assets are a key factor affecting whether and how people leave their homes and whether or not they subsequently cross an international border. Much will depend on whether they have the physical health and material and other assets they need to enable them to flee – to pay for transport, to feed, clothe and shelter themselves after leaving their homes, to pay border guards and other officials, to obtain documentation – including connections with relatives or other people who might help them when they reach their destination. Typically, whole families or households, rather than individuals, make decisions about whether or not to flee, and not all members will necessarily be able or willing to move at the same time (Van Hear, 2003: 9). The staged nature of family flight is often the consequence of people accumulating the resources they need to enable further movement or to help subsequent family members to leave. In many households, the triggers and timing of flight are differentiated by age, gender and household composition, and later flight will often be determined by the experience of those who fled first (Dolan, 1997: 7). While refugees may choose an intended destination on the basis of personal connections or linguistic or ethnic affinity, such factors are usually considered after the initial, sometimes abrupt, decision to flee (ibid.: 4). Those left behind frequently include some of the poorest and most vulnerable people, who may come to depend upon departed family members.

3.3 The international refugee 'regime'

Refugee protection – and the international system or 'regime' that provides it – must, at its core, ensure safety from the risks and threats that originally gave rise to a person's flight. But protection, in this context, does not equate simply with safety, understood in terms of reduced risk. The risk-avoidance strategies that people might resort to closer to home, such as moving from their village to a local town, might provide some measure of greater *safety* from a direct threat, but this would be entirely contingent upon individual or family circumstances and the immediate nature of the violence or persecution that they

fear. *Protection*, as understood in the context of international refugee protection, implies a stronger, positive defence or safeguard of people's rights and welfare (Hathaway and Foster, 2003: 405). It encompasses the totality of measures that are intended to ensure the basic rights of those fleeing once they have reached another country. The obligations involved in refugee protection are specifically addressed to (asylum) states, and are based on the premise that refugee protection is an international state obligation designed to provide substitute protection in lieu of the national protection that has failed (*ibid.*: 411). Refugee protection therefore encompasses a refugee's initial admission into a country of refuge and subsequent respect for their fundamental rights, including the right not to be returned to their country of origin or any other country where their safety from persecution or other risks to their lives might be threatened.

The roots of today's international refugee regime go back to the interwar period of the last century, when the League of Nations was called upon to respond to a series of refugee crises in Europe. By the late 1940s, refugee status had come to be conceived of as relating to individuals rather than groups, and resulting from persecution or the threat of persecution by highly developed states (Shacknove, 1985). This conception captured not only the recent experience of refugees from Nazism, but also the new political concerns (and superior voting strength in the UN) of Western states keen to accord priority to persons whose flight was motivated by anti-communism (Hathaway, 1991: 6–7). The identification of 'persecution' as the key criterion defining refugees was in keeping with governments' concern to make the status of refugee exceptional (Zolberg et al., 1989: 25), and reflected the fact that broader human rights concepts and international human rights law had yet to be developed.

The central building-blocks of today's international refugee regime were put in place by the United Nations in the early 1950s. In December 1949, the General Assembly adopted a resolution to create the office of UNHCR, the Statute of which was adopted a year later. In 1951, the Convention Relating to the Status of Refugees was adopted, which now forms the core of international refugee law. Key temporal and geographical reservations contained within the 1951 Convention – which at the time reflected signatory states' desire to limit their obligations towards new refugee populations – were only removed by a Protocol in 1967. The 1951 Convention and 1967 Protocol remain the only universal refugee treaties. Currently, 147 states are party to one or both of these instruments (UNHCR, 2008).

Under the terms of the Convention and Protocol, refugee protection encompasses a refugee's initial admission into a country of refuge and subsequent respect for their fundamental rights in that country, including the right not to be returned to their country of origin or any other country where they may be at risk of persecution or other risks to their lives. The obligations associated with refugee protection only come to an end when a 'durable solution' has been found in the form of *national* protection, whether through full and permanent integration in an asylum country, or return to the country of origin once effective protection has been restored there. By stipulating how refugees should be treated by signatory states, the 1951 Convention represented an exceptional limitation to the overriding principle of state sovereignty and non-interference in the internal affairs of the state that dominated international relations during the post-war period, but reflected the primacy of this principle by restricting international protection obligations to people who had left their country of origin (Collinson, 1993: 64).

Refugees are defined within the Convention by the so-called 'inclusion clauses', which state the key circumstances or attributes that make a person a refugee, and 'exclusion clauses', which define those who do not need or deserve international protection. 'Cessation clauses' specify how refugee status might come to an end – for example if a person secures the nationality and hence permanent protection of an asylum country. The Convention also details the rights and standards of treatment that should be accorded to refugees in a country of asylum, including the prohibition on returning a refugee to a country where their life or freedom may be threatened, known as the '*non-refoulement*' principle. As regards refugees defined by the 1951 Convention, the prohibition on *refoulement* is now also accepted as part of

Box 3: The 1951 Convention's definition of refugee

According to the Convention, a refugee is any person who, 'owing to a 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'.[21] The definition of refugee contained in the 1951 Convention is very closely tied to the concept of persecution, rather than to more generalised ideas of violence or disorder. However, the Convention avoids defining key terms such as 'persecution', partly to allow for leeway in their interpretation and application. Generally, persecution is understood as serious human rights abuses or other serious harm, often perpetrated in a systematic or repetitive way, such as torture, physical assault, unjustified detention or severe discrimination over a prolonged period (UNHCR, 2005a: 56). The 1951 Convention does not define a refugee as someone who has been formally *recognised* as having a well-founded fear of persecution, so a person whose predicament is described by the definition is a refugee regardless of whether or not he or she has been formally recognised as such (Lauterpacht and Bethlehem, 2003: 116; UNHCR, 1992).

21 To incorporate so-called 'stateless people', the definition continues: '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'.

customary international law, meaning that all countries are bound by the principle, irrespective of whether they have signed the Convention.

3.3.1 The OAU Convention, the Cartagena Declaration and the EU's 'Qualification Directive'

Aside from the 1951 Convention and its 1967 Protocol, the only binding international treaty dealing exclusively with refugee protection is the 1969 Organisation of African Unity Convention Relating to the Specific Aspects of Refugee Problems in Africa (the OAU Convention). Drafted in response to the experience of anti-colonial wars in Africa, the OAU Convention was intended as a regional complement to the 1951 Convention by extending protection for refugees fleeing the indiscriminate effects of conflict, violence and serious political upheaval and unrest, irrespective of whether they have a well-founded fear of persecution.[22] The 1984 Cartagena Declaration on Refugees – a non-binding regional agreement endorsed by a number of Latin American states[23] – also includes a broader concept of refugees, reflecting the region's direct experience of mass displacement associated with civil wars and large-scale human rights abuse.[24]

Although strictly regional instruments, the OAU Convention and the Cartagena Declaration have had considerable influence on refugee protection worldwide, in particular the protection of people who are not covered by the persecution-oriented definition of the 1951 Convention. For example, the 2004 European Union 'Qualification Directive' – a binding agreement establishing provisions for a common European asylum policy – restricts the refugee definition to that of the 1951 Convention, but includes so-called 'subsidiary' or 'complementary' protection for other people who require protection but do not qualify for refugee status.[25] None of the instruments discussed above is intended to be applied directly to people seeking assistance as a consequence of extreme poverty, natural disaster or other economic or ecological causes.

22 The extended refugee definition contained in the OAU Convention applies to 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'. See Mandal (2005: 16).

23 The Cartagena Declaration was originally adopted by ten Central American countries. On its twentieth anniversary, all Latin American countries reaffirmed their commitment to the spirit of the Cartegena Declaration and approved a plan of action to improve refugee protection throughout the region. To date, ten Latin American countries have incorporated the Cartagena refugee definition into their national legislation, and three countries apply the definition in practice.

24 The Cartagena Declaration extends the concept to include people who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflict, massive violation of human rights or other circumstances which have seriously disturbed public order. See Mandal (2005: 16).

25 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for qualification and status of third country nationals or stateless persons as refugees or persons who otherwise need international protection and the content of the protection granted.

3.3.2 UNHCR

UNHCR is charged with providing international protection for refugees under the auspices of the UN, and with seeking 'permanent solutions' for refugee problems through voluntary repatriation or integration in an asylum country. UNHCR's protection activities are overseen by the Executive Committee of the High Commissioner's Programme (ExCom).[26] UNHCR also supervises how states treat refugees, to try to ensure adherence to international refugee and human rights law, including respect for the principles of *non-refoulement* and asylum, and to ensure that appropriate procedures are followed to determine whether asylum-seekers are refugees according to the relevant refugee instrument. Its mandate for refugee protection, defined by its 1950 Statute and subsequently expanded by successive UN General Assembly and ECOSOC resolutions, uses a broadened definition of refugee comparable to the OAU Convention and Cartagena Declaration, encompassing refugees fleeing generalised violence as well as people with a well-founded fear of persecution.

As global refugee populations increased during the 1980s and 1990s, so UNHCR's operational role expanded considerably, to encompass material assistance to refugees in addition to its core protection functions, and to include assistance and protection to several other categories of people, including asylum-seekers, returning refugees, stateless people and some IDPs. The agency's competence and protection responsibilities in respect of all groups deemed 'of concern' to UNHCR are determined by reference to its own mandate and the particular circumstances of the people needing protection, rather than by any particular treaty, law or instrument in force in a particular country. It is not unusual, therefore, for UNHCR to be working to secure protection for a group of people who fall within its own expanded refugee definition, but who are not formally recognised as refugees by the asylum country concerned (Lauterpacht and Bethlehem, 2003: 94–96). The considerable expansion of the agency's relief operations over the past two decades – a controversial development for those who favour UNHCR maintaining a narrower focus on its core refugee protection functions – reflects the highly complex relationship that exists between material assistance and protection for all displaced populations.

As Crisp and Slaughter observe, the primary role that UNHCR has assumed for delivering and coordinating support and protection for refugees has weakened the notion of 'state responsibility' for refugee assistance and protection in many contexts: host government involvement has remained very limited in many (especially developing country) contexts, including in countries that are signatories to the 1951 Convention. The 'care and maintenance' model in situations of protracted displacement, in particular, 'endowed UNHCR with responsibility for the establishment of systems and services

26 The UNHCR Executive Committee has 78 member states, not all of which (e.g. Pakistan) have acceded to the 1951 Convention and/or 1967 Protocol.

for refugees that were parallel to, separate from, and in many cases better resourced than those available to the local population'; this 'created a widespread perception that the organization was a surrogate state, complete with its own territory (refugee camps), citizens (refugees), public services (education, health care, water, sanitation, etc.) and even ideology (community participation, gender equality)' (Crisp and Slaughter, 2009: 8).

3.3.3 Additional agreements and instruments

The core international legal and institutional refugee protection framework is further enhanced by a variety of non-binding agreements and other instruments. Although essentially political rather than legal in nature, they nonetheless exert considerable influence over state practice. UNHCR's own guidance, including its *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR, 1992) and its protection guidelines and annual ExCom Conclusions on International Protection, set detailed standards for national laws, policies and procedures on refugee protection.

International human rights law, including the International Covenant on Civil and Political Rights, the Convention Against Torture and the Convention on the Rights of the Child, complements refugee law by informing and expanding the content of many central concepts and provisions of refugee protection, and largely underpins refugee protection beyond the confines of the 1951 Convention. Accordingly, the UN Office of the High Commissioner for Human Rights (OHCHR) has a role in refugee protection to the extent that it is responsible for coordinating UN action on human rights issues.[27]

3.3.4 The wider international humanitarian system

A number of agencies in addition to UNHCR are directly involved in the provision of assistance and protection for refugees, including other UN agencies (including OCHA, WFP, UNICEF, UNDP), ICRC and NGOs. UNHCR's Statute obliges the High Commissioner to establish contact with so-called 'private organisations', and more than 500 NGOs are working as implementing partners with UNHCR. Most are involved in establishing and maintaining refugee camps, delivering material assistance to refugees and, in some cases, protection activities, including monitoring and reporting on refugee rights and welfare and the provision of legal counselling and representation.

3.4 Key trends in refugee policies

Despite well-established international legal obligations and an extensive network of institutions supporting refugees, in practice there is considerable variation in international engagement in different refugee crises. Standards of protection and treatment of refugees also differ hugely. This variation is partly explained by legal and practical factors: states are able to exercise considerable discretion in how they apply the 1951 Convention and other refugee and human rights instruments; different states are parties to different agreements; and responses are conditioned by different countries' particular legal traditions, resources and capacities.

The grossly uneven nature of national and international attention to refugees' predicaments is also distinctly political, however. Although refugee protection should, in theory, be determined by legal principle, in reality responses to particular refugee crises are dictated significantly by factors such as the dominant international perception of a given conflict (or other causes of displacement) and the particular stance towards the refugee population of the host and home governments, donors and other key actors. As observed by McDowell and Van Hear (2006: 3): 'the international humanitarian regime has generated a range of responses from, at one end of the scale, an almost unequivocal generosity and political unanimity in the case of East Timor, to one of continuing neglect in the case of Burundi'.

Insofar as there is an overarching trend, it is unambiguously away from liberal refugee policies towards approaches prioritising containment and repatriation.[28] The end of the Cold War and associated shifts in the nature and frequency of conflicts triggered a rapid and massive escalation in the scale of global refugee displacement, much of it resulting from extreme violence and human rights abuse targeted at particular ethnic or social groups. Faced with potentially large-scale refugee flows that are perceived to be a source of insecurity and substantial socio-economic and ecological cost, governments became increasingly unwilling to admit refugees or offer them any more than temporary refuge. The containment of refugee flows was already an emerging policy trend among Western states, particularly as regards refugees arriving from developing countries, and with the Cold War imperative to admit and integrate people 'escaping' from communism removed, and mounting concern that refugee numbers might escalate out of control, Western governments moved swiftly to try to restrict refugee arrivals and to limit their obligations to asylum-seekers. Facing the withdrawal of superpower financial and operational support for their hitherto generous refugee policies, Southern governments soon began to follow suit. Within a few years, the focus of the international refugee regime had all but entirely shifted: the erstwhile emphasis on asylum and local integration for refugees from communism gave way to a new emphasis on the containment and repatriation of refugees fleeing 'internal' strife and civil wars.

This change was evident in the high-profile international interventions in northern Iraq, the former Yugoslavia, Somalia and Haiti during the 1990s, which were intended largely to contain and reverse refugee flows that were considered a

27 The principle of *non-refoulement* is reinforced by the human rights-based prohibitions on returning a person to a country where he or she is at risk of torture, exposure to cruel, inhuman or degrading treatment or punishment, mass expulsion and, in the case of child asylum-seekers and refugees, the 'best interests of the child' principle (Lauterpacht and Bethlehem, 2003: 93).

28 See, for example, ExCom (2006: 3–4).

threat to international peace and security. The failure of so-called 'safe havens' and other forms of international action to provide even minimal protection for civilian populations, and the appalling humanitarian consequences that ensued in Srebrenica and elsewhere, led to the effective abandonment of the 'safe haven' concept after the mid-1990s. Yet this did not bring about a reversal in the new emphasis on containing or minimising refugee flows and reducing refugee populations. Nor did it quell the growing international consensus, at least among key Western actors, that where national protection fails, the international community might seek to provide substitute protection for vulnerable populations *within* the country concerned.

Indeed, the decline in the global population of refugees 'of concern' to UNHCR, from the peak of nearly 18 million in 1992 to just over 9 million in 2004 (UNHCR, 2006a: 10), was almost certainly attributable, in part, to the new international emphasis on containment and reduction of refugee populations. Northern governments introduced tighter immigration and visa regimes and other pre-entry controls,[29] and sought increasingly to deter asylum-seekers through the use of detention, withdrawal of welfare and other rights and benefits, and restrictive application of the 1951 Convention. In Africa, the dominant approach 'changed from a traditional "open door" policy to a retreat from commitment to the institution of asylum', as reflected in 'restrictive admission policies, expulsion of refugees to places where they face harm, disregard of the rights of refugees, and a retreat from durable solutions' (Rutinwa, 1999: 25). A key part of this retreat, according to Rutinwa, has been the failure of the international community to provide sufficient assistance to refugee-hosting countries to enable them to meet their international obligations.[30] The decline in global refugee numbers was also due to a number of large-scale repatriations – to Mozambique, Cambodia, Rwanda, Bosnia and Afghanistan – indicating that repatriation, rather than integration or resettlement, had become asylum states' preferred 'durable solution' to refugee problems. Reduced support or opportunities for integration in asylum states has further exacerbated the problem of millions of refugees from protracted conflicts languishing in protracted exile (UNHCR, 2006a: 10; Loescher et al., 2008). Overall, people in flight who manage to reach a border to seek protection in another country are less and less likely to be able to cross that border, and those who do manage to cross are less and less likely to find effective protection on the other side.

29 Extending, potentially, to the transfer of asylum-seekers and their claims to third-country 'regional protection areas' or 'transit processing centres' (UNHCR, 2006a: 38–39)

30 When Tanzania closed its borders with Burundi and Rwanda to prevent new refugees from entering the country during the 1990s, the main reason cited by the government was the failure of the international community to provide adequate assistance to support these refugee populations (Rutinwa, 1999: 18). On the impact of a decline in international assistance on the Pakistani government's approach to Afghan refugees, see Turton and Marsden (2002: 1) and Borton et al. (2005: 3).

