

**INTERNATIONAL LAW OF  
INTERNALLY DISPLACED PERSONS:  
THE ROLE OF THE UNHCR**

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**SUMIT SEN**

**INTERNATIONAL LEGAL STUDIES DIVISION  
CENTRE FOR STUDIES IN DIPLOMACY,  
INTERNATIONAL LAW AND ECONOMICS  
SCHOOL OF INTERNATIONAL STUDIES  
JAWAHARLAL NEHRU UNIVERSITY  
NEW DELHI - 110067**

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**JAWAHARLAL NEHRU UNIVERSITY**  
SCHOOL OF INTERNATIONAL STUDIES

Centre for Studies in Diplomacy  
International Law & Economics

Telegram : JAYENU  
Telex : 031-73167 JNU IN  
Telephones : 667676/ 418,408  
667657/  
Fax : 91-11-686-5886  
New Delhi-110067


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**C E R T I F I C A T E**

This is to certify that the Dissertation entitled, "**International Law of Internally Displaced Persons : The Role of the UNHCR**", is being submitted by **Sumit Sen** , in partial fulfilment of the requirements for the award of the degree of **Master of Philosophy** of this University. This is his original work and has not been submitted for any other Degree of this University or to any other University.

We recommend the Dissertation to be placed before the examiners for evaluation.

*B. S. Chimni*  
**DR. B.S. CHIMNI**  
(SUPERVISOR)

  
**PROF. V.S. MANI**  
(CHAIRPERSON)

**For**

***Baba and Maa***

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## Prologue

*They have been called "refugees in all but name". Casualties of armed conflicts, targets of ethnic or religious persecution or victims of a breakdown of law and order. They have been driven out of their homes but they have not sought, or they have not succeeded in reaching, safety in another country. Millions of internally displaced persons throughout the world live scattered in the jungle, huddled in camps or hiding in the anonymity of urban slums. Their masses cover the dark side of the world refugee problem.*

Operational Experience with Internally Displaced Persons

UNHCR

Geneva, September 1994

## Chapter 1

### *An Introduction*

The refugee phenomenon is one of the most tangible manifestations of the aftermath of the Cold War. In the context of increased international migration and new political relationships, asylum-seekers present unique challenges to states in particular and the international community as a whole. Human rights and national interests are juxtaposed in the debate over new policy responses.

According to the Office of the United Nations High Commissioner for Refugees (UNHCR), an unprecedented number of refugees are fleeing persecution, approximating 19 million.<sup>1</sup> About 30 million people are reported to be displaced within their own countries.<sup>2</sup> These are only part of the estimated 100 million migrants worldwide who move for a variety of reasons, ranging from poverty and economic insecurity to population growth and environmental degradation.<sup>3</sup> Like refugees, the displaced are victims of civil wars, internal strife, communal violence, forced relocation and gross violations of human rights; they lack food,

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<sup>1</sup> UNHCR, The State of World's Refugees, (Penguin Books, New York, 1993), p.1.

<sup>2</sup> Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to the Commission on Human Rights resolutions 1993/95 and 1994/68, E/CN.4/1995/50, 2 February 1995, Refugee Survey Quarterly, Vol.14, Nos. 1 and 2, 1995, p.194.

<sup>3</sup> United Nations Population Fund, The State of World Population: 1993, (UNFPA, New York, 1993).

shelter, clothing, safety, basic health care and education. Vulnerable and unable to find places of safety, IDPs often suffer persistent violations of fundamental human rights, and their needs go unmet.<sup>4</sup>

There are clear parallels between refugees and the displaced. Both groups lack the protection of their governments. The 'root causes' of both are similar, and hence 'solutions' for one are often interlinked with the other. Yet, the fact that one group crosses the border and another does not or cannot, makes a significant difference to their situation under international law and the United Nations' response to their plight. For refugees, there is the international protective mechanism under the UNHCR mandate and a specific body of law to address their needs. The needs of the internally displaced remain to be addressed largely with the general provisions of human rights law and humanitarian law, and through *ad hoc* operational measures and mechanism.

Despite the intensity and scope of internal displacement, there is no adequate system of protection and assistance for the displaced people. "... no specific legal instrument covers the particular needs of the internally displaced, and no specific institution is mandated to address those needs."<sup>5</sup>

On March 5, 1992, the UN Commission on Human Rights adopted

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<sup>4</sup> Boutros Boutros-Ghali, Analytical Report of the Secretary-General on Internally Displaced Persons, E/CN.4/1992/23, (United Nations, 1992), para.6.

<sup>5</sup> Francis Deng, Protecting the Dispossessed: A Challenge for the International Community, (The Brookings Institution, Washington D.C., 1993), p.2.



resolution 1992/77 in which it requested the UN Secretary-General to designate a representative to seek from all governments views and information on human rights issues related to IDPs and to examine existing human rights mechanisms, the applicability of humanitarian and refugee law and standards for the protection of IDPs, and also extend provisions of relief assistance to them. The Secretary-General was to seek information on these matters from the specialized agencies, relevant UN organs, regional intergovernmental and non-governmental organizations and experts in all regions.

### 1.1 The Challenge

Within the perspective of the international community, the crisis of the IDPs is that they fall within the domestic jurisdiction of states and are therefore not covered by the protection normally accorded to refugees. Whereas, the fundamental rights and human needs of IDPs are at least as threatened as those of refugees. It seems, on the whole, the need of the IDPs for international protection and assistance appears to be greater.<sup>6</sup> International responses to emergencies involving the displaced have been undertaken by the UNHCR and, outside the UN system, most prominently, by the International Committee of the Red Cross (ICRC). But in the absence of clear mandates, the international

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<sup>6</sup> Francis Deng, Protecting the Dispossessed, op cit.

responses have been *ad hoc* and limited.<sup>7</sup>

An extensive correlation exists between causes of displacement and the responses of the governments concerned. Where the causes are natural disasters, a national consensus to provide protection and assistance is likely, and the government often assumes responsibility with the assistance of the international community. The most serious cases emanate from armed conflicts in which the IDPs become the responsibility of no one because neither side is concerned with them or they become the victims of one or another side. It is particularly in these circumstances that protection and assistance from the international community is needed, often urgently, although they are frequently difficult to provide because of the 'jealous defence of sovereignty' by governments that are unwilling or unable to provide equal protection to all nationals.

The challenge posed by the IDPs should be viewed in the context of events since the end of the Cold War. 'Refugees in the post-Cold War era, particularly from the developing world, no longer possess any ideological or strategic value.'<sup>8</sup> Ethnic and religious conflicts have been unleashed in many parts of the world. Today, there are tentative signs that the international community is prepared to rise to the humanitarian challenges posed by the

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<sup>7</sup> The mandate of the International Committee of the Red Cross (ICRC) is reasonably clear and has been dealt with in greater detail in Chapter 4 at 4.5 - 'Institutional Arrangements and Interagency Cooperation'.

<sup>8</sup> B.S.Chimni, 'The Incarceration of Victims: Deconstructing Safety Zones', in Dr. Najeeb Al-Nauimi and Richard Meese eds., Proceedings of the Qatar International Law Conference '94, (Martinus Nijhoff, Dordrech/Boston/London, Forthcoming), p.73.

forcible internal population displacement which has now become a monumental crisis in too many parts of the world. Given the magnitude and the scope of the problem and the inadequate *ad hoc* response thus far, there seems to be international consensus that an institutional mechanism to cope with the displacement phenomenon is urgently required.<sup>9</sup> The challenge, however, is dependent on an even larger context. Resolving the problems of the IDPs must ultimately mean addressing the causes of displacement, which, in many instances, means making efforts towards resolving conflicts, ensuring peace and security for all, and guaranteeing the rights of citizenship without discrimination, a task that may call for international intervention with all its attendant problems.<sup>10</sup>

## 1.2 Legal Protection

International human rights law and humanitarian law are considered the principal sources of protection for the IDPs. Together with refugee law, they provide the basis for articulating further protection procedures. Although these bodies of law are conceptually distinct, they have 'influenced' and 'informed' each other and have contributed to a corpus of laws that could be applied to the problems experienced by the IDPs.<sup>11</sup>

Unlike refugee law, which generally applies only when a border

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<sup>9</sup> See UNHCR's Operational Experience with Internally Displaced Persons, Division of International Protection, Office of the United Nations High Commissioner for Refugees, (Geneva, September 1994), p.1.

<sup>10</sup> Francis Deng, Protecting the Dispossessed, op cit, p.4.

<sup>11</sup> Ibid.,

is crossed, or humanitarian law, which applies to situations of armed conflict, human rights law proclaims broad guarantees for the fundamental rights of all human beings.

The International Bill of Human Rights, composed of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), represents the corpus of human rights law recognizing the inherent equality and dignity of all human beings and setting a common standards for their rights.<sup>12</sup> The ICCPR and its Optional Protocol elaborate on the principles set forth in the UDHR and provide a procedure for formal complaints and investigations. The ICESCR is the primary source of obligations to ensure the economic and social well-being of all persons. Among the specific rights that form the basis for assisting the IDPs are the right to food, clothing, housing and medical treatment. Other international legal instruments - the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention of the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families - contain provisions offering a wide range of relevant human rights guarantees. Regional

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<sup>12</sup> See Universal Declaration of Human Rights, A/810 (United Nations, 10 December 1948); International Covenant on Economic, Social and Cultural Rights, A/6316 (United Nations, 16 December 1966); and International Covenant on Civil and Political Rights, A/6316 (United Nations, 16 December 1966).

human rights instruments, including the African Charter on Human and Peoples' Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights, provide similar and in some cases, additional guarantees.<sup>13</sup>

With respect to humanitarian law, the four Geneva Conventions of 1949 and the Additional Protocols of 1977 reaffirm the principle that in situations of armed conflicts those not directly participating in the hostilities shall be treated humanely. Article 3, common to all four Conventions, categorically prohibits violence to life and person, the taking of hostages and outrages upon personal dignity of persons in situations of "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." It affirms a due process requirement and imposes a duty to provide the sick and wounded with medical care. The obligation deriving from Article 3 is absolute for each party and not contingent upon reciprocity.