3.5 The 'refugee cycle': protection through admission, asylum and 'durable solutions'

The international refugee regime is based on an assumption that refugee status is temporary. People only become refugees once they have crossed an international border, and they only remain refugees until they secure some form of durable national protection, either in an asylum country or following return to their country of origin. The following discussion is framed around what may be termed the 'refugee cycle': the particular points – from admission and refuge (or indeed refusal) to a supposed eventual solution – where the laws, policies, procedures and agendas of key actors determine the legal status of persons in flight, and the protection they receive.

3.5.1 Admission at the border

For many people fleeing persecution or violence, the first hurdle in their efforts to find protection is reaching and crossing a border. Conditions within the country of origin will often make the journey to a border extremely hazardous, both in terms of the physical dangers that people face and the reprisals that might result if they are apprehended during flight. Asylum-seekers may fail to reach the border, or may be turned away when they get there, because they lack the identification or travel documents that are usually needed at border crossings. Crossing a border may depend on an asylum-seeker's ability to pay smugglers to transport them across clandestinely, to buy false papers, or to pay bribes or offer sexual favours to border guards. Frequently, ignorance among border guards as to the relevant laws and policies on refugee protection and the absence of relevant authorities equipped to deal with asylum applications may result in refugees being rejected at the frontier.

Strictly speaking, states are not bound by any of the international refugee instruments to admit asylum-seekers if rejection will not result in *refoulement*. Thus, countries increasingly will not admit asylum-seekers if they have transited through another country that is considered 'safe', and where it is presumed that the asylum-seeker could have sought protection – the so-called 'safe third country' policy. There are no universal legal or procedural guidelines supporting this policy, however, and overly broad interpretations risk forcing asylum-seekers back to countries where the principle of *non-refoulement* may not be respected. This was highlighted as a particular concern, for example, in a 2005 survey of state practice in the former Soviet Union (UNHCR Bureau for Europe, 2005: 18).

In many cases, non-admission can stem from a political decision not to let in a particular group or nationality, or to close a border altogether. Throughout the Great Lakes region, for example, a trend emerged during the 1990s to refuse entry to asylum-seekers (Rutinwa, 1999: 11); Tanzania, for instance, restricted the entry of asylum-

seekers by blocking access points through which many would-be refugees sought to enter the country (*ibid.*: 19). Hundreds of thousands of Kosovans fleeing to the Former Yugoslav Republic of Macedonia in 1999 following the NATO bombing of Serb forces were confronted with a closed border and became trapped at the frontier. In November 2000, Pakistan officially closed its border with Afghanistan on the grounds that it was unable to absorb any more refugees. In February 2002, Islamabad's refusal to allow any more refugee registrations in the Chaman area left 60,000 people stranded in what became known as a 'waiting area' astride the Afghanistan–Pakistan border (Turton and Marsden, 2002: 16). For a period during the most recent Iraq war, the Jordanian authorities prevented the entry of single Iraqi men between the ages of 17 and 35, and Jordanian border guards reportedly rejected Iraqi asylum-seekers who were, or appeared to be, Shi'a (Frelick, 2007: 24); large numbers of Palestinians who were resident in Iraq before the war and who since fled the violence remain trapped in camps in border areas (UNHCR, 2009c). Kenya's closure of its border with Somalia has reportedly led to abuses at the border, with Kenyan police forcibly returning large numbers of asylum-seekers and refugees (Human Rights Watch, 2009).

3.5.2 Reception of asylum-seekers

Those who do manage to gain entry into an asylum country should be treated in accordance with international human rights law *and* in accordance with international refugee law, on the grounds that any asylum-seeker may be a refugee. In practice, however, the treatment of asylum-seekers varies substantially between countries, partly as a consequence of the vastly different financial and other resources available in different countries to support national assistance and protection systems. While the country of asylum is primarily responsible for providing shelter, food, health care and other welfare benefits, poorer countries hosting large populations of asylum-seekers and refugees rely heavily on the direct assistance provided by UNHCR and the wider humanitarian and international system.

The registration and provision of identity documents should provide a minimum level of legal protection for asylum-seekers on their arrival in an asylum country, for example to prevent their arrest or expulsion on immigration grounds, to help identify those with special protection needs (such as unaccompanied or separated children, the elderly, the disabled and single-parent or destitute families), or to facilitate the provision of material assistance and associated protection. But practice varies considerably as regards registration. In countries where the government does not have a system for registering asylum-seekers, this task has been undertaken by UNHCR under its own mandate (e.g. Kenya) or on behalf of the government (e.g. Benin). In Kenya in 2005, it was estimated that no more than 20% of all asylum-seekers and refugees possessed individual documentation confirming their status (Turton, 2005: 29);[31] in Ukraine, most asylum-seekers remained unregistered because the majority of asylum claims failed to satisfy strict admissibility rules (UNHCR Bureau for Europe, 2005: 29). In most countries, unregistered asylum-seekers, usually lacking documentation, are highly vulnerable to exploitation, arrest, detention and/or deportation or *refoulement*. UNHCR reported in 2007, for instance, that in Kenya lack of documentation remained a major protection risk for asylum-seekers and refugees (UNHCR, 2007e: 134). In Iran, Jordan and Lebanon, documentation issued to asylum-seekers by UNHCR to indicate their status has not proved sufficient to ensure their protection (UNHCR, 2007d: 359–60; Frelick, 2007: 25; Trad and Frangieh, 2007: 35).

Many asylum-seekers (and recognised refugees) are detained in border camps, isolated refugee 'settlements', airport transit zones, detention centres, police stations and prisons. Detention may be a response to concerns about the welfare and security of host communities or the state. It may also arise from fears that an asylum system is becoming over-burdened, or may be a means of deterring new arrivals or preventing the integration of refugee populations. Detention for some may be 'indefinite and un-renewable, irrespective of the well-foundedness of the claim or the fact that illegal entry and presence are due exclusively to the necessity to find refuge' (Goodwin-Gill, 2001: 35). Millions of refugees in protracted situations worldwide have remained for many years restricted to camps or segregated settlements and deprived of basic rights (US Committee for Refugees and Immigrants, 2005: Table 2).

In some circumstances, some form of detention may be considered necessary in order to screen large groups of asylum-seekers, particularly in mass-influx situations where there is a high risk that combatants, war criminals and other excludable people are present among civilians seeking refuge. ExCom Conclusion No. 94 (2002) on the civilian and humanitarian character of asylum emphasises the importance of screening inflows to identify and separate so-called 'armed elements' from civilian asylum-seekers.[32] This is essential for maintaining the civilian and humanitarian character of asylum. As the Rwandan refugee camps in former Zaire and Tanzania in the mid-1990s showed, failure to separate and intern armed elements is likely to expose civilian asylum-seekers and refugees to intimidation, military recruitment and attack, and erode the asylum state's willingness to provide asylum. In practice, however, such screening is an enormous logistical challenge (UNHCR, 2001a; da Costa, 2004: 13). In the tense and chaotic conditions that usually characterise mass influxes, only superficial screening is likely to be possible. In

31 A Refugee Act was adopted in Kenya in 2006, creating a new legal framework for the government's management of refugee affairs, with legislation providing for the establishment of national structures to deal with asylum issues. See UNHCR (2007d: 239). In Benin, an independent asylum appeal body was established in 2006: ExCom (2007: 5).

32 Conclusion on the Civilian and Humanitarian Character of Asylum, Executive Committee Conclusion No.94 (LIII), 2002 (UNHCR, 2005b).

Tanzania in 1997, for instance, the government embarked on individual screening of all Rwandan asylum-seekers, but the huge numbers involved soon proved overwhelming, and no excludable individuals were identified (Rutinwa, 2002: 13; Whitaker, 2002: 11).[33] In the absence of effective screening, governments have sometimes resorted to border closures to prevent all asylum-seekers – armed elements and civilians – from entering. After the destruction of the Rwandan refugee camps in eastern Zaire in 1997, for instance, refugees who tried to cross into the Central African Republic were initially blocked by the government until UNHCR undertook to meet the costs of screening (Rutinwa, 2002: 12). Jordan's closure of its border to young men trying to cross from Iraq represents an extremely crude form of screening in the context of a mass-influx situation. A minimum measure to reduce the risks associated with the presence of combatants is to locate asylum reception centres as far away as possible from the border and the location of conflict, as in eastern Chad, where refugee populations near the Sudanese border have suffered extremely high levels of forced recruitment and armed attacks.

3.5.3 Determining status

Governments cannot protect refugees effectively if they do not first identify them. Precisely how and when refugee status determination is carried out, however, varies considerably between different countries and different contexts of arrival. Although the asylum state should be responsible for identifying refugees, as with the registration of asylum-seekers, in certain circumstances UNHCR does this, either on behalf of the government (usually where the state has no adequate procedures in place for providing fair and efficient status determination), or under its own mandate (often where the country has not signed up to any refugee treaty and has no formal protection system in place). Just as certain admissibility rules may prevent some asylum-seekers from registering in an asylum country, so admissibility restrictions may also prevent asylum-seekers from accessing full status determination procedures, for example where a government has introduced accelerated procedures for asylum-seekers arriving from countries of origin that are generally deemed to be 'safe'. In many countries, procedures may be cumbersome, leaving asylum-seekers waiting for long periods – sometimes years – for a decision on their status.

Mass-influx situations affecting the richer industrialised states – most notably those in Europe related to conflict in the former Yugoslavia during the 1990s – have led some governments to suspend entirely access to refugee status determination procedures for particular groups of asylum-seekers. Instead, asylum-seekers have been offered 'temporary protection' outside the formal framework of international refugee protection, and generally on an *ad hoc* basis and as an emergency response to a sudden influx of people whose arrival is judged to render formal individualised procedures impractical. The intention is to suspend full refugee protection obligations towards particular groups in order to facilitate their rapid return to the country of origin as soon as conditions allow. The majority of ethnic Albanians who fled Kosovo in 1999, for example, were given temporary protection arrangements in other European countries. The emergency lasted a relatively short time, and large-scale returns took place a few months after the first mass outflow. The concept has since been formalised in the European context through the EU's 2002 Directive on Temporary Protection, which provides for specific groups of persons fleeing a particular conflict to be granted temporary protected status for up to two years, pending changes in the home country that might allow for their return.

In some countries, refugees have been offered some form of asylum, but without reference to any national legislative or policy provisions based on an international refugee instrument. Like many asylum-seekers protected through temporary arrangements, refugees protected in this way are not likely to have access to any formalised status determination unless this is provided by UNHCR. Although, in principle, refugees protected on the basis of *ad hoc* national arrangements of this kind are covered by customary international refugee law and international human rights law, in practice their treatment is determined more by national political and administrative discretion. In Jordan, for instance, Iraqi nationals who left Iraq after the war in 2003 benefited from a Temporary Protection Regime until 2005, but following a terrorist bombing in Amman in November 2005 the government declared that the protection policy would no longer be applicable to Iraqis (UNHCR, 2007e: 196); although Jordan and Syria continue to host the largest numbers of Iraqi refugees and have allowed them access to some public services, the situation of Iraqi refugees in these countries remains precarious, with most lacking the right to work or access to the informal job market (UNHCR, 2009c).

A substantial proportion of the world's refugees remain marginalised from any formal refugee protection systems. This includes so-called 'spontaneously settled' refugees and the vast majority of 'urban refugees' – a vulnerable group that typically receives little or no protection or assistance. In Kenya, most Somali and other refugees living in urban areas, representing a substantial proportion of the country's refugee population, fall foul of the government's de facto refugee encampment policy: those lacking official permission have left the camps, and those lacking any official legal status (many awaiting the conclusion of lengthy status determination processes) risk arbitrary arrest and detention, and possible deportation or *refoulement*. By the end of 2008, UNHCR had registered 15,000 Somalis in Nairobi, almost certainly representing only a small fraction of the total number of Somali nationals in the city, estimated to be well over 100,000 (Human Rights Watch, 2009: 44). In Bangladesh, the 20,000 or so recognised Burmese refugees residing in refugee camps are far

33 By contrast, the comparative success of a screening and separation operation in the DRC in 2001 was possible because combatants could be identified clearly and swiftly, were unarmed and UN peacekeepers were present (Yu, 2002).

Box 4: *Ad hoc* protection of Afghan refugees

Afghan refugees in Pakistan and Iran represent by far the largest group of refugees to be protected on the basis of *ad hoc* national arrangements. Although Iran is a signatory to the 1951 Convention and 1967 Protocol, it chose to give Afghans the status of *mohajerin*, or people seeking asylum for religious reasons. As such, their protection and assistance was dependent on whatever benefits might be offered to them on the basis of hospitality, rather than on the basis of rights emanating from Iran's treaty obligations. Pakistan is not a signatory to the 1951 Convention or any other international refugee instrument, and like Iran has regarded its hospitality to Afghan refugees as a religious and humanitarian duty, rather than a legal obligation.

By the end of the 1990s, partly in response to a decline in international support for hosting Afghan refugees, both countries had started hardening their approach to refugee protection. After 1992, the Iranian government ceased to grant asylum automatically to asylum-seekers from Afghanistan, and after 1997 it stopped registering new arrivals altogether. As a consequence, many Afghans in the country are considered illegal aliens. Around 90,000 refugees were deported in 1998, and a further 100,000 in 1999. In Pakistan, meanwhile, most Afghans who arrived during the 1990s were neither registered nor issued with identity documents. They were exempted from Pakistan's immigration laws and thus from deportation as illegal immigrants, but from January 2000 Afghan asylum-seekers were no longer offered automatic asylum and could no longer claim exemption from the country's Foreigner's Act (Turton and Marsden, 2002).

outnumbered by the estimated 100,000–200,000 Burmese living as migrants outside the camps. UNHCR has almost no information about this population, even though most would probably have a strong claim to refugee status. The two million or so Iraqi refugees currently in neighbouring countries within the region represent the largest urban refugee caseload ever dealt with by UNHCR. Many live in low-income areas in Damascus, Amman, Beirut and Cairo, with little means of livelihood, limited access to education or health services and no secure legal status (UNHCR, 2007b: 3). The majority are not registered with UNHCR (UNHCR, 2009: 246).

Some people in flight may calculate that their interests are best served by remaining outside formal procedures. They may decide that they are unlikely to be granted refugee status; they may want to avoid the restrictions on freedom of movement and/or means of self-reliance such procedures impose (as in Kenya and Tanzania); or they may be fearful of approaching the authorities of the asylum country. Most people who have fled to other countries from the conflict and human rights abuse in Colombia, for example, are 'invisible' to the authorities and to UNHCR. As a consequence of inadequate asylum regimes and lack of security, especially in border areas, many choose to remain undocumented rather than apply for asylum because of fears about their security, including exposure to selective killings, trafficking, harassment, forced recruitment or extortion (UNHCR, 2006b: 348–49).

There are no international legal obligations or provisions that stipulate precisely how a state should identify whether an asylum-seeker is a refugee. While some indirect guidance is provided by international human rights instruments – for example relating to due process and rights of appeal – the 1951 Convention contains no guidance on procedural matters. Procedures to be followed in refugee status determination are, however, taken up in ExCom Conclusions[34] and in UNHCR's 1992 *Handbook* (UNHCR, 1992). In those countries that are signatory to the OAU Convention, or that base their national legislation on the Cartagena Declaration, claims are assessed against a broader set of criteria than in countries that are only signatory to the 1951 Convention and 1967 Protocol. The outcomes of asylum claims also depend on the adjudication body's interpretation of the refugee definitions and other obligations contained within the applicable treaties. Although UNHCR advocates the liberal interpretation of international refugee definitions, the overall trend seems to be towards more conservative interpretation, particularly as regards the 1951 Convention definition (UNHCR Bureau for Europe, 2005: 17). For example, it has been relatively common for status determination bodies to rule that acts carried out by non-state agents cannot be considered persecution, or that those fleeing gender-based violence or 'war refugees' do not qualify under the 1951 Convention. Many asylum-seekers screened out of refugee protection are offered some form of alternative or so-called 'complementary' protective status, usually associated with a lower level of security of residence and other rights and entitlements.

One of the principal mechanisms used by many countries to respond to mass influx situations is group recognition on a *prima facie* basis. Although there is no legal reason why the 1951 Convention/1967 Protocol should not be applied to *prima facie* recognition of whole groups of refugees, in practice the mechanism has most commonly been used in African and other countries that base their refugee protection systems on an expanded definition of refugee.[35] The key factors that would trigger the use of *prima facie* recognition are the objective circumstances causing people to flee, the number of people involved and the urgency of the need for protection and assistance (Rutinwa, 2002: 1). Those found to be refugees under a group determination mechanism should enjoy full refugee status under the appropriate refugee instrument, and

34 See, for example, Conclusion on the Determination of Refugee Status, Executive Committee Conclusion No. 8 (XXVIII), 1977; and Conclusion on The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, Executive Committee Conclusion No. 30 (XXXIV), 1983 (UNHCR, 2005b). See also Mandal (2005: 28).
35 Note that the EU's Directive on Temporary Protection allows for the *prima facie* protection of specific groups fleeing a particular conflict for a temporary period, but not as recognised refugees. This Directive has yet to be applied in practice.

they therefore should be granted all associated rights and protection (*ibid.*: 2).