The specific need for protection of IDPs during civil conflict is recognized in Article 17(1) of the 1977 Protocol II to the Geneva Conventions, which states that "the displacement of the civil population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand," in which case "all possible

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<sup>13</sup> See African Charter for Human and Peoples' Rights, CAB/LEG/67/3, (OAU, Addis Ababa, 1982); European Convention for the Protection of Human Rights and Fundamental Freedoms, UN Treaty Series, (United Nations, 1950); and American Convention on Human Rights, OEA/Ser.L/V/II.23, doc.21, (OAS, Washington D.C., 1975).

measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, safety and nutrition." Article 17(2) states, "civilians shall not be compelled to leave their own territory for reasons connected with the conflict." The Geneva Conventions confer special status to the ICRC, which is mandated to protect and assist victims of armed conflict as provided for under humanitarian law.

Existing international standards under humanitarian law have limitations. Although article 17 of Protocol II is a useful provision, it applies only to persons displaced because of armed conflict and only to States that are party to Additional Protocol II.

International refugee law is of significance to IDPs, and 'one of the most important rights drawn from it may be the right to seek asylum.'<sup>14</sup> The critical and in some instances the only distinction is that crossing an international border turns an IDP into a refugee.

Some scholars have argued, and this aspect has further been discussed in Chapter 4, that this is an arbitrary distinction limiting the applicability of refugee law to IDPs. But, it is of enormous consequence because an IDP's presence in a country other than his or her own initiates coverage by a well-established protective mechanism under the UNHCR and affords the person's rights recognized under international law.

The crossing of the border is vital to the concept of non-

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<sup>14</sup> Francis Deng, Protecting the Dispossessed, op cit, p.7.

refoulement<sup>15</sup> and the core of refugee protection is based on the right of the refugees not to have to return to a country that would persecute them.

Although there has been no formal redefinition of the term refugee under the 1951 Refugee Convention and the 1967 Protocol, the mandate of the UNHCR has been extended to include those displaced for reasons other than 'a well-founded fear of persecution' on the grounds outlined in the Convention and even extends to those who have not crossed national boundaries.<sup>16</sup> The OAU Convention and the Cartagena Declaration broaden the definition but the criterion of crossing an international border remains.

Any extension of refugee law to IDPs can only be 'partial' and therefore only 'partially protective'.<sup>17</sup> However, protective mechanism of the UNHCR has been quite effective under the High Commissioner's 'good offices'.<sup>18</sup>

However, according to Francis Deng, the 'legal protection falls short of providing the internally displaced with protection

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<sup>15</sup> Non refoulement has been recognized as customary law for all refugees, even those fleeing generalized violence who do not fit into one of the traditional categories of the 1951 Convention or the 1967 Protocol. See Goodwin-Gill, 'Non-Refoulement and the New Asylum Seekers,' Virginia Journal of International Law, Vol.26, (Summer 1986), pp.897-920.

<sup>16</sup> When there is a mention of displaced persons in the context of UNHCR, the reference is to "externally" displaced persons and not to IDPs.

<sup>17</sup> Francis Deng, Protecting the Dispossessed, op cit, p.8.

<sup>18</sup> Sadruddin Aga Khan, 'Legal Problems Relating to Refugees and Displaced Persons', Collected Courses of the Hague Academy of International Law, Recueil Des Cours, Vol.I, (The Hague, 1976), pp.287-352.

adequate to their specific needs.'<sup>19</sup> The 'Analytical Report of the Secretary-General on Internally Displaced Persons' concluded that there is at present no clear statement of the human rights of the internally displaced or those at risk of becoming displaced. The applicable international law is a patchwork of customary standards: parts apply to all persons, parts only to certain sub-groups of displaced persons, such as those displaced by armed conflict, and parts may not apply in certain situations, such as an emergency threatening the life of a nation, or may apply only in a state of emergency. Internal displacement causes humanitarian and human rights crises of major proportions that calls for clear guidelines that could be applied to all IDPs; regardless of the cause of their displacement, the country concerned, or the legal, social, political, or military situation.

The reality is that the IDPs constitute millions of vulnerable people whose desparate needs are yet to be sufficiently met. 'What is needed is more than the letter of the law in a document; it is a greater awareness of the problem and practical measures to provide speedy remedies, although a clear statement of pertinent standards would be a significant complement. Conceived as part of a dynamic process of decision-making, law becomes not an end but a means to be moulded as need requires, both an an educational prescription and a sanction.'<sup>20</sup>

In cases of human rights violations, people whose rights have

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<sup>19</sup> Francis Deng, Protecting the Dispossessed, op cit, p.8.

<sup>20</sup> Francis Deng, Protecting the Dispossessed, op cit, p.10.



been violated need legal recourse to law enforcement mechanisms. IDPs hardly ever resort to seeking remedies through established legal procedures. The meaningful source of protection and assistance available to them becomes their 'right of access' to humanitarian relief, which means the right of physical access by the international community and the 'right' of the international community to be given that access.<sup>21</sup>

### 1.3 Enforcement Mechanisms

In its resolution 43/131 regarding 'Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations', the UN General Assembly recognized the displaced persons outside the original definition of refugees to be within the scope of international, and therefore UN, concern. The UN Secretary-General had also approved guidelines stressing "the responsibility of States to take care of the victims of emergencies occurring on their territory and the need for access to those requiring humanitarian assistance."<sup>22</sup>

However, 'the increased concern with the relief needs of the internally displaced have not been accompanied by increased attention to (their) protection.'<sup>23</sup> Although significant measures have been taken within the framework of the Commission on Human

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<sup>21</sup> Ibid.,

<sup>22</sup> Boutros Boutros-Ghali, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping, A/47/477;S/24/11, (United Nations, 17 June 1992).

<sup>23</sup> Francis Deng, Protecting the Dispossessed, op cit, p.11

Rights, the challenge of providing comprehensive international protection and assistance to the IDPs are yet to be sufficiently addressed. One way to provide this coverage would be to establish for the IDPs an equivalent of the High Commissioner for Refugees. However, at this stage, the international community is not prepared to endorse an expensive new organization.

Another response might be to expand the mandate of the UN High Commissioner for Refugees, in order to include the IDPs. 'The similarity of the plight of the IDPs to that of refugees has increasingly led UNHCR to extend its humanitarian expertise to instances of internal displacement.'<sup>24</sup> In fact, 'in recent years, UNHCR has also sought to address the problem of internal displacement as part of its strategy to prevent refugee flows, as (exemplified) in northern Sri Lanka and former Yugoslavia. In both cases, UNHCR had acted as the principal UN agency, at the request of the UN Secretary-General.'<sup>25</sup>

The proposed expansion of the mandate needs to be cautious. While protecting the IDPs, even through mechanisms like 'safe haven', the UNHCR needs to take measures which would not betray the core of her activities - the institution of asylum.

In 1992, the Department of Humanitarian Affairs (DHA) was established in order to coordinate all UN humanitarian activities.

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<sup>24</sup> Sadako Ogata, Statement at the Roundtable Discussion on United Nations Human Rights Protection of Internally Displaced Persons, (Nyon, Switzerland, 5 February 1993), Selection of Speeches and Statements by Mrs. Sadako Ogata (UNHCR), Vol. I, January-July 1993.

<sup>25</sup> Ibid.,

The mandate of the DHA specifically excludes human rights activities, since it was perceived that human rights was so politically sensitive that they might jeopardize humanitarian action undertaken by the international community. DHA engages in policy-making and not actually rendering field services. A workable possibility with regard to IDPs might be the usage of the services of both the DHA and the UNHCR, the former shaping policy based on the vast operational experience of the latter, along with other UN agencies.

Determining the bases for action in specific situations and developing effective enforcement will require major innovations, not only with respect to the legal doctrine and institutional arrangements, but also in the operating principles on international politics and practice. 'Enforcement, therefore, involves assertive action of the international community to override traditional prerogatives of sovereignty.'<sup>26</sup>

#### **1.4 Reconciling Sovereignty with International Responsibility**

'In the post-Cold War world ... a new standard for intolerance for human misery and human atrocities has taken hold ... something quite significant has occurred to raise the consciousness of nations to the plight of peoples within sovereign borders. There is a new commitment - expressed in both moral and legal terms - to alleviate the suffering of oppressed or devastated people. To argue today that norms of sovereignty, non-use of force, and the sanctity

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<sup>26</sup> Francis Deng, Protecting the Dispossessed, op cit, p.13.

of internal affairs are paramount to the collective human rights of people, whose lives and well-being are at risk, is to avoid the hard questions of international law and to ignore the march of history.'<sup>27</sup>

In 1991, the former UN Secretary-General, Javier Perez de Cueller had stated, 'does [intervention] not call into question the cardinal principles of international law, one diametrically opposed to it, namely, the obligation of non-interference in the internal affairs of States?'<sup>28</sup> In his 1991 Annual Report, de Cueller wrote of the new balance that must be struck between sovereignty and the protection of human rights: 'It is now increasingly felt that the principle of non-interference with(in) the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity ...'

Dr. Boutros-Ghali, in his report to the Security Council on strengthening the capacity of the world organization to cope with matters of international peace and security, wrote that respect for sovereignty and integrity is 'crucial to any common international progress,' but went on to say that 'the time of absolute and exclusive sovereignty ... had passed,' that 'its theory was never matched by reality,' and it is necessary for leaders of States 'to find a balance between the needs of good internal governance and

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<sup>27</sup> David J. Scheffer, 'Towards a Modern Doctrine of Humanitarian Intervention,' University of Toledo Law Review, Vol.23, (Winter, 1992), p.259. Quoted from Francis Deng, 'Protecting the Dispossessed,' op cit, p.14-15.