While *prima facie* recognition can provide a rapid and effective way of extending refugee protection to large numbers of asylum-seekers arriving *en masse* and needing urgent help, it has some significant drawbacks, including the difficulty of identifying and separating combatants and other people who should be excluded from protection. In addition, assessments of the conditions that might be causing people to flee, like assessments of conditions that might or might not be conducive to safe return, are easily influenced by political or strategic priorities, or by local hostility to the admission of large numbers of asylum-seekers. Concerns among asylum countries about the security and financial and other implications of hosting large refugee populations are reflected in a growing reluctance to grant *prima facie* recognition to large groups of asylum-seekers. In Tanzania, for instance, some district authorities have reportedly used *ad hoc* individualised screening procedures for Burundian and Congolese asylum-seekers, despite the official national position that *prima facie* refugee status should be granted to these groups (Rutinwa, 2005: 25–26).

In response to the mass influx of refugees from Iraq into neighbouring countries, UNHCR resorted to *prima facie* recognition of refugee status under its own mandate, making them all 'persons of concern to UNHCR', despite the lack of formal government status-determination systems or procedures in the countries concerned. This reflected the judgement made by UNHCR that across-the-board individual status determination for hundreds of thousands of people was 'not feasible, [and was] unnecessary and strategically undesirable' (UNHCR, 2007b: 7). On the basis of *prima facie* presumptive status, UNHCR has had a responsibility to work with countries of asylum to ensure availability of protection and, potentially, solutions, with protection efforts focused on securing and improving protection in the region, including protection from *refoulement*, non-penalisation for illegal entry and access to education, health care, housing and other basic services (*ibid.*: 2). In Kenya, UNHCR is granting *prima facie* refugee status to Somalis arriving in Dadaab camp in accordance with the OAU Convention, reportedly providing status decisions within minutes (Human Rights Watch, 2009: 46–47).

3.5.4 Refugee status and effective protection in asylum states

The core protection principle for recognised refugees is that of *non-refoulement*. In practice, however, *refoulement* of refugees appears to be a fairly regular phenomenon (see, for example, ExCom (2006: 5) and (2007: 3)). Individual *refoulement* commonly results from refugees' lack of recognised status, as when urban refugees are deported as illegal immigrants. Most cases of *refoulement* involving groups of refugees take place as a result of a deliberate decision or policy of the government concerned, often triggered by concerns about national security. Surveying practices in Africa since the mid-1990s, Rutinwa (2005: 18) concludes that 'the *non-refoulement* norm is virtually a dead letter'.

The strains on refugee protection that have led to a growing tendency to *refoule* refugees have also led to a deterioration in the standards of treatment of refugees in many asylum states, particularly in poorer countries that have become long-term hosts to large refugee populations. In practice, many countries struggle to meet the required standards of treatment because of wider economic and political problems. In many countries, local populations experience severe problems in accessing adequate shelter, food and clothing, and so there are challenges in establishing or supporting any system to ensure minimum international standards of treatment for refugees that will not result in them being treated more favourably than the host community.

Often, severe restrictions on the rights and entitlements of refugees have been introduced in an effort to reduce the economic and other impacts of refugee populations, or to deter new arrivals and encourage refugees to return to their countries of origin. In Tanzania and Uganda, the right to education has been significantly curtailed for refugee children, and in Tanzania and Kenya refugees have been required to live in designated refugee camps and prevented from farming outside camps. By restricting access to markets, land and employment, these measures directly limit any potential for refugees' economic self-reliance. Contravention of the encampment rules has led to the arrest, detention and, sometimes, *refoulement* of refugees (on Tanzania, see UNHCR (2007d: 195) and (2007e: 106)).

With donor interest in long-term 'care and maintenance' programmes waning, refugee camps are often characterised by poor health, high malnutrition and neonatal death rates, poor education facilities and limited supplementary feeding programmes (Turton, 2005: 5, 35). Among the camp-based refugee populations in Kenya, for example, UNHCR reported that, in 2006, restricted funding resulted in 'sub-standard protection and assistance, particularly in sectors such as health and sanitation' (UNHCR, 2007d: 242), with acute malnutrition rates calculated at 26.3% in Dadaab and 19.6% in Kakuma, and anaemia levels among children under five often as high as 83% (UNHCR, 2007e: 132). Conditions have deteriorated further since the arrival of more than 80,000 Somali refugees since 2007 (Human Rights Watch, 2009: 26–27). In Uganda, insufficient funding during 2006 forced UNHCR to abandon many non-life-saving activities such as post-primary education, vocational training and income generation, which in turn reportedly led to an increase in protection-related incidents as a consequence of young people having little to do (UNHCR, 2007d: 254).

In reality, therefore, even the most fundamental rights of refugees, including the right to life, are not adequately

protected in many situations of refugee flight. This is particularly the case where refugee camps are located near a border and/or in areas with high levels of continuing violence and instability, and where governments have not been able successfully to separate combatants from the civilian refugee population. Repeated attacks by the *Janjaweed* militia on Darfurian refugee settlements in Chad, for example, contributed to UNHCR's decision in December 2003 to relocate the refugees to new camps away from the border; and refugee settlements in northern Uganda have come under frequent attack both from cross-border incursions and from the Lord's Resistance Army (LRA) within Uganda itself. Host governments, often keen to contain refugee flows and maintain conditions that might eventually facilitate large-scale returns of refugees, are often reluctant to see refugee camps moved out of border areas, however, and may be unwilling to meet the financial costs or support the substantial logistical operations involved.

Since protection is so central to addressing the needs of refugees, the widespread and persistent lack of attention to questions of protection among many humanitarian agencies is highly significant (Collinson, 2005: 3). As regards engagement in protection issues connected with people's access to and enjoyment of refugee status in countries of asylum, local and international human rights organisations and specialist refugee organisations usually play a more central role than humanitarian agencies.[36]

3.5.5 Denial of refugee status

It follows that any status determination procedure designed to identify people who should be recognised as refugees must also screen out a large number of people who, for a variety of reasons, do not qualify for refugee protection. Denial of refugee status does not necessarily equate with denial of protection, however. And even where it is found that a person does not need or deserve protection, their subsequent treatment and status may well be affected by the international refugee regime and supporting human rights norms and instruments. Certainly, denial of refugee status does not automatically result in a person being summarily returned to their country of origin.

The circumstances in which refugee status may be denied include the so-called 'internal flight' or 'internal protection' alternative. In Northern countries, there has been a growing practice since the mid-1980s of decision-making authorities denying refugee status on the grounds that an asylum-seeker could have found protection against persecution in another part of their country of origin. There is no direct justification within the 1951 Convention for excluding asylum-seekers on this basis, but the practice has become relatively common nonetheless. The growing frequency with which asylum claims are rejected on grounds of an 'internal flight alternative' prompted UNHCR in 2003 to issue guidelines on the issue in the context of the 1951 Convention and 1967 Protocol (UNHCR, 2003a), and to issue specific advice as regards particular refugee situations. A 2006 UNHCR 'Return Advisory' concerning Iraqis outside Iraq, for instance, cautioned that asylum claims:

> *should not be rejected merely on the basis of an internal flight alternative. Whether the individual is a refugee under the 1951 Convention or flees generalised violence, there is no internal flight alternative within the Southern or Central regions [of Iraq], given the reach of both state and non-state agents of persecution, the lack of national protection and grave insecurity and human rights violations prevailing in those parts* (UNHCR, 2006c).

The exclusion clauses contained in the international refugee instruments represent a crucial component of the refugee definition by defining *who does not need or deserve* international protection. The 1951 Convention excludes those already receiving refugee protection under the auspices of another UN body (for instance Palestinians under the UN Relief and Works Agency (UNRWA)); those who already have the same rights and obligations as nationals in a new country of residence; anyone who has committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime, or anyone guilty of acts 'contrary to the purposes and principles of the United Nations'. The OAU Convention, the Cartagena Declaration and the EU's Qualification Directive exclude non-deserving asylum-seekers on similar grounds. Security-inspired restrictions associated with the 'war on terror' contributed to a broadening of interpretations of grounds for exclusion in some countries (ExCom, 2007: 6). In the United States, for example, status determination decisions have reportedly interpreted a 'serious non-political crime' to include crimes such as the use of false documents which, outside of the immigration or asylum context, would usually be considered minor.[37]

International refugee instruments do not exclude combatants or other armed elements *per se,* and the fact that an asylum-seeker has previously been a combatant in the country of origin or arrived carrying weapons does not in itself permanently exclude him or her from consideration for refugee status. However, ExCom and UNHCR guidance is clear that former combatants must have permanently and unambiguously renounced their combatant status before an application for asylum can be considered. Current or former combatant children are likely to be particularly vulnerable in a refugee context; UNHCR recommends that child soldiers should not be interned, but instead granted 'special protection and assistance measures'. There is, however, little in the way of guidelines on determining the civilian or military status and subsequent refugee status of former combatants, and separation and internment in a refugee context is fraught with logistical, operational and legal problems. Exclusion

36 See, for example, UNHCR (2001b); Norwegian Refugee Council (2004); Amnesty International (2006).

37 Key informant interview, 2006.

therefore frequently fails, particularly in situations of large-scale refugee flows.

3.5.6 When does refugee status cease?

As already noted, the 1951 Convention is based on the assumption that refugee status is a temporary condition which should cease when a refugee once again enjoys permanent national protection.[38] Cessation of refugee status is not automatically tied to repatriation: the refugee's status may change as a result of obtaining a new residence status or nationality in the first asylum state or another country, and a refugee's physical return to the country of origin does not necessarily imply that their refugee status should cease (for example, where refugees make short visits back to their home country).

There are three distinct situations in which the cessation clauses might be applied: where an asylum state applies a cessation clause to a recognised refugee; where an asylum state terminates protection for an entire group of refugees; and where UNHCR applies the cessation provisions of its Statute, usually to facilitate the conclusion of its role with respect to a particular nationality group (Fitzpatrick, Brotman and Brotman, 2001: 17). Financial cost, questionable practical impact and potential political controversy mean that asylum states rarely apply cessation clauses to individual refugees (*ibid.*: 2–5). When they are applied to individual cases, the cessation clauses appear to be used more frequently in decision-making during initial refugee status determination, with changes in a refugee's personal circumstances or changed political conditions in the country of origin used as a reason for denying refugee status (*ibid.*: 2).

Governments have occasionally sought to apply the 'ceased circumstances' cessation clauses to particular refugee groups as a means of encouraging or accelerating the return of refugees and/or to deter new arrivals, but not always with the agreement of UNHCR. In 1998, UNHCR advised the Dutch government not to apply the ceased circumstances clauses to Bosnian refugees because there was insufficient evidence of fundamental and durable change in Bosnia to warrant doing so (*ibid.*: 505–10). Likewise, warnings sent by Germany's Federal Office for Refugees and Migration to around 20,000 Iraqi refugees after November 2003 informing them that their refugee status might be revoked on the grounds that the political situation in Iraq had fundamentally changed were contrary to UNHCR advice that the ceased circumstances cessation clauses should not be applied to Iraqis granted refugee status during the previous regime (UNHCR, 2006c: 4).

More commonly, governments of asylum states use the concept of cessation in relation to particular refugee groups that they are reluctant to continue protecting, but without direct recourse to the formal application of the cessation clauses. This is evident in situations where refugees are protected under the international refugee instruments just as much as it is where they are protected under alternative 'temporary', 'complementary' or *ad hoc* protection provisions. When governments apply the concept on an *ad hoc* basis without direct reference to the international refugee instruments, the threshold of change to warrant effective cessation tends to be considerably lower than would apply to formal cessation proceedings under international refugee instruments. Thus, it is not uncommon for asylum states to terminate refugee status for whole groups of refugees as a means of justifying enforced return despite continuing volatility and lack of safety or effective protection for refugees in the country of origin. States are more likely to terminate refugee protection in this way if they are burdened with a very large refugee population that they consider a threat to national security and/or an unsustainable drain on national resources (see Box 5).

UNHCR has invoked cessation on a number of occasions as a means of formally terminating particular protection and assistance programmes and resolving the status of so-called 'residual caseload' refugees who remain in countries of asylum (Fitzpatrick and Bonoan, 2003: 499). In these situations, most commonly in connection with the settlement of a civil conflict, the so-called 'ceased circumstances' clauses apply (*ibid.*: 506). Many of the world's most complex and protracted refugee crises, however, are caused by equally complex and protracted conflicts that do not lend themselves to clear judgements as to the nature and durability of change. One of the main reasons for UNHCR not using the ceased circumstances cessation clauses more frequently is the difficulty of determining whether changes in particular countries of origin are sufficient. Between 1973 and 1999, UNHCR applied the ceased circumstances provisions under its mandate on only 21 occasions (Fitzpatrick and Bonoan, 2003: 501).[39]

3.5.7 Refugee return

The 1951 Convention does not directly address the issue of refugee return to the country of origin, and in the past UNHCR's involvement with refugees tended to come to an end once they had crossed back over the border. However, progressive expansions of UNHCR's mandate over the years to extend and strengthen its protection and assistance activities on behalf of returning refugees reflect the recognition that refugees' need for international protection may continue for some time after their return to their country of origin, and that it is only once their return is deemed to be durable that they might be considered as no longer 'of concern' to UNHCR.

38 UNHCR (1996: c. 2). The grounds for cessation of refugee status are detailed in Articles 1C(1) through to (6) of the 1951 Convention, and cover cessation of refugee status as a consequence of a refugee's own conduct (voluntary reavailment of national protection or country of origin nationality or voluntary re-establishment in the country of origin, or voluntary acquisition of a new nationality), and the so-called 'ceased circumstances' clauses, where the circumstances that caused a person's fear of persecution have come to an end.

39 Examples include Mozambique (1975), Guinea-Bissau (1975), Angola (1979), Hungary (1991), Chile (1994), Namibia (1995), South Africa (1995), Malawi (1996), Mozambique (1996) and Ethiopia (1999).

Box 5: *Ad hoc* cessation of refugee status and forced return

Perhaps the most graphic example of the *ad hoc* cessation of refugee status in recent history involved the forced return of Rwandan refugees from Tanzania in December 1996. Tanzania feared that the Rwandan Patriotic Front (RPF) would resort to military action to clear out the Rwandan refugee camps in western Tanzania, as it had already done in eastern Zaire. Tanzania accepted RPF assurances that it was prepared to receive the refugees, and that they would not be killed on their return to Rwanda, despite the fact that Tanzania had failed to separate suspected combatants and *genocidaires* from the wider refugee community. The Tanzanian government made it clear that it considered conditions in Rwanda to have improved to the point where Rwandan refugees no longer had a claim to refugee status, since the serious disturbances to public order that had compelled them to leave had ceased. The international community largely supported this view. UNHCR signed a Memorandum of Understanding with the Tanzanian government requiring all refugees to leave Tanzania by the end of December, but containing assurances that no force would be used.

Following the announcement of the deadline for them leave Tanzania, and probably fearing forced return to Rwanda, refugees started fleeing many of the camps in early December, and within days tens of thousands of refugees were heading towards Uganda and Kenya. As the mass movement of refugees increased, the Tanzanian army blockaded the area, closed the refugee camps and forced 200,000 refugees back towards the Rwandan border. On 14 December the refugees began to cross back into Rwanda. UNHCR had undertaken to provide financial and logistical assistance for the repatriation operation, and continued to do so even after it became apparent that force was being used. Little objection was raised by foreign governments. By the end of the operation, nearly half a million Rwandan refugees had been forced back into Rwanda. Many feared persecution or serious harm, and their forced return under these circumstances almost certainly amounted to *refoulement* under international refugee law. It also probably contravened the human rights-based prohibition on the mass expulsion of foreign nationals. The ensuing insurgency resulted in the deaths of several thousand civilians and further massive displacement within Rwanda (Whitaker, 2002; Borton and Eriksson, 2004: 76, Annex 4).

Refugee return should be voluntary, and should take place in conditions of safety and dignity.[40] The voluntary nature of return must not be assessed simply in terms of whether or not force is used to compel return, but also in terms of the circumstances in which refugees make decisions about their return to the country of origin. If their decision-making is affected by misleading or distorted information or propaganda, their return cannot be seen as voluntary (UNHCR, 1996: chapter 2). The voluntary nature of return is also undermined where host countries exert indirect pressure on refugees by depriving them of fundamental rights in the country of asylum. In this respect, there is a clear link between standards of treatment in the asylum country and involuntary return or *refoulement*.

UNHCR is responsible for promoting, facilitating and monitoring refugee repatriation. UNHCR's active promotion of voluntary repatriation where conditions allow (including substantially improved conditions in the country of origin and sufficient guarantees of returnees' safety and protection) is formally distinguished from the facilitation of return, usually where refugees want to return despite adverse political, security and other conditions that would preclude UNHCR from encouraging their repatriation. In most situations of large-scale refugee return, UNHCR will seek tripartite agreements with the country of asylum and the country of origin, which are designed to build confidence and secure protection and other commitments affecting the safety and success of refugees' return (UNHCR, 1996: chapter 3).

There is a risk that protecting and assisting returning refugees can privilege them relative to other groups. Non-discrimination is a key principle of international human rights law, and it should govern returnee protection. However, even where needs-based programming avoids privileging returning refugees, tensions may still arise between returning groups and resident populations, particularly where underlying political tensions related to a conflict were reflected in differentiated patterns of flight and return. Returning refugees will often not be the most vulnerable people in the areas that they are returning to – not only because, through having secured some degree of international protection, they would have been spared some of the harm that others suffered within the country of origin, but also because many of the

Box 6: Refugees' vulnerability following return

The durability of refugees' return and reintegration depends to a great extent on the quality of protection that they enjoy on their return to their country of origin. Returnees' protection needs are often more acute after their return than they were in the country of asylum. This was evident in East Timor, for example, after the mass exodus of refugees triggered by the popular consultation on autonomy in August 1999. Refugees returning from West Timor were viewed with suspicion by many among the wider East Timorese population: those with actual or alleged affiliations with the pro-integrationist militia risked intimidation, beatings, rape and murder. This anti-militia sentiment was manipulated to settle vendettas and personal grievances, which in turn made it difficult for UNHCR and other agencies to predict which returnees might be vulnerable to attack (Commission on Human Rights, 2000: 12).