<sup>28</sup> UN Press Release, SG/SM/4560, 24 April 1991.

the requirements of an ever more interdependent world.'<sup>29</sup>

'Absolute sovereignty is clearly no longer defensible; it never was.'<sup>30</sup> The critical question now is under what circumstances is the international community justified to override sovereignty in order to protect the displaced. The common assumption in international law is that to justify such action, there must be a threat to international peace. Some argue that massive violations of human rights and displacement within a country's borders constitute such a threat.<sup>31</sup> Others would contend that a direct threat to international peace is too high a threshold because it would preclude action on too many humanitarian crises. 'Indeed, they say, the time has come to recognize humanitarian concern as a ground for intervention. Insistence on a threat to international peace as the basis for intervention under Chapter VII of the UN Charter has become more a legal fiction than the principle justifying international action.'<sup>32</sup>

The consent of the State concerned is perhaps the chief difficulty of a legal character presented by the provision of humanitarian assistance to displaced persons. Both as a matter of international law and as a matter of practice, the consent of the State is 'normally' required. The enunciation of a comprehensive strategy for the protection of the IDPs include taking into account

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<sup>29</sup> Boutros-Ghali, Agenda for Peace, op cit, p.5.

<sup>30</sup> Francis Deng, Protecting the Dispossessed, op cit, p.18.

<sup>31</sup> Note by the president of the Security Council, S/25344, 26 February 1993.

<sup>32</sup> Francis Deng, Protecting the Dispossessed, op cit, p.18.

of the full range of factors which compel people to leave their homes: political, social, economic and environmental. The problem of displacement can be a source of instability and a threat to international peace. Thus protecting the IDPs require a comprehensive and an integrated approach, encompassing peace-making, peace-keeping and peace-building as well as humanitarian action.

The challenge is the translation of the preventive and solution-oriented strategy into practical measures. How does the international community control the abuse of State power? How does the international community get States to eliminate violations of human rights in their territory and cooperate internally to reduce the 'push factors', to meet humanitarian needs as well as to create conditions conducive to return which is the ultimate solution to the problem of displacement?

The issue of humanitarian access is important not only in relation to legal standards but also in the development of institutional means to protect human rights. Although as has been earlier stated that it is the duty of the State to protect the rights of its citizens, in a situation of internal displacement, the State may itself be the persecutor or may be unwilling to protect or unable to do so, for instance in a case where it has lost territorial control during an armed conflict.

The assumption of national sovereignty leaves no international jurisdiction for protection, unlike that of the UNHCR in the case of refugees. However, the growing concern of legitimate international concern on matters relating to human rights is slowly

creating more 'space' for international bodies to play a role in monitoring the protection of the IDPs than was previously possible. Various mechanisms are being used, including that of international presence.

The objective of the dissertation is to analyse the legal issues arising out of UNHCR's involvement with internally displaced persons. The dissertation addresses the extent and the conditions in which the Office of the UNHCR undertakes activities on behalf of the IDPs. There is also a need to overview whether the High Commissioner has a mandate to act with regard to the persons displaced within their own country. The proposed dissertation would seek to analyse the situations which are appropriate for the UNHCR to undertake activities on behalf of the IDPs. The next section of the dissertation will address the legal norms applicable for the protection of persons forcibly displaced or at risk of being displaced within their own countries. The dissertation will look at the content of UNHCR's activities and the interagency cooperation in activities on behalf of the internally displaced persons.

The enunciation of a comprehensive strategy for the protection of the IDPs should include taking into account of the full range of factors which compel people to leave their homes: political, social, economic and environmental. The problem of displacement can be a source of instability and a threat to international peace. The dissertation would refrain from researching issues as diverse as the strengthening of collaborative arrangements between agencies, a comprehensive approach to assistance and protection, an expanded

role for human rights bodies and options for institutional reform, as also issues relating to differences in the treatment of displaced persons and refugees because of their legal status. The definitional aspect and the consent of the host state merit wide attention. Since the dissertation essentially looks at the role of the UNHCR, the issues of definition and consent-based regime would be analysed keeping the UNHCR in mind.

The dissertation analyses the challenge to provide legal protection to the IDPs, illustrating the enforcement mechanisms, and reconciling the issues of sovereignty with international responsibility. The role of UNHCR in the international refugee regime traces the dynamics of regime change and the refugee and IDP in International Law. The activities of the UNHCR to be studied include : Protection, Durable Solutions, Political Asylum as a Durable Solution, Voluntary Repatriation, Local Integration, Third-Country Resettlement, Repatriation in the Midst of Continuing Conflicts and the UNHCR in the Cold-War Period.

The contemporary refugee dilemma would be studied under various headings, including, among others : the UNHCR in the Post Cold-War Period, Prevention and Containment, and also protection aspects of UNHCR on behalf of IDPs.

A country profile would be helpful to gauge the field reports of the UNHCR in their activities on behalf of the IDPs. The country under consideration would be Sri Lanka, reviewing : Government of Sri Lanka response to the IDPs, the UNHCR's Open Relief Centres (ORC), the United Nations authorization and consent of the parties, the impact of UNHCR's involvement in Sri Lanka and finally, the



present situation.

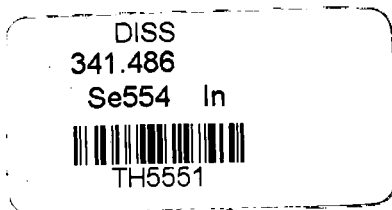
The international community is deeply concerned with the humanitarian challenges and the legal issues, as have been posed by the problem of forcible internal population displacement. The 'Legal Basis of UNHCR Action for the IDPs' will evaluate the existing substantive law, beginning with the Charter of the United Nations, the Universal Declaration of Human Rights, the four Geneva Conventions, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as from other texts, including relevant regional instruments as also the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.

The consent of the State concerned is perhaps the chief difficulty of a legal character presented by the provision of humanitarian assistance to displaced persons. The challenge to the international community as regards the IDP is that they fall within the domestic jurisdiction of a state and are therefore not covered by the protection normally accorded to refugees. International humanitarian action hopes to ensure that displacement is a transitory condition, the lack of national protection representing an aberration of the practice where the state accepts their responsibility to protect their own citizens.

Both as a matter of international law and as a matter of practice, the consent of the State is 'normally' required. These issues would be viewed in the perspective of the protection and

assistance activities of the UNHCR on behalf of the IDPs.

The proposed dissertation will seek an analysis on the status of the IDPs vis-a-vis international human rights law and international humanitarian law, and link institutional arrangements relating to interagency cooperation. It also will address issues on the compilation of legal norms and the applicable legal norms for the Office of the UNHCR.



Chapter 2

*UNHCR and International Refugee Regime*

According to Gil Loescher, international institutions traditionally have had difficulty addressing refugee problems, particularly during times of great disorder and structural change within world politics - for example, during the First World War when multinational states and empires disintegrated and after the Second World War when the global structure shifted from a multipolar to a bipolar system. In order to regularize the status and control of stateless people in Europe, the 'world community' established an international refugee regime,<sup>33</sup> some 70 years ago. Since then, international laws specifying refugees as a unique category of human rights victims to whom special protection and benefits should be accorded have been signed and ratified by over a hundred and twenty-four states and enforced for several decades.

Like international institutions, however, states also have been traditionally ambivalent about international cooperation over refugee issues. On the one hand, states have a fundamental, self-serving interest in quickly resolving refugee crises since refugee movements create domestic instability, generate inter-state

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<sup>33</sup> International regimes are defined using Stephen Krasner's explanation of "principles, norms and decision-making procedures around which actor expectations converge in a given issue area." Stephen Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables,' International Organization, Vol 36, 1982, p.185.

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tension and threaten international security. Thus, states created the international refugee regime prompted not by purely altruistic motives, but by a desire to promote regional and international stability and to support functions which serve the interests of governments, namely, burden sharing and coordinating policies regarding the treatment of refugees.

On the other hand, state independence is also an issue. States often are unwilling to yield authority to international refugee agencies and institutions and consequently, impose considerable financial and political limitations on their activities. For example, the first intergovernmental activities on behalf of refugees during the interwar period (1921-1943) were limited to specific groups of European refugees. The series of international organizations created to deal with these situations possessed limited mandates of short duration. Although governments met in the early cold war period (1949-1951) to create the contemporary international refugee regime and formulate rules and decision making procedures, they sought to limit once again the regime's responsibilities in the context of the emerging global refugee problem. The great powers were unwilling to commit themselves to indefinite financial costs and large resettlement programs. The scenario today remains much the same.

Nonetheless, despite state reservations, significant intergovernmental collaboration on the refugee issue did in fact occur, and the responsibilities accorded to the international refugee regime steadily expanded, with assistance and protection granted to a progressively larger number of refugees. In the

post-Cold War era, however, the number of displaced people in situations of internal conflict, state disintegration and environmental degradation is growing rapidly. The refugee regime, ill-equipped to address the causes of the crisis, the numbers caught up in it or its consequences, is once more in danger of being overwhelmed.

Having presented an overview, this chapter examines the dynamics of regime change through the five periods during which the international refugee regime confronted significant challenges to its authority and adapted to those specific needs: (a) the interwar period; (b) the immediate post-Second World War era; (c) the period of expansion into the Third World during the late 1950s through most of the 1970s; (d) the decade of the 1980s, when the regime faced long-standing refugee problems resulting from superpower involvement in regional conflicts; and finally, (e) the post-Cold War era, during which internal displacements and repatriations in situations of civil conflict, political and communal violence, forced relocations and other gross human rights violations assume primary importance for international organizations and governments. The objective in analysing the different stages is essential to appreciate the regime change as has been occurring in the past decades, as also an appreciation of the changes in the functioning of the UNHCR. It is the post-Cold War era that shall be the focus of the dissertation.

## 2.1 DYNAMICS OF REGIME CHANGE

### (a) The Interwar Refugee Regime

The international refugee regime came into existence in the aftermath of the First World War, when governments were confronted by massive numbers of homeless people devastated by the war and the breakup of multi-ethnic empires, mainly in Europe and Asia. Millions of uprooted people, rendered stateless by their governments, without national passports and, therefore, without identification or protection, wandered outside their home countries, searching for refuge. Fearing huge flows of displaced people, European governments rushed to erect protective barriers, close borders and expel thousands of individuals across national frontiers.<sup>34</sup> Such government reaction resulted in the creation of large refugee populations which threatened regional security in Europe and compromised the limited resources of private or public international agencies and individual European governments.