40 As specified, for example, in Executive Committee Conclusions No. 65 (XLII), 1991; No. 68 (XLIII), 1992; No. 74 (XLV), 1994; No. 77 (XLVI), 1995; No. 85 (XLIX), 1998; No. 95 (LIV), 2003; and No. 101 (LV), 2004 (see UNHCR, 2005b).

most vulnerable people did not flee abroad because they were unable to do so. An evaluation of the European Commission Humanitarian Office (ECHO) programme in Angola identified the major vulnerable groups in the country following the 2002 ceasefire. In addition to 130,000 repatriated refugees, these included 3.5 million IDPs and 85,000 demobilised UNITA soldiers and their family members. Unaccompanied children, the elderly, widows, the disabled, street children, female- or child-headed households and poor populations in newly accessible areas were also identified as highly vulnerable (Borton et al., 2005: 102.).

Most large-scale repatriation programmes take place after difficult political settlements, and so there are usually intense political pressures bearing down on the process. In response to criticisms that UNHCR had abandoned its protection responsibilities through its involvement in the forced return of Rwandan refugees in 1996, the then High Commissioner stated: 'when refugee outflows and prolonged stay in asylum countries risk spreading conflict to neighbouring states, policies aimed at early repatriation can be considered as serving protection', and that this is what motivated UNHCR's policy of 'encouraging repatriation from Zaire and Tanzania to Rwanda, even though human rights concerns in Rwanda never disappeared'.[41] According to a 2004 Danida study of assistance to displaced people in Afghanistan, some donors sought to play down the economic and security problems faced by IDPs and returnees in order to support refugee return from Europe. This arguably compromised UNHCR's ability to analyse the situation objectively, and to fulfil its protection mandate as regards the safe, dignified and voluntary return of refugees. Pressure from donors to promote repatriation to Afghanistan also restricted any diplomatic support that UNHCR could draw on in its representations to Pakistan and Iran with regard to the heavy pressures placed on Afghans to return following the 2002 overthrow of the Taliban (Borton et al., 2005: 85 and 93; Turton and Marsden, 2004). One result of such a rapid and large-scale repatriation exercise was that a significant proportion of those refugees who returned to Afghanistan with UNHCR assistance did not remain there (Turton and Marsden, 2002: 1).

The experience of large-scale repatriation to Afghanistan illustrates that the notion of full and definitive reintegration in the country of origin as a 'durable solution' does not always match the social reality of returning refugee populations. For most of those repatriating to Afghanistan, the return process is determined to a large extent by a primary concern to maintain or secure livelihoods, and these, in turn, very often depend on families or communities maintaining transnational economic and other links in Pakistan or Iran and further afield. Thus, paradoxically, the so-called 'backflow' of returning refugees to Pakistan may have supported the sustainability and durability of refugee returns and Afghanistan's longer-term reconstruction (Turton and Marsden, 2002: 39). As noted by Nicholas Van Hear, '"transnationalism" is arguably a "solution" favoured by the displaced, since it is the practice often pursued by them in everyday life' (Van Hear, 2003: 14).

41 Remarks by Sadako Ogata at a Conference of the Carnegie Commission on the Prevention of Deadly Conflict, Geneva, 17 February 1997 (transcript, p. 4). Quoted in Whitaker (2002: 13).

3.6 Conclusion

The massive refugee displacements in the Balkans, the Great Lakes and elsewhere during the 1990s, and the serious protection failures that accompanied them, prompted a wide-ranging reassessment of the meaning and content of refugee protection within UNHCR and the wider humanitarian system. Whereas protection had previously been left to legal specialists focused on matters of legal status and due process in status determination procedures, 'effective refugee protection' has come to be viewed by UNHCR and other refugee agencies and advocates as a much broader issue, encompassing the comprehensive protection of refugees' fundamental human rights at all stages in the displacement 'cycle', including their physical protection from violence and other direct threats or harm.

The majority of governments have been moving in the opposite direction, however, chipping away at refugees' rights in their national legislation and policies to the point where, in practice, refugee protection is intended to apply to a progressively narrower range of people in flight, and is defined in increasingly minimalist terms to mean the absence of immediate danger, rather than an active or positive undertaking to guarantee refugees' rights. For many governments, the 'effective protection' of refugees may mean little more than the (temporary) avoidance of *refoulement*. Increasingly, asylum-seekers and refugees are kept in isolation or detention, prevented from becoming self-reliant and forced to remain dependent on international assistance or remittances. With progressive downgrading of refugees' rights and entitlements, and fluctuating or declining donor support for refugee care and assistance programmes in many parts of the world , UNHCR and other humanitarian actors are often forced to choose between providing insufficient protection and assistance to refugees, or offering no protection at all. High-profile and highly politicised refugee crises have typically distracted international attention and associated support from protracted refugee problems (Crisp and Slaughter, 2009: 6). Spending on long-term situations, the UNHCR has observed, 'is often characterized by what has been termed the "plastic sheeting syndrome": limited funds and waning donor commitment lead to stop-gap solutions, such as the provision of plastic sheeting instead of more durable shelter materials. Spending on short-term fixes, however, yields only fictitious savings … It can only ensure that such situations are perpetuated, not solved' (UNHCR, 2004: para. 12).

It is possible that pushing too hard for improved rights and conditions for refugees may risk their *refoulement* or the non-admission of newly arriving asylum-seekers (Crisp, 2003a: 28). Yet it is also clear that the denial of basic rights and the

failure to provide for even minimum standards in nutrition, health, shelter and security can make life so intolerable, unsustainable and insecure that people feel compelled to try to move on to other countries (legally or illegally) as asylum-seekers or undocumented migrants, or to return to their country of origin despite continuing threats to their lives and security there. Where formal refugee status has come to be associated with insecurity and the threat of forced return, many refugees may prefer not to apply for such status in the first place. And where access to refugee status is severely restricted by narrow interpretations of the refugee definition and other strict admissibility criteria, many will fall outside the scope of formal refugee protection mechanisms altogether.

Thus, greater numbers of those who manage to reach an asylum country will remain there without any legal status, or will move on to other countries as undocumented migrants without any effective national or international protection. Indeed, the particular status a refugee has in a country of asylum – whether recognised refugee status, alternative protected or residence status, or no legal status at all – is often contingent as much upon his or her particular coping strategies and the prevailing rules, procedures and definitions governing access to refugee protection in a given country, as it is on the objective strength of his or her claim to refugee status under international law. Different members of a single refugee family will often have different legal statuses despite having fled from the same circumstances at the same time and for the same reasons.[42] Meanwhile, the greater the proportion of refugees who enter or remain in host countries as undocumented migrants without recognised refugee status, the more pervasive the perception among host populations that many are undeserving of protection. This perception then increases domestic political pressure to further restrict the entry and rights of asylum-seekers and, in some cases, force their return to countries of transit or origin. This problem is exacerbated where, as is frequently the case, refugee and migrant populations are mixed.[43]

In this restrictive climate, it is often difficult to judge whether certain protection innovations, particularly those led by reluctant host governments, serve to enhance or undermine protection outcomes for refugees. The launch of a donor-led initiative in 2004 to strengthen the protection capacities of countries of first asylum was controversial for precisely this reason. Although it is unreasonable to argue against efforts to improve standards of protection for asylum-seekers and refugees in countries of first asylum, particularly in the poorer countries that continue to shoulder the greatest refugee protection burden, it appeared that a primary motivation for this initiative was Northern governments' desire to address their own asylum problems by introducing new measures to help contain refugee flows in regions of origin and to facilitate the return of asylum-seekers to countries of first asylum (on the basis of 'safe third country' provisions). Thus, to many observers, the initiative appeared to be part of a broader effort among Northern governments to shift, rather than share, the international burden of refugee protection.[44] This was reflected most graphically in initiatives by Australia and some European governments to develop new mechanisms and procedures for transferring asylum-seekers and the processing of their claims to third countries (UNHCR, 2006a: 38–39).

The widespread retreat of asylum governments from the core protection regime set out in international refugee treaties is similarly reflected in the frequent resort to alternative 'temporary' or 'complementary' protected status. Both represent potentially valuable protection tools, and have been viewed as generally positive by UNHCR. Temporary protection can provide a framework for the rapid and immediate protection of large numbers of people fleeing temporary violence or other serious disruption in their country of origin. Complementary protection can address the significant protection gaps left by the relatively narrow refugee definition contained in the 1951 Convention. However, everything depends on how, and in what spirit, these concepts are applied in practice. There is little doubt that both concepts have the potential to undermine international refugee protection if they are used by governments primarily as a way of avoiding their specific legal obligations towards refugees. Similarly, *prima facie* recognition of refugee status can be an extremely useful tool for rapidly granting protection to large refugee groups, but it does not necessarily enhance refugee protection where associated rights are very severely restricted and refugees, despite their status, remain highly vulnerable to attack and other risks to their lives, or are threatened with *refoulement*. In practice, the actual protection of people in flight may depend less on whether they are granted refugee status, and more on whether they actually enjoy basic human rights and effective protection whilst in the asylum country, regardless of their formal status.

In asylum countries within refugees' regions of origin, host governments' concern to minimise the impacts of refugee influxes and maximise the chances of refugee return is reflected in their frequent reluctance to allow refugee populations to relocate away from insecure border areas, particularly when donor funding and support are considered insufficient. Coupled with failures in separating combatants from refugee populations, this means that many refugees continue to be caught up in the conflicts and upheavals that caused their flight. As a consequence, they not only remain highly vulnerable to attack and other conflict-related risks, but are also much more likely to be viewed as a political liability and a security risk by the host country. This, in turn, further discourages the host society from offering refuge, and increases the possibility that refugees might be forcibly returned to their country of origin.

42 Interview, 13 April 2006.

43 As regards the acute problems for refugee protection posed by steep increases in 'mixed flows' of asylum-seekers and economic migrants transiting through North Africa, see ExCom (2006: 8); ExCom (2007: 8); and UNHCR (2007d: 315–17).

44 Interviews, 13 and 14 April 2006; see also Crisp (2003b).

A possible consequence of governments narrowing the scope and effectiveness of international refugee protection is that the focus of protection will shift progressively away from external asylum and towards in-country protection and assistance, increasing the tendency for humanitarian operations to be pulled more directly into dangerous and volatile situations of continuing conflict and political upheaval. To the extent that external protection remains an option, this appears to be viewed increasingly by governments as a temporary response to refugee flight,[45] with less and less emphasis being placed on seeking 'durable solutions' for refugee problems outside the country of origin. The failure to develop a workable notion of expanded international responsibility to provide in-country protection is reflected in the increasingly prevalent use of the 'internal flight alternative' concept, which rests instead on the possibility of at least partial *national* protection in the country of origin.

Whether relating to IDP protection or the internal flight alternative for refugees, and whether provided by international or national actors, in-country protection is often defined, in practice, in terms of the relative absence of immediate threats, rather than the comprehensive protection of rights. Whatever protection is actually available is contingent upon what the national government, local authorities or international actors are willing and able to provide in a particular place at a certain point in time. This will vary enormously from one situation to another, and will depend greatly on the political, strategic and economic importance attached to particular emergencies by the international community, ranging from low-key diplomacy to major peacekeeping operations and military interventions.

In situations deemed of least strategic importance, the only international protection available may be what humanitarian agencies can provide on the ground in particular localities. This of course raises the question of what constitutes 'protection' in the midst of conflict. Clearly, humanitarian presence or the delivery of humanitarian assistance do not in themselves equate to effective protection. The mere presence of UNHCR and other humanitarian agencies may, however, be taken by a reluctant asylum government as a sufficient guarantee of asylum-seekers' or returnees' safety or protection in their country of origin, irrespective of these agencies' actual capacity to ensure protection in practice. Whatever protection humanitarian agencies might be able to provide is unlikely to equate in any way with the level and quality of protection for refugees that is envisaged by the 1951 Convention and other international refugee instruments. While humanitarian agencies have become increasingly sensitive to gaps and failures in the protection of refugee populations, including returning refugees, the majority of humanitarian agencies remain primarily focused on assistance, rather than protection.

UNHCR's dominance of international refugee assistance – reinforced by the exclusion of refugee situations from the cluster approach – and the marginal role that many asylum governments play in supporting refugee populations is likely to hinder the development of more effective and strategic responses to refugees' needs, particularly in protracted refugee situations. As Crisp and Slaughter argue, protracted refugee situations should not be regarded as the 'fiefdom' of UNHCR, but as a shared responsibility amongst many actors: '[w]hen people flee from their own country, cross an international border and acquire the status of refugee … they do not cease to be of concern to other actors within and outside the UN – actors whose mandate and activities lie in areas other than humanitarian relief, such as socio-economic and community development, education and training, agriculture and micro-finance' (Crisp and Slaughter, 2009: 14).

With asylum governments keen to restrict their obligations towards asylum-seekers and refugees, it is entirely possible that international efforts to strengthen the national protection of IDPs, returnees and other vulnerable groups within countries of origin – while desperately needed – could lead to a higher incidence of border closures, summary returns of asylum-seekers and involuntary and/or unsafe refugee repatriations. Already, UNHCR has become a key player in a number of highly controversial refugee repatriation operations, begging the question whether the 'solution' sought is for the host and donor governments concerned, or for the refugees themselves. In the case of Rwandans in Tanzania and former Zaire, for instance, Ogata judged that the numbers were too great for the receiving countries and therefore 'from the outset it seemed obvious that return was the main solution' (Ogata, 2005, quoted in Harrell-Bond, 2006).

According to Harrell-Bond, UNHCR's mandate has been 'stretched beyond all recognition' as a result of measures to remain internationally 'relevant' at a time of dwindling donor support for external asylum as a solution to refugee problems. This is reflected in an exponential expansion in its humanitarian relief operations relative to its core refugee protection functions (Harrell-Bond, 2006). The potential trade-off between, on the one hand, the maintenance of external protection for refugees in largely reluctant asylum states, and, on the other, often inadequate internal protection for returnees, IDPs and other vulnerable groups within their own countries, has generated deep controversy around UNHCR's expanding role on behalf of IDPs. Those supporting UNHCR's lead responsibility for IDP protection, camp management and emergency shelter in the UN's 'cluster' approach have argued that UNHCR is not only 'predisposed' to helping the internally displaced, but that asylum countries might be more willing to maintain their asylum policies if more is done to protect the internally displaced, to reduce their need to seek asylum and to create conditions conducive to their return (UNHCR, 2006a: 167).

While broader reform of the UN's humanitarian operations and strengthened partnerships between UNHCR and other

45 Interview, 14 April 2006.

humanitarian, development and political actors is seen by some as an opportunity for UNHCR to refocus its activities on its core refugee protection mandate,[46] the institutional, political and operational pressures driving the continued expansion and consolidation of UNHCR as a broadened relief organisation remain immense. The six goals of the Agenda for Protection, adopted jointly by the UNHCR and governments in 2002 following 18 months of discussions within the Global Consultations on International Protection, clearly aim to reaffirm refugee protection as the agency's key priority, but also reflect a broadening conception of what is meant by, and entailed in, refugee protection. In addition to strengthening implementation of the 1951 Convention and 1967 Protocol, the Agenda addresses the protection of refugees within broader migration movements; burden-sharing and capacity-building to improve the reception and protection of refugees; addressing security-related concerns; seeking durable solutions; and meeting the protection needs of refugee women and children (UNHCR, 2003b). Since UNHCR's activities and operations depend crucially on the continuing support of its donors and the cooperation of refugee-hosting governments and their commitment to the principles of refugee protection, the success of this agenda will depend most directly on the pressures and priorities brought to bear on the international refugee regime by leading donors and key host governments.

Many of the protection problems facing refugees and asylum-seekers, including *refoulement*, the closure of borders, interception at sea, detention and restricted rights, are historically familiar and long-standing problems (UNHCR, 2006a: 48). At the same time, millions of refugees continue to find protection under the provisions of the international refugee regime. But, if new restrictions at borders and in status determination procedures in asylum countries mean that fewer and fewer of the world's refugees are able to access refugee status, if reluctant host governments continue to erode the protection that people enjoy as refugees, and if, as a consequence, refugees are discouraged from coming forward because refugee status is no longer associated with real protection or the enjoyment of basic human rights, the refugee concept will lose its distinctive meaning within the international human rights and humanitarian systems. This point has not been reached yet, but if current trends continue it cannot be ruled out in the future.

46 See, for example, Goodwin-Gill (2006).

Chapter 4
The emergent status of 'internally displaced person'

Sarah Collinson

4.1 Introduction

This chapter considers the implications of recognising internally displaced persons (IDPs) as a distinct category of concern. In particular, it explores the protection implications for IDPs of national governments' policies and responsibilities; international legal, political and military action to protect civilians; and prevailing humanitarian policy and operational practice. While the plight of refugees is recognised in a highly evolved international legal and institutional regime, IDPs are still in the process of being defined as a special category of concern. Nevertheless, IDP assistance and protection is at the centre of many recent reforms in the international humanitarian system, and IDPs as a group are now arguably more prominent than refugees on the international humanitarian and political 'map' (Slim, 2004). This chapter discusses this development and its relevance for protection. The key question is simply this: to what extent can a person's identification as internally displaced improve their effective protection?

Although international humanitarian assistance to the internally displaced dates back at least four decades, it has been extremely inconsistent and sporadic, usually part of more general humanitarian operations on behalf of conflict-affected populations and (returning) refugees. Only recently, in the context of the massive and apparently escalating levels of internal displacement witnessed since the early 1990s, have the internally displaced been identified as a distinct category of vulnerable people with distinct needs, who might warrant specific protection and assistance efforts from national and international actors.

Growing international recognition, however, does not equate with a distinct international legal status. In legal terms, IDPs remain civilians, and in countries where displacement results from violent conflict, governance and development failures and/or natural disaster, the internally displaced are likely to represent only one among many vulnerable groups in society. The very fact that the internally displaced remain as citizens within their country means that their own government, rather than the international community, is primarily responsible for their protection and assistance alongside other citizens, including other war-affected civilians. Despite growing international consensus on the need to address IDPs' needs more effectively, many questions surround the 'IDP' label in terms of its significance for determining protection and assistance efforts and outcomes on the ground. Contention centres particularly on the extent to which IDPs as a group necessarily require special treatment as a consequence of their displacement as compared to other people; the extent to which, in practical terms, they can be identified and targeted for specific protection and assistance measures; who should undertake these efforts and how; and whether the prioritisation of IDP protection – whether successful or not – might weaken the institution of asylum for refugees by encouraging the containment of displaced populations within countries of origin.

The first section of this chapter reviews the emergence of the internally displaced as a category of people in need. Internal flight represents an essential protection or survival strategy for many civilians affected by conflict or human rights abuse, but displacement is often itself a cause of extreme vulnerability. A number of specific needs and vulnerabilities are commonly associated with internal displacement, including dislocation from home communities, land and livelihoods, a heightened risk of violence and human rights abuse (often linked to the original cause of displacement), marginalisation from state services and a lack of 'durable solutions' resulting in protracted displacement. Highly complex and varied causes and patterns of internal displacement, however, do not mean that all displaced persons are equally vulnerable, or that the displaced are necessarily more vulnerable than non-displaced groups. This poses considerable challenges for any effort to identify and/or target IDPs with the assistance or protection they may need.

The second section explores why the national protection that should be provided by IDPs' own governments – based on their general obligations defined by international human rights law and, in cases of armed conflict, international humanitarian law – is often absent or ineffective in practice, not least because people are often displaced by the very government that is supposed to protect them. Even in countries whose governments appear committed to helping and protecting their displaced populations, lack of resources or political will, lack of government control over non-state actors or competing interests frequently result in weak protection regimes and poor protection and assistance outcomes on the ground.

The third section considers the role of the international community in protecting and assisting IDPs. Changing conceptions of state sovereignty and the strengthening international human rights regime have contributed to an

increased recognition of the international community's 'collective and complementary responsibility' in situations where governments are unable or unwilling to protect their own citizens (Feller, 2006: 11). International military intervention has become much more common since the early 1990s; although rarely for the purpose specifically of protecting IDPs, peacekeeping and peacemaking operations are increasingly called upon to protect civilian populations, including the displaced. The drive for a specific status for IDPs originated at the international level among international NGOs and the UN (Bagshaw, 1999?), and has crystallised in a nascent international normative framework for IDPs in the form of the UN's 1998 *Guiding Principles on Internal Displacement*, based on existing protection norms and provisions contained in international human rights, humanitarian and refugee law. Yet the record of international political, military and legal action on behalf of displaced populations is at best mixed. Progress in establishing an international normative framework for IDPs has not translated into the consistent observance of these standards by governments or by insurgent groups.

Section 4 considers the implications of these changes for humanitarian actors. Where humanitarian agencies are operating in the midst of violence and upheaval, their activities are frequently jeopardised by poor security and a poor protection environment, and risk becoming an inadequate substitute for appropriate protection responses from national and international political and military actors. Working in situations of continuing and sometimes extreme violence and human rights abuse, humanitarian actors face difficult dilemmas. Should they cooperate with political and military actors? What is the right balance between assistance-oriented programming and protection-oriented or rights-based activities? Will attention to IDPs as a group enhance their protection, and is it even possible to ensure protection for IDPs and others at risk in their own countries?

The chapter ends by assessing the overall relevance and impact of the IDP category for the protection of people displaced by conflict or persecution.

4.2 'Internally Displaced Persons' as a distinct category

The history of conflict and persecution-related internal displacement is certainly as long as the history of the wars and human rights abuses that cause it. Yet it was not until the 1980s that the issue of internal displacement began to attract serious international attention. This was linked in part to the expansion of the international humanitarian system and the consequent expansion in humanitarian agencies' involvement with IDPs – as, for example, in Sudan in the early 1970s, where UNHCR extended its refugee resettlement assistance to returning IDPs. An increase in the number of civil wars internationally and the associated devastation among civilian populations led to an escalation in the numbers of people internally displaced, and expanding humanitarian engagement in these conflicts led to greater international awareness of their plight. Estimates of the global population of IDPs increased exponentially, from 1.2 million in 11 countries in 1982 to 25 million in 40 countries by the end of the 1990s (Cohen, 2006a: 89).

The massive population displacements and associated refugee flows caused by conflict in Iraq, the former Yugoslavia and Rwanda in the early 1990s led to forced displacement being viewed increasingly as an issue of international peace and security within the international community. Preoccupation in the West with containing refugee movements, and the associated international 'humanitarian' interventions and expanded humanitarian presence in countries experiencing large-scale displacement, drove a growing interest in protecting people within their own countries – as reflected in the (disastrous) creation of so-called 'safe havens' for displaced and other civilian populations in the midst of ongoing conflicts. More broadly, changing conceptions of state sovereignty following the end of the Cold War meant that acceptance was growing for the idea that the international community had an interest in the internal affairs of states, and a responsibility to ensure that civilians were properly protected by their governments. From the early 1990s, the UN Security Council started to demand international access to displaced and other populations affected by conflict and massive human rights abuse, sometimes authorising the use of force to ensure the delivery of relief.

Concern to improve national and international responses to crises of internal displacement led in 1992 to the appointment by the UN Secretary-General of a Representative on Internally Displaced Persons, and the development of the UN's *Guiding Principles on Internal Displacement* in 1998. As discussed further below, the *Guiding Principles* set out the key rights of IDPs and the responsibilities of their governments and other actors prior to, during and following displacement (Martin et al., 2005: 48). The Principles do not contain a legal definition of IDPs, since the aim was not to create a distinct legal category analogous to the international legal definition of a refugee, but rather to provide a 'descriptive identification' of people who are internally displaced, and to clarify the legal protection that they should enjoy on the basis of existing international human rights and humanitarian law in particular (Phuong, 2004: 57). The *Guiding Principles* describe the internally displaced as:

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

The key criteria defining IDPs are that they are subject to involuntary movement – i.e. an element of coercion exists – and that they remain within national borders (Cohen, 2006a: 92).

Thus, the description excludes people moving 'voluntarily', for example as a consequence of economic destitution. Beyond these two key features, a range of possible causes of displacement are listed, and – as indicated by the words 'in particular' – the list is not intended to be exhaustive (Mooney, 2005: 11). This reflects the fact that the drafters were not bound by the limitations that they would have faced in drafting a legal status, and so were able to take an ambitious approach, aiming to address all aspects of IDP protection in a very broad range of potential displacement situations (Phuong, 2004: 57).

Like the broadened refugee definitions developed by the OAU and OAS (discussed in Chapter 3), the IDP description includes not only those fleeing targeted persecution, but also those uprooted by the indiscriminate effects of conflict, violence and human rights abuse. Including as it does those displaced by natural or human-made disasters, the description also extends to people who would not qualify as refugees if they crossed a border, even under the broadened regional refugee definitions. Although not specifically mentioned in the description, the content of the *Principles* indicates that people uprooted by development projects are also to be included. However, while the displacement caused by development projects is thought to be on a far greater scale globally, and the displacements caused by natural disasters often gain much higher media profile, the focus of international concern with IDP protection remains centred on those uprooted by conflict and human rights violations (Mooney, 2005: 12).

4.2.1 The causes and dynamics of conflict-related displacement and the resulting vulnerability of IDPs

As with refugees, violence remains a primary cause of internal displacement. Often, people are deliberately forced to move by hostile authorities – sometimes by the state, sometimes by non-state actors. This is frequently a feature of ethnic or communal conflicts and government-led counter-insurgency campaigns. Governments or occupation forces in at least 17 countries were involved in deliberately displacing people during the course of 2006 (IDMC, 2007: 17).[47] The aim is often to move people forcibly in order to gain control over natural resources or to facilitate a military campaign. Sometimes, the (permanent) displacement of populations constitutes an end in itself, for example as part of a campaign of 'ethnic cleansing'. The associated human rights abuses often include scorched-earth tactics, systematic sexual violence and abuse, the forcible recruitment of fighters and slave workers, looting, extortion, disappearances, massacres and arbitrary killings.

People's ways of coping with conflict or persecution depend upon a broad range of factors, including location, security conditions, the strength and nature of local governance and social networks, and access to roads, markets and other assets and institutions. Where and how people move is also constrained by the human, financial, social and other resources at their disposal. This is reflected in highly varied displacement patterns (Collinson, 2003: 5). While some individuals or households may have the resources to flee to another country, many will only be able to move a short distance, and many others will not have the resources to flee at all. Often, those compelled to move will try to remain as close as possible to their place of origin in an attempt to maintain a livelihood or protect property. In northern Uganda, for example, there have been high rates of movement between internal displacement camps and 'semi-settled' villages as people have tried to balance security risks with access to essential assets (Stites, 2006: 11). Sometimes families or households will intentionally separate, with some members seeking asylum abroad while others move to another part of the country, perhaps leaving some of the household (often the elderly) at home, as has been common in Sri Lanka, Nepal, Afghanistan and Somalia.

Whether they have fled or been forcibly displaced, IDPs' movement often results in exposure to new and sometimes extreme risks and vulnerabilities. Whatever the cause of their displacement, IDPs are separated, sometimes at very short notice, from their original living environment and any associated security, community support and livelihoods (ICRC, 2006: 3). Displacement frequently results in the separation of families, increased exposure to sexual and gender-based violence and sexual exploitation (particularly affecting women and children), forcible military recruitment, social and economic marginalisation or destitution, extreme stigmatisation and exclusion from health, education and other state services, homelessness, loss of land and other property, and restrictions on freedom of movement. Because IDPs are often moving or remain within areas suffering continuing conflict and crisis, they are extremely vulnerable to physical attack and other forms of violence and human rights abuse. An OCHA/ICVA mission to Central Katanga in the DRC in 2006, for instance, witnessed 'traumatised displaced populations', many of whom had suffered horrific atrocities and were now being victimised by the Congolese army, with reports of rapes, beatings, abductions, forced labour, theft and extortion (OCHA/ICVA mission to Central Katanga, DRC, 15–18 March 2006). As recently witnessed in Sri Lanka and Pakistan, the presence of combatants frequently leads to the militarisation of displaced populations and an exacerbation of the violence and abuses affecting IDPs, including their heightened exposure to insurgency or counter-insurgency operations – for instance, direct military attack or siege tactics by government forces and insurgents effectively holding displaced and other civilian populations hostage and using them as a 'human shield'.

Where displacement of particular groups has been intentionally caused or sanctioned by a government or other actors in control of a particular area, IDPs are likely to remain particularly unprotected by the authorities, perhaps even directly threatened, as compared to much of the wider civilian

47 The 17 are: Burma, the Central African Republic, Chad, Colombia, Côte d'Ivoire, the DRC, Iraq, Lebanon, Kenya, Pakistan, the Palestinian Territories, the Philippines, Senegal, Sri Lanka, Sudan (Darfur), Uganda (Karamoja) and Zimbabwe.

population. Fearing further persecution or abuse, people may try to remain in hiding after being displaced. For example, in Burma and Papua, where IDPs receive little if any government protection, people have sought refuge in the jungle, with little or no access to food, medical care or other basic services (IDMC, 2006: 65). Fear of ill-treatment, retribution or persecution by the government and government-aligned paramilitary groups among displaced Tamils in the north of Sri Lanka contributed to the de facto entrapment of Tamil civilians in areas held by the Liberation Tigers of Tamil Eelam (LTTE) during 2008 and early 2009. People displaced from the north are now detained in military-controlled internment camps with little effective protection from direct threats to their physical safety and other fundamental rights. Even where IDPs can access relief from the government or humanitarian agencies, overcrowded and unsanitary conditions and inadequate supplies of food, water and shelter in camps and other displacement sites often leave populations exposed to extremely high rates of water-borne and other contagious diseases and malnutrition.

4.2.2 Difficulties in identifying 'IDPs' in practice

The principal intention behind the development of a commonly agreed description of IDPs has been to improve their protection. Once conceptualised as a particular group, the application of the description and *Principles* depends on the identification of the internally displaced on the ground. In practice, this is fraught with problems.

Part of the difficulty in determining who is and who is not an IDP stems from the extreme confusion often associated with the outbreak of violence or the sudden onset of disaster, when population movements may be difficult to trace and many displaced and other civilian communities are difficult to access (Rasmussen, 2006: 16). War, violence and associated social and political upheaval and economic crises typically result in complex patterns of movement, in which the distinction between displaced and non-displaced is often difficult to determine, and their respective vulnerability and need for assistance hard to gauge. 'Displacement' can mean anything from overnight local refuge to semi-permanent relocation. Many of those forcibly displaced are dispersed amongst the local population, often in towns and cities, and may be difficult to distinguish from other migrants.

In practice, a multiplicity of factors and motivations affects the circumstances and dynamics of people's actual movement, and people's status is often not fixed. For instance, initial involuntary displacement may be followed by more voluntary movement as people seek out new livelihoods and other opportunities, sometimes rejecting the chance to return to their place of origin even when conditions would allow them to do so. Indeed, in some situations – such as Peru and Colombia – the stigma and, at times, danger attached to the IDP label, due to its perceived association with poverty, destitution and connections with the armed conflict, means that many people choose not to identify themselves as displaced, particularly if they are eager to become socially mobile or have previous urban links and experience. IDP organisations in Peru have been difficult to maintain because many displaced people migrate on to a variety of destinations within the country in search of employment (Stepputat and Nyberg Sorensen, 2002: 37; Weiss Fagen et al., 2005). In this context, it is important to remember that displacement per se may not represent the most significant determinant of people's identity or vulnerability, since religion, ethnicity, gender, age, occupation or other aspects of identity may be equally or more significant in determining people's circumstances and the way they are treated (Refslund Sorensen, 2001: 6).

Although the IDP description in the *Guiding Principles* captures the general breadth and diversity of causes of displacement, it does not capture the complexity and multiplicity of factors behind people's movement. By tending to treat displacement as a (temporary) deviation from the 'norm' of settled residence, for example, the IDP category fails to take sufficient account of the extent to which mobility typically forms part of people's livelihood and coping strategies before, during and after violent conflicts (Stepputat and Nyberg Sorensen, 2002: 36; Collinson, 2009). In many crisis situations, compulsion may be difficult to distinguish from choice in the dynamics of people's movement as they constantly adapt their livelihood strategies to changing and sometimes highly volatile security and economic conditions. In Somalia, Narbeth and McLean report that the IDP label 'lacks cohesion and is plagued with difficulties, not least because of the complex and dynamic patterns of population movement within the country'; in reality, IDPs are often 'indistinguishable from other groups, such as the urban poor' (Narbeth and McLean, 2003: 9). Similarly, in northern Uganda, Stites reports that much population movement is essentially voluntary, and represents an important part of adaptive livelihood strategies aimed at balancing livelihood objectives with security (Stites, 2006: 11).

The identification of IDPs is arguably most important where there is a risk that combatants are present within the displaced population. But just as IDPs may at times be difficult to distinguish from other vulnerable civilian groups, so it may not always be possible to distinguish clearly between civilian IDPs and combatants, particularly in situations where the entire society has been militarised as a consequence of the conflict and where there are high rates of forced recruitment. This is a particular case of the more general problem of distinguishing combatants from civilians discussed in Chapter 2. The logistical and security challenges associated with the identification, demobilisation and reintegration of combatants among both refugee and internally displaced populations are enormous, hampered often by governments' lack of adequate military, financial and other resources or lack of control over areas where IDPs are located. As has been apparent in Sri Lanka, questionable will on the part of the government to

expedite swift and effective screening may also play a part where the authorities distrust or are hostile to a particular displaced population and lack incentives to take the practical measures needed to restore free movement and other fundamental rights to the populations affected.

The question of when displacement ends, or the point at which people are no longer identified as IDPs, is also complex, particularly in situations of protracted displacement (Rasmusson, 2006: 16). Unlike refugee status, internal displacement is a *de facto* situation and does not confer an international legal status. Thus, from an international legal perspective there is no need to formally declare the end of displacement, and in situations of complex displacement and mobility doing so may also be impractical (Bettochi and Freitas, 2003: 13). As argued by Walter Kälin: 'the factual situation of displacement in most cases changes and ends gradually and not abruptly' and 'the specific needs of IDPs change gradually over time'; hence, 'it is not possible, and would be wrong to try, to define cessation clauses analogous to Article 1C of the Refugee Convention that would fix a specific moment when displacement is considered to have ended' (Kälin, 2003: 16). Nonetheless, just as in situations of refugee return, an ending or 'solution' to internal displacement is often sought by national authorities or international actors, often in the context of highly politicised peace and reconstruction processes in which the designation of IDPs as 'no longer displaced' may represent a significant and sensitive political issue. In Rwanda, for example, controversy over the status of former IDPs resettled to new villages after the closure of displacement camps at the end of the 1990s reflected political pressure to designate all former IDPs as permanently resettled, irrespective of the nature or circumstances of their resettlement (Zeender, 2003: 30). In Sierra Leone, the government has been keen to discourage prolonged displacement and reliance on humanitarian aid when areas of return have been declared safe, so there has been little if any assistance available for 'residual' IDPs, and those not wishing to return are no longer considered to be IDPs by the government (McGoldrick, 2003: 31).