To reduce this source of interstate tension by actually addressing the problem of refugees, in 1921, Western governments established the first multilateral coordinating mechanism for refugees, the High Commissioner for Refugees, endowed with specific responsibilities for Russian and later for Greek, Turkish, Bulgarian and Armenian refugees. In the 1930s, the major European governments reached international agreements to protect refugees fleeing from the disintegrating Russian and Ottoman Empires. In

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<sup>34</sup> John Hope Simpson, The Refugee Question, (Oxford University Press, London, 1939).

later years, these governments extended the agreements to include those fleeing Germany and Austria.

Although still under the aegis of the League of Nations, the international response to refugees prior to the Second World War did not constitute an effective regime. Governments throughout this period, fearing pressure to recognize political dissidents of any state by a supragovernmental authority, refrained from adopting a universal definition of "refugee." Instead, Western governments designated only specific national groups as refugees, providing them with only minimal protection and keeping the mandate of the High Commissioner deliberately narrow. As the League's political effectiveness and credibility declined, particularly after the withdrawal of Germany, Japan and Italy from its membership and after its failure to resolve the Manchurian and Ethiopian conflicts during the 1930s, its competence to deal with refugee problems also decreased. The crucial impediment to genuine international cooperation towards refugees was the lack of any consistent or coherent international commitment to resolving refugee problems.

The Second World War displaced millions of people. At first, international efforts to resolve the postwar refugee problem followed the pattern set in the interwar period: They were temporary measures aimed at resolving an emergency situation. To this end, the Big Four set up in 1943 an intergovernmental body, the United Nations Relief and Rehabilitation Agency (UNRRA),<sup>35</sup>

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<sup>35</sup> Kim Salomon, 'Refugees in the Cold War: Towards a New International Refugee Regime in the Early Postwar Era', (Lund University Press, Lund, Sweden, 1991).

whose principal function was to promote and oversee the repatriation of the millions of displaced people under Allied control. UNRRA was in no sense a refugee organization: only incidentally did it aid those refugees with fears of political persecution. Although it was authorized to give temporary relief to those under its care, it was not empowered in any way to arrange for the resettlement of refugees and displaced persons to third countries. Moreover, in accord with the terms of the February 1945 Yalta agreements and in response to Soviet pressures, UNRRA played an active part in Europe in the forcible repatriation of large numbers of people, many of whom had asserted fear of persecution.

**(b) Early Post-Second World War: The Origins of the Contemporary International Refugee Regime**

The contemporary international approach to refugee problems emerged fully only after UNRRA was abolished in 1945. Despite adamant opposition from the Soviet Union, Western governments undertook new initiatives to resettle Eastern European refugees. In 1947, the Western powers committed themselves to the creation of the International Refugee Organization (IRO), which focused on resettling the remaining refugees and displaced persons created by the war and its aftermath. With the establishment of IRO,<sup>36</sup> the international community adopted, for the first time, a universal definition of refugee based on "persecution or fear of persecution"

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<sup>36</sup> Louise Holborn, 'The International Refugee Organization. A Specialized Agency of the United Nations: Its History and Work, 1946-1952,' (Oxford University Press, London, 1956).



on the grounds of race, religion, nationality or political opinion. In doing so, Western powers hoped that IRO would achieve two goals.<sup>37</sup> First, to resolve effectively situations with potential to destabilize already-weakened European economies attempting to recover from the ruins of war, and second, to "internationalize" the refugee problem by distributing refugees and refugee costs among a number of North and South American and Western European nations, as well as Australasia and a number of African countries. As such, IRO served the interests of occupied Germany and Western European countries which were concerned about hosting refugee populations. The principal architect of the postwar refugee regime, the United States, also used IRO to its advantage by underwriting over two-thirds of its costs, thereby exercising exclusive control over its leadership.

The IRO proved to be an extremely expensive operation, and the United States and most of its Western allies became weary of making any new open-ended financial commitments to refugees. Events in India, Korea, China and Palestine, as well as along the perimeter of the Iron Curtain, had all created new refugees by the millions, convincing American and other Western officials that there was no end in sight to the world refugee problem. Unwilling to pledge unlimited support to refugees, Western governments now actively opposed the United Nations committing itself to unspecified and

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<sup>37</sup> Gil Loescher, 'The International Refugee Regime: Stretched to the Limit?', Journal of International Affairs, Vol.47, No.2, (Winter 1994).

future responsibilities.<sup>38</sup>

The establishment of the Office of the United Nations High Commissioner for Refugees (UNHCR) in 1950 reflected the political and strategic interests of the European powers and, specifically, the United States. By placing severe limitations on UNHCR's functional scope and authority, the United States and its Western allies sustained their desire to create an international refugee agency that would neither pose a threat to their national sovereignty nor impose new financial obligations on them.