The loss or withdrawal of the IDP 'label' can be arbitrary, as in the case of the IDP camp 'Aero' in Bunia, DRC, where in 2005 the IDP status of the camp's population effectively ended when the managing NGO decided to dismantle the camp – in part because it had established that over half the camp's residents originated from Bunia city itself (Atlas Logistique, 2005). But in many situations, the ending of IDP status is of great political significance. Where displacement involves particular ethnic or other groups, assisting IDPs to settle in the place where they have been displaced risks consolidating a process of 'ethnic cleansing'; and yet, to the extent that IDPs, as citizens, may wish to exercise their right to free movement and choose not to return to their place of origin, the direct application to internal displacement situations of the refugee-related notion of 'durable solutions', with an emphasis on return, may be problematic (UNHCR, 2006d: 12). In Sierra Leone, where the government has been anxious to bring an end to the country's displacement crisis, MSF has complained that the IDP return process 'more closely resemble[d] eviction than resettlement ... due to a lack of respect for the basic rights of the people to be able to choose their fate, and to be treated with dignity at each stage of their return' (MSF, 2002: 2; quoted in McGoldrick, 2003: 31). Consequently, many returning IDPs, who were no longer designated as displaced, were at risk of becoming displaced once again.

In other situations, neither the return nor the local integration of particular displaced communities has suited government political interests or military strategies, and IDP status has become, effectively, a barrier to any kind of sustainable solution. In Sri Lanka, the vast majority of the 63,000 'old caseload' Northern Muslim IDPs living in Puttalam district, who were originally expelled by the LTTE from Northern districts in 1990, still languish in one of 141 government-sanctioned 'welfare centres', excluded from the resident host population, occupying marginal land, many lacking adequate shelter and sanitation and other basic infrastructure, and suffering overcrowding, little access to livelihood or income-generation opportunities, and little or no access to safe drinking water. In this context, as in others, it is not clear when the vulnerabilities caused by displacement, such as the absence of livelihood opportunities, cease to be a 'humanitarian' concern (Collinson, Buchanan-Smith and Elhawary, 2009).

Ultimately, many of the problems and debates around the IDP label derive from a lack of appreciation of the distinction between categorisation as an indicator of vulnerability and categorisation as a targeting tool (Borton et al., 2005: 56). Recognition of the IDP category and the particular vulnerabilities likely to be associated with it should enable national authorities and other actors to address IDPs' needs and provide for their protection, along with those of other vulnerable groups, such as women, children, minorities and the landless poor. Of course, many IDPs will fall into more than one of these categories. All should benefit from equal protection of and access to their human rights and, where it applies, all should be equally protected by international humanitarian law. Leaving aside the practical problems associated with identifying IDPs and determining the ending of displacement in practice, a key question remains whether recognition of the vulnerability of IDPs as a group translates into improved access to protection and enjoyment of human rights on the basis of the measures and actions taken by national authorities, the international community and humanitarian actors, and on the basis of existing international human rights and humanitarian law.

4.3 National protection and national protection failures

As defined by the *Guiding Principles*, 'protection' is about guaranteeing rights. While local communities – perhaps

families and friends – may bear the most immediate and often the greatest burden of providing some level of safety and security for IDPs, and of helping them with their most urgent material needs, ad hoc shelter and assistance within the community does not amount to protection. IDPs' protection depends, in the first instance, on whether they can turn to, or rely on, the state to ensure that their human rights are respected. First and foremost, responsibility for assisting and protecting IDPs lies with the national authorities.

At the formal level, there have been substantial developments over the past decade. Under international human rights law, and according to the concept of 'sovereignty as responsibility' which gained ground within the United Nations during the 1990s, states have a clear obligation to respect, protect and fulfil the human rights of their citizens and of any other persons in their territory or under their jurisdiction (IASC, 2006: 11). A 2006 *Framework for National Responsibility* drafted by the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons suggests a number of key steps to help states discharge their responsibility for the protection and assistance of IDPs, including measures to prevent or mitigate displacement, the creation of a national legal framework for upholding the rights of IDPs, developing a national policy on IDPs and supporting lasting solutions for the displaced; further guidance for developing national laws and policies is provided in a 2008 *Manual for Law and Policymakers* (Brookings Institution, 2008). In addition, the *Framework* emphasises the importance of cooperation with the international community when national capacity is insufficient to address the needs of the displaced (Representative of the Secretary-General, 2006: 6).

A number of states affected by internal displacement[48] have introduced laws or policies aimed at improving the protection of their displaced populations, many basing their legislation or policy provisions explicitly on the *Guiding Principles* (Kälin, 2006: 5), either in their entirety, or adapted to address specific national circumstances (e.g. India's National Policy on Resettlement and Rehabilitation for Project Affected Families and *Angola's Norms on the Resettlement of the Internally Displaced Populations*). Iraq, Georgia, Peru and Uganda have adopted comprehensive legal or policy frameworks for IDP protection, restating IDPs' rights and the various actions to be taken by responsible parties at the various stages of displacement (IDMC, 2009: 28). Others have introduced laws or policies to address a specific right of IDPs (e.g. Turkey's *Law on the Compensation of Damages that Occurred due to Terror and the Fight Against Terrorism* and the United States' *Hurricane Education Recovery Act*) (Wyndham, 2006: 7–8, 11). Colombia's *Law 387*, adopted prior to the *Guiding Principles*, represents one of the most comprehensive pieces of national IDP legislation to date, addressing all stages of displacement from prevention through to protection during displacement and durable solutions (*ibid.*: 8). Ethiopia and Eritrea have laws and policies that address the needs of IDPs along with other vulnerable populations (Weiss et al., 2005: 66–68).

Passing legislation and developing policies does not necessarily carry through to implementation, however. Indeed, no comprehensive empirical study has yet documented whether these new laws and policies have, in fact, improved the protection of IDPs (*ibid.*: 65). According to the Geneva-based Internal Displacement Monitoring Centre (IDMC), the majority of countries affected by internal displacement do not have specific laws or policies guiding national responses, and among those that do, only a handful appear to be making a genuine effort to implement them (IDMC, 2006: 17; IDMC, 2007: 13). In both Angola and Colombia, for example, there remain significant gaps between national laws and their implementation (see, for example, Carvalho, 2003; Inter-Agency Standing Committee, 2006b). Meanwhile, low awareness of the *Guiding Principles* among national authorities, even in countries officially committed to them, reduces their influence on the ground. A 2005 review of assistance to IDPs, for example, reports that Afghanistan's minister responsible for IDPs was not familiar with the *Principles*, despite the government's stated commitment to them in its IDP National Operation Plan (Borton et al., 2005: 81).

More significantly, internal displacement is itself a 'symptom of state dysfunction' to the extent that, where it occurs – particularly where it results from conflict or human rights violations – it is the result and manifestation of the state's failure to adequately protect its citizens (Cohen and Deng, 1998a, quoted in Phuong, 2004: 209). State institutions may be weak and lack capacity, or the overall governance structure may undermine national action on behalf of displaced populations. In Sri Lanka, for example, the potential responsiveness of particular parts or levels of the civilian government to IDP needs has been undermined by the stance of the military and by the dispersal of policy formulation and implementation across numerous government departments (Martin et al., 2005: 18). Georgia has a progressive legal framework setting out the status and rights of IDPs, and yet lack of central government resources and weak control outside the capital, a crippled economy, poor security in many areas and a lack of jobs and other opportunities has meant that, in reality, little progress has been made towards improving IDP protection and assistance (*ibid.*: 16–17).

In many countries, the same conflicts that have caused displacement have also caused the wholesale destruction of state institutions, critically weakening any state capacity to provide meaningful protection or assistance. A 2006 inter-agency mission report from Liberia noted, for instance, that Lofa County, which had received up to 40% of IDP returns, had little in the way of functioning government administration, police or basic services, such as health, justice and education (OCHA Inter-Agency Internal Displacement Division, 2006). In Somalia, the protection of IDPs has been critically compromised by the absence of functioning state institutions

48 Azerbaijan, Bosnia, Croatia, Cyprus, Georgia, Iraq, Liberia, Nepal, Peru, Russia, Serbia, Kosovo, Turkey and Uganda (IDMC, 2009: 28).

and state authority. Conversely, in countries with comparatively strong state structures, the protection and assistance of IDPs has often been impeded by the government's reluctance to address the humanitarian crisis and allocate the necessary resources (IDMC, 2006), or by competing military or political interests. In Uganda, a national IDP policy introduced in 2004 was very slow to be implemented, and lack of funds dedicated to implementation remains a major problem there (IDMC, 2009: 29). Uganda's IDP camps have long suffered from sporadic and inadequate government services, high levels of violence and abuse, and the absence of the rule of law or access to justice (Brown, 2006: 2). In Angola, the end of the civil war in 2002 led to a major shift in focus away from IDP protection and resettlement and towards the demobilisation and resettlement of ex-combatants and their families (Carvalho, 2003). In Indonesia, the government has been active in providing assistance to IDPs in Aceh, but restricted this assistance to those inside IDP camps, where they could be more easily monitored and controlled (Borton et al., 2005: 67).

Poor standards of governance, transparency and accountability at both national and provincial levels frequently undermine any role that the state might play in protecting IDPs and other vulnerable groups. In Angola, for example, the government has failed to ensure that IDPs are returning to conditions stipulated by the country's own IDP legislation (Borton et al., 2005: 80; citing Danida, 2004: 38). Poor governance and control of the military, in particular, often leaves displaced and other civilian populations vulnerable to violence and abuse by government soldiers. In the DRC, tens of thousands of unpaid soldiers extract their salaries and 'benefits' from civilians, often through physical assault, armed robbery, rape and murder (Rackley, 2005: 33; Refugees International, 2008). During the height of the LRA insurgency in Northern Uganda, displaced populations were frequently subjected to human rights abuses by pro-government forces (OCHA Inter-Agency Internal Displacement Division, 2003).

Governments themselves may be responsible for or complicit in the displacement, and may remain hostile to the displaced population and indifferent to its protection needs. In Colombia, for instance, paramilitary forces, organised originally by the national army as well as by private landowners and drug cartels, have been responsible for the majority of displacement in the country (Weiss Fagen et al., 2005: 77). Policies presented as 'protection' strategies have sometimes directly jeopardised IDPs' rights and security, as witnessed in the case of Burundi's *regroupement* policy in the late 1990s. Similarly, in Uganda in the 1990s the national army forced almost the entire population of Northern Uganda off their land and into IDP camps (so-called 'protected villages') in its campaign to drive out the LRA (Paul, 2006: 5). Governments may also block or restrict access for humanitarian agencies and obstruct other forms of international involvement, often amidst international condemnation of the government's treatment of IDPs and other civilians and failure to respect international humanitarian and human rights law. In recent years, for example, the governments of Sri Lanka, Sudan, Colombia and Burma have all imposed tight restrictions and controls on the operations of humanitarian agencies and have limited or blocked humanitarian access to areas experiencing major displacement crises. As witnessed in Sierra Leone during the 1990s, and more recently in Sri Lanka, where people are displaced in areas controlled or occupied by insurgent forces, government authorities may not consider it in their interests to provide assistance or allow access by international agencies, since to do so is seen as providing indirect support to the insurgents. Similarly, non-state actors opposed to the government may take the same position and try to prevent assistance to IDPs who are thought to support the government (Phuong, 2004: 211).

In sum, two fundamental paradoxes undermine the principle of state responsibility for IDP protection. First, state authorities are often themselves behind the displacement in the first place. Second, the crisis that caused the displacement may have disabled the state to point that it is unable to provide any effective protection for the displaced and other vulnerable civilians. According to the concept of 'sovereignty as responsibility', when national authorities are unable or unwilling to protect their citizens, 'the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations' (UN General Assembly 2005: para. 135; quoted in Cohen, 2006a: 91). In the next section we consider the extent to which this responsibility is reflected in practice.

4.4 The role of the international community in protecting and assisting IDPs

The past two decades have seen an unprecedented willingness within the international community to intervene in situations where governments have failed in their responsibilities towards civilian populations – in Sudan, Bosnia, Somalia, Haiti, Iraq, Kosovo, Rwanda, Sierra Leone, East Timor, Afghanistan and the DRC, to name only a few. The form of intervention has ranged from limited humanitarian relief through to major military operations. Yet the international community's responses have remained grossly inconsistent, with displacement crises such as Afghanistan subject to major international intervention, while others, such as Zimbabwe, all but ignored.

To some extent, this inconsistency reflects the lack of consensus around the concept of sovereignty as responsibility (including the more narrowly-focused RtoP concept in cases of genocide, crimes against humanity, ethnic cleansing and war crimes): many governments, including China and India, have not accepted that the international community has any right to interfere in the internal affairs of states on the basis of humanitarian or human rights concerns. Suspicion that

international 'humanitarian' action or intervention will simply serve as cover for the pursuit of political and military interests by the most powerful Western states has also weakened support for the concept at the global level. Threats to international peace and security – not the right of humanitarian intervention or the 'duty to interfere' – remain the principal international legal basis justifying humanitarian intervention. And while the notion of 'threat' has undoubtedly been extended to include mass population displacement, it remains highly questionable whether *internal* displacement crises – as opposed to mass refugee flows – are often likely to reach the threshold of perceived international threat (Phuong, 2004: 220–23). Meanwhile, the drain on military and aid resources imposed by the campaigns in Iraq and Afghanistan, and the problems besetting other (often far less well-resourced) peacekeeping operations, sow more doubt about the future willingness of the international community to intervene for humanitarian or human rights reasons. Nonetheless, even if inconsistent and at times ineffective, there remains an important role for international peacekeeping operations in the protection of displaced populations. Beyond military action, broader international efforts on behalf of IDPs – including diplomatic engagement, peace-building, development and human rights initiatives – can play a significant role in supporting national protection, tackling the causes of displacement and promoting potential solutions. With the outcome of such efforts usually very uncertain, however, humanitarian action remains the keystone of international efforts to address the plight of internally displaced populations.

4.4.1 International efforts to address root causes and seek durable solutions

Whether international diplomatic and political engagement helps or hinders IDPs depends on how it is carried out, and on the motivations behind it. International pressure towards ending the civil war in southern Sudan, for example, allowed for large-scale returns of the internally displaced population (IDMC, 2006: 17). Equally, however, there remains the potential for international efforts to undermine IDP and refugee protection – principally when the political or strategic interests of international actors favour returns even if this means compromising protection needs. Afghanistan and Liberia are two examples of countries where international pressure has arguably contributed to returns in unsuitable conditions (International Development Committee, 2001; OCHA Inter-Agency Internal Displacement Division, 2006). In Sudan, international pressure to stop the abuses in Darfur was tempered by concerns not to derail the North–South peace process, and so progress to restore protection for one population of IDPs risked further jeopardy for another.

In numerous situations, the political engagement of the international community has simply been inadequate to bring about any real change in the treatment of IDPs and other vulnerable groups. Zimbabwe, Chechnya, Sudan and Sri Lanka are notable examples. In some contexts, there is a disjuncture between a donor's diplomatic activity and its direct support for peace-building and protection efforts on the ground. In other cases, the international community has appeared to be fully behind peace and protection initiatives, but donors have failed to provide sufficient practical support (see Bagshaw and Paul, 2004: 76). In many instances, the ability or willingness of the international community to influence the root causes and dynamics of displacement and to help towards solutions is limited by divisions within the international community itself. This is more and more evident with the ascendency of new global powers and the concomitant waning of the relative geopolitical and economic power and influence of Western donor states. Thus, in Burma, the government's resistance to (predominantly Western) international pressure to improve humanitarian access to minority groups uprooted by counter-insurgency campaigns is bolstered by China's direct support for the regime. Similarly, the Sri Lankan and Sudanese governments have found new non-Western political and economic sponsors (including China, India and Iran), which in turn has severely depleted the relative financial and political influence of Western donors and the efficacy of their humanitarian and human rights advocacy.

International pressure is likely to be even less effective where armed non-state actors are a primary agent of displacement, as in Somalia. Like many 'illegal' paramilitary forces, these groups are not bound by international human rights law, which applies to states only (Zeender, 2005: 102). While often guilty of extreme violations and abuses of the civilian population, the activities of non-state actors are often poorly monitored and documented. The presence of non-state actors in IDP camps or among the wider civilian population blurs the distinction between combatants and non-combatants, further threatening the safety and security of IDPs and other civilians and hampering humanitarian assistance and protection efforts (*ibid.*: 102–103). While many international actors, including the ICRC, UN Special Rapporteurs, NGOs and the Representative of the Secretary-General on the Human Rights of Internally Displaced People, have engaged with these groups to try to improve their protection of IDPs and other civilians, little progress has been made overall towards 'humanising' their practices (Weiss Fagen et al., 2005: 76), particularly where they are financed by criminal commercial activities and so do not rely directly on the support of civilian populations.

4.4.2 Human rights and humanitarian law

Where people are displaced in the context of armed conflict, IHL should provide protection as it does for all civilians. IHL also contains a number of provisions on issues that are especially pertinent to displaced populations, such as humanitarian access and prohibitions on forced transfers of populations. Common Article 3 of the Geneva Conventions is especially significant for IDP protection since it sets out fundamental principles regarding the humane treatment of

civilians, including non-discrimination (Phuong, 2004: 45). Generally, the rules of IHL intended to spare civilians from hostilities and their effects are crucial to the prevention of displacement, as well as the protection of people after they have been displaced. These include the prohibitions on attacking civilians and civilian property, on indiscriminate attacks, on the starvation of civilians as a method of warfare and the destruction of objects indispensable to their survival, and on collective punishment or reprisals against civilians (ICRC, 2006: 3). Humanitarian law does not address the problem of displacement in any comprehensive way, however, and important gaps remain in the body of law as a whole in its application to non-international armed conflicts.

In situations where IHL does not apply, IDPs should be protected by international human rights law, although many rights of particular significance to IDPs are only implicit within general human rights provisions. For example, norms prohibiting cruel, inhuman and degrading treatment and protecting the right to freedom of movement apply to IDPs, as they do to all civilians, but there is no clear prohibition against the forcible return of people to places of danger, and no explicit right to be protected from unlawful displacement, to find refuge in a safe part of the country, or to have access to protection and assistance during displacement (Weiss Fagen et al., 2005: 47; citing Cohen and Deng, 1998b: 74; Phuong, 2004).

International refugee law, meanwhile, cannot apply directly to IDPs: not having crossed an international border, they do not satisfy any refugee definition. Nevertheless, refugee law has been treated as an important source of guidance and standard-setting for the protection of the internally displaced, as regards, for example, the principles of *non-refoulement* and safe and voluntary return, and the concept of durable solutions. ‘Soft-law’ guidelines formulated within the international refugee regime have also informed the development of standards for the treatment of IDPs, such as UNHCR guidelines on the treatment of vulnerable groups within refugee populations (Phuong, 2004: 47). Yet there are also significant tensions between international refugee law and the developing standards on IDP protection, since the promotion of internal protection for IDPs may sit uncomfortably with the right of asylum when host states are keen to minimise their responsibilities towards refugees.

Much internal displacement takes place in conditions where none of the three areas of law is clearly applicable, for example where states have not ratified the key treaties concerned (as in Burma); where civilians are at the mercy of non-state actors who are not bound by human rights law and do not respect IHL (as in the DRC, Sudan and Somalia); or where tensions and disturbances are below a level to trigger the application of IHL, but which nonetheless result in certain restrictions of or derogations from human rights law, such as restrictions on freedom of movement, often in the context of a declared ‘state of emergency’ (as in Israel/Occupied Palestinian Territories) (*ibid.*: 48–49).

4.4.3 The Guiding Principles on Internal Displacement

As noted above, the *Guiding Principles on Internal Displacement*, finalised in 1998, introduce no new binding obligations. Rather, they restate and clarify existing law. In part, this reflects lack of international support for a new treaty (Cohen, 2006a: 92; Cohen, 2006b: 102–103). Because they do not introduce any new binding obligations, the drafters were able to ensure very wide scope in the coverage of the *Principles*, in terms of the breadth of displacement situations to which they pertain (as reflected in the broad and inclusive IDP description); their applicability to all stages of displacement; and the wide range of actors to whom the *Principles* are intended to apply (not only governments, but all authorities, groups and persons) (*ibid.*: 57). No enforcement mechanism is associated directly with the *Principles*, although the fact that they are based on existing treaties and conventions ‘gives them a moral force as well as highlighting ways in which a state’s actions in relation to IDPs might be challenged through the national courts’, creating potential for them to be treated as customary law (Borton et al., 2005: 79). As noted, a growing number of countries have introduced policies and/or legislation that make explicit reference to the *Principles*. Regional organisations have expressed their support and commitment to the *Principles*, and they have found strong support from within the UN system, including through the UN Human Rights Commission/Human Rights Council and treaty bodies, and in the September 2005 World Summit outcome document. The adoption by a number of African states of a binding protocol on IDP protection and assistance within the Great Lakes Conference framework, and continuing efforts within the African Union to develop an Africa-wide IDP convention, point to strengthening regional treaty law based on the *Principles* (*ibid.*: 1-6; IDMC, 2008).

Some reservations have nevertheless been expressed about the *Principles*. There has reportedly been concern within the ICRC, for example, that principles specifically designed to deal with internally displaced persons could ultimately narrow the scope of protection that international law grants to the entire civilian population (Phuong, 2004: 53, citing Contat Hickel, 2001). Phuong points out weaknesses in the *Principles* themselves, including their failure to address adequately the issues of minority protection and ‘ethnic cleansing’ and the absence of any mention of ‘safe areas’, which have profound implications for the rights of free movement and asylum and the delivery of protection in situations of displacement (Phuong, 2004: 65).

The most important reservation concerns the gulf between governments’ stated support for the *Principles* and their observance in practice. While the *Principles* have had significant impact as a catalyst for some governments to develop new laws and policies on internal displacement,

progress has been slow; only a patchwork of national laws and policies has been introduced across a limited range of countries, and there are serious gaps in implementation across the board (see, for example, Statement of the Representative of the Secretary-General, 2006). Cognisant of the many barriers to the adoption and implementation of the *Principles* at national level, the current Representative of the Secretary-General has developed a manual to assist legislators and policymakers in drafting relevant laws and policies (Brookings Institution, 2008).

4.4.4 International military and police action to protect and assist IDPs

In situations where the government or other authority in control of a given area is unwilling or unable to provide security or other forms of meaningful protection for displaced and other vulnerable groups, the only way to achieve immediate physical protection may be through international military and police operations – usually taking the form of international peacekeeping operations. UN Security Council mandates given to peacekeeping operations during the early 1990s reflected a traditional approach to peacekeeping, limiting peacekeepers to interposing themselves between warring factions and using force only in self-defence (O'Neill, 2004: 5). In the context of the numerous intrastate conflicts that erupted over the following decade, peacekeepers were called upon to perform an expanding range of activities, including the protection of humanitarian operations and civilians (Weiss Fagen et al., 2005: 197). Yet a gap between narrow and inadequate peacekeeping mandates and the acute protection needs of vulnerable civilian populations persisted, with appalling humanitarian consequences, as seen for instance in the inadequately protected 'safe areas' in Rwanda and Bosnia in the mid-1990s.

Security Council Resolution 1296, adopted in April 2000, reflected a growing international concern to provide more effective protection for displaced and other civilians in the context of peacekeeping and broader international engagement in situations of armed conflict. The Resolution expresses regret that 'civilians account for the vast majority of casualties in armed conflicts and are increasingly targeted by combatants'; reaffirms 'its concern at the hardships borne by civilians during armed conflicts … including refugees and internally displaced persons'; and notes that the overwhelming majority of internally displaced persons are civilians and, as such, are entitled to the protection afforded under existing humanitarian law. It also affirms the intention 'to ensure, where appropriate and feasible, that peacekeeping missions are given suitable mandates and adequate resources to protect civilians under imminent threat of physical danger', and invites the Secretary-General to bring to its attention 'situations where refugees and internally displaced persons are vulnerable to the threat of harassment or where their camps are vulnerable to infiltration by armed elements'. The Security Council also indicated its willingness 'to consider the appropriateness and feasibility of temporary security zones and safe corridors for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes against the civilian population' (UN Security Council, 2000). In response to the Srebrenica tragedy, however, the UN emphasised that these must be demilitarised and established with the agreement of belligerents, or they must be truly safe areas, fully defended by a credible military deterrent (Holt and Berkman, 2006: 18–19). In a similar vein, the *Report of the Panel on United Nations Peace Operations* (the so-called Brahimi Report) highlighted the need for improved international political engagement, improved financial backing and clear, robust and achievable mandates (Panel on United Nations Peace Operations, 2000; Weiss Fagen et al., 2005: 199).

Over the past decade, UN peacekeepers have been charged with a variety of protection responsibilities on behalf of displaced populations, including the protection of relief convoys and IDP camps, establishing and maintaining secure humanitarian areas, monitoring and reporting on the conditions of the displaced and supporting protection and assistance for IDPs returning to their places of origin (Cohen, 2006a: 98). Many armed forces have taken note of the specific challenges associated with IDP protection and assistance in the context of peacekeeping, and have introduced training in this area. Military training provided by Western governments and the UN to national and regional forces in regions affected by conflict also includes a focus on protecting IDPs and refugees (*ibid.*). However, while there have been successes in specific cases, continuing weaknesses in the overall mandates, scale and quality of troop deployments have undermined peacekeeping missions in virtually every country where they have been deployed. For example, in February 2000 – only a couple of months before it adopted Resolution 1296 – the Security Council authorised the deployment of just 5,500 armed troops to support the implementation of the Lusaka ceasefire agreement in the DRC, representing 'a grossly inadequate response to years of war and millions of deaths' (O'Neill, 2004: 33). Over the following three years, thousands of civilians were killed or uprooted, but the peacekeeping force (MONUC) could do little except when fighting died down (*ibid.*). These shortcomings were not addressed until 2003, when the Security Council authorised an Interim Emergency Multinational Force in Bunia to protect the airport and IDP camps and, subsequently, strengthened MONUC's mandate. Although civilian protection has become a more central goal, the mission has not been able to provide reliable physical security for people caught up in the extreme violence and abuse associated with the conflict (Holt, 2006).

Continuing reluctance within the Security Council to approve UN peace operations, particularly those requiring a Chapter VII (peace enforcement) mandate, has led to a progressive shift towards regional and coalition-based military operations, in which the peacekeeping side of the UN may only be marginally involved, if at all (Weiss Fagen et al., 2004: 201). Recent experience demonstrates that regional organisations often lack

a clear security mandate and adequate resources or accountability, and are prone to political bias or political involvement in the conflicts concerned. In Sierra Leone and Liberia, for example, ECOMOG not only failed to deliver basic protection for displaced and other civilian populations, but was itself accused of human rights abuses and participation in resource wars (*ibid.*: 202; O'Neill, 2005: 19). In Darfur, the mandate of the AU force (AMIS) was very weak, partly as a consequence of reluctance within the AU to coerce consent from the Sudanese government (O'Neill and Cassis, 2005: 25). Any protection of civilians depended on the presence of troops in the vicinity and the availability of (extremely limited) AMIS resources and capability (Cohen, 2006c: 1; O'Neill and Cassis, 2005). It was not until 2007 that AMIS was eventually replaced with the stronger (but still too limited) hybrid AU–UN peacekeeping mission, UNAMID. In Afghanistan, the UN-sanctioned operation was dispatched under the command and control of the United States as lead nation; meanwhile, the US operation in Iraq was launched without the sanction or mandate of the UN.

Issues connected with the broader protection benefits of international peacekeeping for vulnerable civilians also remain problematic. While some humanitarian agencies have called for more assertive and effective international peacekeeping, others, among them the ICRC, have expressed considerable concern over the linkage of humanitarian action and military operations. The risk is that, by becoming associated with a military peacekeeping mission that is not seen as neutral by one or other party to a conflict, humanitarian actors may jeopardise their access to vulnerable populations and increase their own risk of attack. There is also the risk that humanitarian agencies will become implicated in international protection failures. UNHCR, for instance, faced criticism from refugee and human rights advocates in the mid-1990s for its direct involvement with in-country protection in Bosnia (including the failed 'safe havens') in the context of an ineffective UN-led military intervention. As the focus of humanitarian activity shifts from external assistance and protection for refugees towards direct involvement in delivering assistance and protection within countries affected by displacement, it is likely that humanitarian agencies will come to rely on international military protection where it is available. The establishment of so-called 'integrated missions', involving the political, military, humanitarian and development arms of the UN, is likely to reinforce this trend.

4.5 Humanitarian action to protect and assist IDPs

Successive evaluations of humanitarian assistance and protection efforts on behalf of IDPs point to serious and persistent weaknesses, characterised overall by inconsistent, unpredictable and fragmentary coverage, poor-quality needs assessment, poor coordination between agencies and between activities and confusion and debate over the separate identification of IDPs, and over the implementation of protection-oriented programmes on their behalf (see, for example, Borton et al., 2005).

4.5.1 Poor coverage in IDP assistance and protection

Given that so many displaced populations remain within conflict zones, poor coverage results to a great extent from insecurity or the obstruction of aid. In countries such as Afghanistan, Somalia, Iraq, Colombia, the DRC, Uganda, Sudan, Pakistan and Sri Lanka, large numbers of IDPs have remained entirely beyond the reach of any humanitarian protection or assistance; where access is possible, it is typically only through the use of armed escorts or the efforts of local staff and national NGOs. Coverage is often further distorted where the relative ease of access affects the degree of media attention and donor awareness of particular displaced groups. In Liberia, for example, IDPs living in and around Monrovia have received far more assistance than displaced people in other parts of the country, largely because humanitarian agencies, journalists and donor representatives have all had easier access to them (Borton et al., 2005: 62). A 2006 OCHA/ICVA mission to Katanga province in the DRC found only three NGOs present on the ground, and reported that these NGOs were overwhelmed by the scale of the crisis in the area (OCHA/ICVA Mission to Central Katanga, 2006).

As with assistance to refugee populations, there is also a clear bias in humanitarian assistance in favour of IDPs located in camps. Although often the result of poor access to populations outside camps, this bias may also reflect an operational and donor preference for delivering assistance and protection to larger concentrations of vulnerable groups, and an assumption that those outside the camps have achieved a degree of self-sufficiency or are protected and supported by host families and communities. In Northern Uganda, the humanitarian focus on camps effectively supported and endorsed the government's encampment policy, which violated IDPs' freedom of movement and other fundamental rights. In any case, the emphasis on camp-based IDPs has done little to improve their protection; those in the Northern Uganda camps, for instance, have suffered poor social and economic conditions, weak rule of law and frequent and widespread violence at the hands of rebel and government militia.

In Darfur too, questions have been asked about the protection implications of the humanitarian presence concentrated within the camps in government-controlled areas. Initially, these camps provided a 'safe flight' option for many IDPs, and thereby saved many lives, but relatively little was done to reorient humanitarian action towards vulnerable populations outside the camps. Not only are the camps themselves highly insecure places, but the encampment of IDPs has accelerated (irreversible) changes in the ethnic geography of Darfur (Pantuliano and O'Callaghan, 2006: 19). As noted above, camps may 'solve' the immediate problem of identifying and assisting IDPs, but they carry a high risk of being linked to political strategies of containment and control in a given conflict. Where this is the case, humanitarian agencies may become players in a government's or other authorities' or belligerents' political and military strategy. In Sri Lanka, international humanitarian

agencies are continuing to provide assistance to IDPs trapped in internment camps which, for the government, serve the primary strategic purpose of maintaining the recent military victory against the LTTE in the north.

One of the principal factors in poor humanitarian coverage among and between displaced and other vulnerable populations is uneven donor funding. This, in turn, is almost certainly linked to the political and strategic priorities of host governments, donors and humanitarian agencies (ALNAP, 2003: 67; Smillie and Minear, 2003). A 2003 National Audit Office (NAO) evaluation of the British government's humanitarian programmes reported that, since 1997, the per capita level of humanitarian assistance provided in European emergencies had been five times higher than for emergencies in Africa. The NAO concluded that this discrepancy could not be explained simply by differences in the cost of delivery and associated security, and suggested that wider strategic considerations were playing a part (National Audit Office, 2003: 4). Persistent donor under-funding of particular crises further undermines needs-based programming at the field level, where operational agencies reduce their appeals according to what they envisage donors will tolerate (Danida, 1999).

4.5.2 Debate over targeting IDPs within humanitarian programmes

The dominant paradigm shaping the stated policies of many agencies providing in-country humanitarian assistance to vulnerable populations is to provide assistance on the basis of need, rather than on the basis of preconceived categories. According to a 2001 policy document outlining WFP's approach to assisting displaced populations, for example, the agency stated that it would:

> *target displaced populations on the basis of food insecurity rather than identify them as a particular group. The Programme will apply the same targeting criteria to displaced persons that it does to other food-insecure groups, while making a special effort to understand and address the particular needs of IDPs … While there may be some situations in which the internally displaced will be specifically targeted (for example those living in transit centers of camp-like situations), in others, IDPs are much better assisted through programmes aimed at broader segments of the food-insecure population* (WFP, 2001b: 8).

Similarly, a 2003 evaluation of ECHO's programme in Sudan commented that 'ECHO has funded projects based on the assessment of needs in the field, not using any pre-conceived categories (such as IDPs, refugees and local population)' (ECHO, 2003a: 7). The ICRC 'has defined an operational approach towards the civilian population as a whole that is designed to meet the most urgent humanitarian needs of both displaced persons and local and host communities', and has cautioned against the 'increasing tendency within the humanitarian and donor communities to consider the needs of IDPs and those of the resident population separately' (ICRC, 2006: 2–3).

The 2005 synthesis review of support to IDPs (Borton et al., 2005) identified considerable objection among humanitarian actors not only to the separate treatment of IDPs as a special category (potentially at odds with the principle of impartiality), but also their identification as a distinct category at all. This, the authors note, was 'somewhat surprising considering the widely held view that IDPs had been a relatively neglected group and the participation of many humanitarian agencies in efforts to address such neglect over the last decade' (p. 14). It is also surprising in view of the fact that categories are widely used in humanitarian assistance to label groups with special needs, according to displacement status (refugee, IDP, returnee, 'old'/'new' caseload, host), personal attributes (gender, age, disability), health status (HIV), ethnic group, wealth and so on, with some categories closely associated with higher levels of need and vulnerability (ECHO, 2004b: 4–5).

Part of the reason for this disquiet is concern that IDPs will be targeted separately for assistance and protection and thereby privileged over other groups (*ibid.*). According to the ICRC's Position on Internationally Displaced Persons, segmenting the humanitarian response and splitting beneficiaries into categories, such as IDPs, 'entails the risk that certain groups of affected persons, possibly those in greatest need, may be neglected' (ICRC, 2006: 4). If aid is targeted specifically at IDPs, this can create tensions with host and other communities or potential beneficiaries. In Kismaayo, Somalia, for example, Narbeth and McClean (2003: 17) note that material assistance should be provided to the wider community, not only in the interests of neutrality and impartiality 'but also as a pragmatic means to reduce the potential for conflict between groups, or the targeting of aid providers'. Unease is also related to the difficulty of actually identifying IDPs amongst the wider population, especially when they are outside camps and, as is often the case, living amongst other vulnerable groups. As noted earlier, the category itself is often blurred by nomadic or seasonal migration and other forms of voluntary or livelihood-based movement. As with urban refugees, there is a particular difficulty in identifying and assessing the needs of IDPs living in towns and cities. IDMC and OCHA's Displacement and Protection Support Section launched the Guidance on Profiling Internally Displaced Persons in 2008 to help obtain jointly-agreed information on the number and location of IDPs. Other guidelines developed by the global camp coordination and camp management (CCCM) and protection cluster working groups have highlighted the importance of IDP profiling, while new profiling methodologies have been designed, for example, for IDPs in urban areas (IDMC, 2009: 17).

Finally, levels of vulnerability *within* IDP populations are extremely varied. A 2003 evaluation of ECHO's Angola programme, for instance, comments that vulnerability criteria

are the best instrument of targeting because, in a long-lasting emergency, displacement inevitably evolves into a variety of situations and degrees of vulnerability: 'those displaced long ago and effectively resettled versus those newly displaced and in urgent need; those displaced to nearby towns versus those who ended up in other provinces; quasi-economic migrants versus those who fled combat, etc.' (ECHO, 2003b: 8).

4.5.3 Tensions and debates over protection activities on behalf of IDPs

Part of the difficulty lies in the continuing uncertainty within the humanitarian sector around the concept of protection, and how to address beneficiaries' protection needs. Even more than with material assistance programming, effective protection strategies depend on understanding the exposure of certain groups, like IDPs, to particular kinds of risk. There needs to be better understanding of the specific group-based protection needs of IDPs, as a separate issue from their material needs (which may or may not vary significantly from those of non-displaced populations), and more must be done to ensure that the *specific* protection needs of internally displaced populations are effectively assessed, monitored and responded to (Collinson, 2005: 26). Mooney observes that focusing on the particular problems of specific groups at risk will often be the best way to ensure that the group can access the same protection as others. Thus, 'addressing the specific problems encountered by IDPs does not preclude protection and assisting other at risk groups; it simply means that the particular needs and vulnerabilities of IDPs are taken into account and addressed, whether through general or targeted programming' (Mooney, 2004: 18, 20).

Action to address IDPs' protection needs calls for a more politically engaged mode of humanitarian action based on the concept of rights, rather than the more traditional philanthropic needs-based approach (Darcy and Hofmann, 2003: 22; Slim, 2001). Particularly salient rights for IDPs include the preservation of family life; freedom of movement; access to courts; freedom from discrimination; right to life; freedom from assault; access to education; freedom from arbitrary displacement, rape, arbitrary detention and kidnapping; freedom to pursue a livelihood; and rights to adequate food, water and shelter (IASC, 2006: 31). Yet rights-oriented programming on behalf of IDPs, as for other vulnerable populations, remains a considerable challenge for humanitarian agencies whose operations have developed predominantly within a 'needs-based' assistance framework founded on principles of impartiality, neutrality and independence. Many agencies remain wary of engaging in human rights issues for fear of politicising their presence and thereby jeopardising their access. Although they usually have far greater access and presence on the ground than more specialised human rights organisations, most non-mandated agencies lack expertise in protection work. While they may be aware of their potential protection role through, for example, human rights monitoring and advocacy, this often fails to translate into concerted or effective protection-focused approaches or strategies.

Even those humanitarian agencies with a clear protection mandate – ICRC, UNHCR and UNICEF – often lack the resources, humanitarian space and political clout required to scale up protection activities beyond quite discrete or limited initiatives, often with poor overall population coverage or impact (Borton et al., 2005: 82–86). Because they are also focused on providing material assistance, the mandated agencies face the same dilemmas as others over balancing the imperative to maintain humanitarian access with the attendant risks of promoting IDPs' and other civilians' rights in what are often extremely difficult or hostile political environments. Usually, given the absence of counter-factual evidence, it is hard to gauge the actual or likely effectiveness of different strategies or approaches to seeking improved protection and rights for IDPs and other vulnerable populations – such as the ICRC's confidential dialogue with authorities and armed groups versus more public and denunciatory forms of human rights advocacy.

A number of humanitarian agencies have started to explore how to enhance their protection impact (O'Callaghan and Pantuliano, 2007). Designing humanitarian assistance so that it does not undermine beneficiaries' protection (e.g. by ensuring that women do not have to search far for firewood), prompt reporting of protection problems when they occur and joint advocacy initiatives represent important steps (Jaspars et al., 2007; Jaspars and O'Callaghan, forthcoming 2009; Cohen, 2006: 97). Humanitarian presence itself can potentially have a positive impact on the protection of IDPs and other vulnerable groups. Yet protection by presence is often extremely risky and frequently ineffective. Problems with access, security and resourcing mean that agencies' presence tends to be restricted to particular (often quite small) areas, with, at best, only intermittent visits to outlying areas. In many recent or ongoing humanitarian crises, including in Gaza, Sri Lanka, Pakistan, Somalia and Sudan, international humanitarian agencies have had little or no presence at all in places where civilians' protection and other needs have probably been most acute. Here, the international humanitarian effort has proved marginal to protection outcomes – positive or negative – for the majority of IDPs and other civilians. The cases where humanitarian presence has contributed to protection have tended to be restricted to those times and places when the warring parties have effectively disengaged (Glaser, 2005: 30–31).

4.5.4 Developing institutional responsibilities for IDPs

Despite the expansion of UN and other operational agencies' activities to address IDP needs, no single agency has had an explicit or exclusive mandate to provide protection and assistance to IDPs. Instead, UN agencies have worked together at country level within a 'collaborative response' structure led by the UN's Resident Coordinator/Humanitarian Coordinator.

Weaknesses in the prevailing 'collaborative response' approach, particularly as regards leadership, coordination and accountability in humanitarian responses to IDPs' needs, came into sharp focus in the context of an extremely incoherent response to the Darfur crisis in 2004 (UNHCR, 2006d: 7). This triggered a humanitarian response review, commissioned by the UN Emergency Response Coordinator Jan Egeland in 2005, which led the IASC to embark on a substantial reform of the international humanitarian response system.

In December 2005, the Principals' Meeting of the IASC agreed to establish the 'cluster approach', according to which nine key areas of response were organised into 'clusters' of relevant humanitarian actors, each with a designated 'cluster lead'. The new approach was intended not only to improve coordination within the UN system, but also to strengthen and improve cooperation between the UN system, the Red Cross/Red Crescent movement, NGOs and governments. The aim was not to institute a radical reform of the system, but rather to enable a more predictable, accountable, timely and effective response, building on existing sectoral expertise and experience (McNamara, 2006: 10). UNHCR was designated as cluster lead for protection, emergency shelter and camp management and coordination in situations of complex emergencies. In disaster situations, the protection response would be decided through consultation among the three UN agencies with a protection mandate (UNHCR, UNICEF and OHCHR). UNICEF, with its child protection mandate, has built up specific expertise in dealing with the protection needs of displaced women and children, and has sought to integrate human rights monitoring and reporting into its operational activities (Phuong, 2004: 130). Both OCHA and OHCHR play a potentially important role in collecting and managing protection information. The International Organisation for Migration (IOM), meanwhile, was to take on responsibility for camp coordination and management in disaster situations (*ibid.*). In addition, UNHCR was designated by UNAIDS as the lead agency for HIV and AIDS among displaced populations. The new approach was launched initially in four 'pilot' countries, the DRC, Liberia, Somalia and Uganda, but has subsequently been applied, either explicitly or in practice, to numerous other country contexts and new emergency situations.

Many have welcomed what seems to be a clarification of previously uncertain responsibilities. Yet as cluster lead for the protection of conflict-related IDPs, the challenges for UNHCR are immense. Reservations about the agency's new role have included concern over the possibly massive expansion of the agency's programmes as ad hoc engagement gives way to more consistent involvement in conflict situations affected by internal displacement (ExCom, 2006a: 4). Funding and capacity issues have been particular concerns. More fundamental reservations were raised as to the potential impact of the cluster approach on UNHCR's core mandate for protecting refugees. ExCom listed four situations in which the institution of asylum could be undermined by UNHCR's participation in, or leadership of, cluster operations in favour of IDPs and affected populations: (a) where involvement with IDPs is part of an overall national or regional strategy to contain displaced persons within the borders of their country; (b) where UNHCR's involvement with IDPs poses a risk that countries of asylum may renounce protection obligations towards refugees and asylum-seekers on the basis that the UN protection response in the country of origin would constitute an 'internal flight alternative'; (c) where the perception of UNHCR's impartiality would be negatively affected to the extent that access to refugee populations in need would be seriously jeopardised or diminished, or where involvement with IDPs would compromise relationships with host governments or parties to a conflict to the extent that there would be substantial negative impact upon protection and assistance activities for refugees; and (d) where involvement with IDPs and affected populations within a collaborative inter-agency framework could lead countries of asylum to conclude that Article 1D of the 1951 Convention was applicable (ExCom, 2006b). ExCom also notes considerable challenges as regards coordination, particularly in view of the cross-cutting nature of protection.

Much remains to be done to ensure better communication and coordination between the UN and non-UN parts of the humanitarian community (and note, in this connection, that ICRC has opted not to participate as a member or leader in any cluster, since this would entail accountability to the UN, thereby compromising its independence). Coordination of humanitarian agencies with the political and peacekeeping sides of the UN, which have such a crucial role to play in international responses to IDPs' protection needs, also remains an area of key concern, not least in the context of integrated UN missions. There is also, reportedly, too little state involvement in the cluster approach – which implies the risk that cluster-based responses will tend to substitute for national responses where the state can and should be leading on IDP protection and assistance. To a large extent, this reflects state-avoiding institutional and operational cultures within the broader humanitarian system (Harvey, forthcoming 2009) and the legacy of decades of international protection and assistance programming on behalf of refugees, which has substituted for state responsibility in poorer asylum countries (Crisp and Slaughter, 2009).

Although the new cluster approach appears to be making a significant contribution to improving accountability for IDP protection and assistance where it has been applied, it is probably unrealistic to expect it to transform the landscape of humanitarian action on behalf of the internally displaced. ExCom's conclusions on the initial experience of the cluster approach caution that it faces 'the same problems that have always dogged attempts by the international community to provide protection and assistance to the internally displaced, including difficulties of access, threats to staff security and the challenge of engaging in recovery efforts in a context of continuing instability'. It remains to be seen whether the cluster approach, even if fully successful in concerting efforts

across agencies, can address these inherent obstacles any better than previous approaches (*ibid.*: 9).

4.6 Conclusion

The record of assistance and protection of internally displaced populations, whether by national or international actors, remains very poor. Despite some progress in increasing international awareness and recognition of IDPs and their needs and improving national and international responses to the predicament of displaced populations on the basis of the *Guiding Principles*, the treatment of displaced populations is (at best) highly inconsistent, with the vast majority of people displaced by conflict enjoying little or nothing in the way of meaningful protection.

Many questions still surround the utility or suitability of the IDP category as a basis for determining protection and assistance efforts on the ground. Contention around the IDP label centres on the extent to which IDPs can and should be identified as a distinct group; whether, once identified, IDPs necessarily require special treatment compared to other people; and who should undertake protection and assistance efforts on their behalf and how. Much of the impetus behind recent efforts to improve recognition of IDPs and improve their protection derives from the argument that IDPs should not be denied the type of protection and assistance that is afforded to refugees simply because they have not crossed an international border. Others, including the ICRC, have maintained instead that it is not the refugee protection model that should be extended to encompass IDPs, but rather the improved protection of *all* civilians in wartime – both displaced and non-displaced – on the basis of international humanitarian and human rights law.

The significance of displacement in determining people's relative vulnerability or ability to cope with conflict and crisis is highly varied. While forced displacement often leads to extreme vulnerability, flight and mobility also represent an essential protection or survival strategy for many civilians affected by conflict or human rights abuse. In practice, not all displaced persons are equally vulnerable or necessarily more vulnerable than non-displaced groups, and IDPs are not always clearly distinguishable from other groups. Nor is it usually clear when displacement ends, as people's needs and circumstances may change gradually, and formal declarations about the ending of displacement by government or other authorities often bear little relation to people's actual circumstances on the ground. Where IDPs are identified or even formally recognised by national authorities or international military, political or humanitarian actors, it remains questionable whether their access to effective protection is improved as a consequence. A number of states affected by internal displacement have introduced laws or policies aimed at improving the protection of their displaced populations, many basing their legislation or policy provisions explicitly on the *Guiding Principles*. However, formal commitments by governments to the principles of IDP protection are rarely matched by effective implementation, whether by design, neglect, incapacity or lack of political will.

Although the past two decades have seen unprecedented willingness within the international community to intervene in the internal affairs of states, international political and military action affecting IDPs and other vulnerable populations has remained grossly inconsistent and has sometimes aggravated the problem. In some cases, displacement crises have themselves been triggered by international intervention, as in Kosovo. In Iraq, the US-led intervention failed to achieve even minimum levels of civilian protection, leaving millions displaced both internally and externally. The drain of the US-led campaigns in Iraq and Afghanistan on international military and aid resources, and the problems that have beset numerous peacekeeping operations around the world, cast doubt over the future willingness of the international community to intervene for humanitarian or human rights reasons. Where, in the absence of the UN, regional or coalition-based military operations have taken the lead, this is often with unclear mandates, inadequate resources, weak accountability and questionable neutrality and impartiality.

The international community has a potentially crucial role to play in efforts to improve and support national protection for IDPs through diplomatic engagement, peace-building, development and other initiatives that address the causes of displacement. Whether international diplomatic and political activity helps or hinders IDPs depends on how it is carried out and on the motivations behind it. Too often, the political engagement of the international community on behalf of IDPs and other civilians affected by conflict and human rights abuse has been inadequate, incoherent, counter-productive, or simply ineffective. Consequently, humanitarian action remains central to international efforts to address the plight of IDPs. Yet the humanitarian effort is itself beset with problems. Some of these, like lack of secure access, are directly related to the political factors described above, but others are not. Humanitarian responses continue to be undermined by poor coverage and needs assessment, the failure to develop and implement effective protection strategies, severe coordination problems and continuing debate and confusion over how IDPs should be identified, and whether they should be specifically targeted. Operationally, the IDP category remains diffuse, its scope unclear and its use dogged by controversy.

Many of the problems and debates around the IDP category derive from confusion or disagreement over its intended use or purpose in humanitarian programming. For some, it is just one among a number of indicators of *potential* humanitarian vulnerability within the wider civilian population. For others, it defines a particular group within the civilian population that is assumed to be vulnerable and in need of targeted assistance and protection (see Borton et al., 2005: 56). Despite this confusion, IDPs frequently receive more attention than other vulnerable groups – for example, where assistance and

protection activities are concentrated in IDP camps due to poor security and access in other locations. Greater attention from humanitarian actors does not necessarily result in improved protection outcomes for IDPs, however, as evidenced in the extreme insecurity and poor human rights environments that characterise so many IDP camps, and numerous failures in efforts to provide 'protection through presence'. Although often essential for addressing IDPs' most immediate needs, the humanitarian system may sometimes jeopardise longer-term IDP and civilian protection where it substitutes for national protection or international political or military intervention.

Action to address IDPs' protection needs calls for a more politically engaged mode of humanitarian action than the traditional needs-based assistance approach, and this remains a significant challenge for the majority of agencies that lack experience, expertise or mandates in protection work. While some, particularly the mandated agencies, have succeeded in improving particular aspects of IDP protection in specific cases, these efforts do not add up to a comprehensive shift in the orientation and outcomes of humanitarian programming affecting IDPs. It remains to be seen how much difference the new cluster approach will make in improving the responses of the humanitarian system to IDPs' protection needs. UNHCR will continue to struggle with the dilemmas inherent in fulfilling and protecting its core refugee protection mandate while simultaneously taking a lead in IDP protection.

The problems and challenges that beset any effort to ensure the protection and rights of IDPs, whether at the national level or by international political, military or humanitarian actors, mean that IDP protection often comes down, in practice, to the relative absence of immediate threats rather than the comprehensive protection of rights. Whatever protection is actually available for IDPs in any particular situation remains more or less contingent upon what the national government or local authority, humanitarian agencies and any peacekeeping or other multinational force present are willing or able to provide. Whether people are labelled or recognised as 'displaced' is rarely the most decisive factor in determining protection outcomes.

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