The United States was the only nation capable of providing the political and financial support to make the international refugee regime function effectively. At the same time, the United States' increasing preoccupation with postwar European foreign policy and the rapidly developing Cold War critically affected the lens through which that country viewed refugee policy. United States policy makers began to consider refugee issues within the same policy framework as national security. To them, the most important aspects of the newly formed refugee regime were maintaining international attention devoted to refugees from communist countries and minimizing international appeals for assistance funds to refugees. To this end, the United States sought to limit severely the functional scope and independent authority of UNHCR and instead created two new U.S.-led organizations: the Intergovernmental Committee for European Migration and the U.S. Escapee Program, both programs parallel to and outside the purview

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<sup>38</sup> Ibid.,

of the United Nations.<sup>39</sup>

Specially created U.N. agencies, the United Nations Works and Relief Agency for Palestine Refugees in the Near East and the United Nations Korean Reconstruction Agency, for example, exclusively handled refugee populations located in such strategic conflict areas as the Middle East and Korea, areas in which the United States and its allies were also deeply involved. The United States funded these organizations much more generously than it did UNHCR, and for a time these organizations provided the United States with a pretext for withholding financial support from the U.N. based refugee regime.

The consequences of such U.S. actions were, for UNHCR, profound. The denial of American financial and diplomatic support directly affected the organization's ability to define an independent role and to implement its goals. Even five years after its founding and despite large refugee flows around the world, UNHCR remained small and relegated simply to providing legal protection for displaced persons not already resettled by IRO. Eventually, however, through its rapid response to the first major Cold War refugee crisis that erupted with the 1956 Hungarian Revolution, UNHCR overcame U.S. opposition and, in effect, became perceived as being useful to American foreign policy interests. The Hungarian crisis presented UNHCR with the opportunity to demonstrate that it was the only agency capable of coordinating both international refugee relief and the collection of funds for

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<sup>39</sup> Ibid.,

emergency material assistance. To extend aid to fleeing Hungarians, the organization made no attempt to judge individual motives for flight but approved all Hungarians in Austria and Yugoslavia as *prima facie* refugees. With the Hungarian operation, the funding capacities and operational services of UNHCR grew; the High Commissioner, August Lindt, won the confidence of both the United States and communist authorities in the Eastern bloc for his repatriation efforts; and UNHCR became the centerpiece of the international refugee regime.<sup>40</sup>

### **(c) Organizational Expansion into the Third World**

The third period of organizational growth for the international refugee regime came during the twenty-year period from the late 1950s to the late 1970s, when the rules, operational capacity and geographic outreach of the international refugee regime expanded due to the pressures, demands and burdens placed upon it by refugee crises in the third world. For UNCHR, this was a period of 'organizational take-off' as it evolved into a firmly established organization with a broader mandate and capacity to provide material assistance on a global level to a greater number of people in refugee and refugee-like situations. UNHCR offered assistance not only to refugees fleeing from persecution who were clearly within its mandate, but also to war victims and other externally displaced people in 'refugee-like situations', who were not formally within the Office's mandate.

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<sup>40</sup> Ibid.,

During the late 1950s, as outflows of refugees from Eastern Europe waned, the international refugee regime shifted its focus to the Third World. With rapid decolonization, the character of refugee problems changed, and the regime came under mounting pressure to adapt its programs and policies to give greater priority to Third World refugees. Anticolonial insurgency, as well as post-independence civil strife and warfare generated vast numbers of refugees. Aristide Zolberg, Astri Suhrke and Sergio Aguayo have noted that the conflicts which produced refugee flows were generally either 'conflicts of state formation' or 'conflicts over the social order.'<sup>41</sup> It needs to be remembered that the conflicts of state formation were largely due to the insensitivity of the former colonial powers of these newly independent countries. The refugees typically arrived in large groups, were destitute and in need of a wide variety of special kinds of emergency assistance. The central concern regarding the international refugee regime was its ability to respond effectively to these new kinds of refugees and its applicability to Third World states in dealing with these problems. In their attempt to respond effectively to these new refugee groups, signatories to the international refugee instruments were 'compelled' to adjust the geographical and time limits of the refugee definition contained in the 1951 Refugee Convention, which covered only refugee movements occurring in

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<sup>41</sup> Aristide Zolberg, Astri Suhrke and Sergio Aguayo, Escape from Violence: Conflict and the refugee crisis in the developing world, (Oxford University Press, New York; Oxford, 1989).

Europe before 1951.<sup>42</sup>

The 1967 Protocol expanded the assistance capacities of the High Commissioner and reoriented the programmes and priorities of the regime from Europe to the Third World.

Moreover, the international refugee regime faced profound political problems arising from the very nature of the new refugee flows. In many cases, refugee situations directly involved, or were created by, either the interests of the Western colonial powers, who were also among the founding members of the international refugee regime, or internal strife and ethnic conflict in newly independent states. Recognizing the political embarrassment that refugee problems caused colonial powers and countries of origin, Western states began to turn increasingly to UNHCR to address refugee situations. They simply adjusted the rules of the regime to fit the new situation. Whenever refugee situations appeared with political dynamics and problems which did not correspond with those of the European situation and were not covered in the UNHCR Statute or involved one or more of the Western powers, the UN General Assembly broadened the scope of UNHCR authority for action.

Thus, for the next two decades, Western governments were willing to turn to UNHCR whenever its services could be usefully applied to meet the needs of these new and different groups of refugees and displaced persons. Through a series of resolutions, conventions and declarations, the definition of refugee was broadened considerably in a *de facto* manner. The extension of the

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<sup>42</sup> Guy Goodwin-Gill, The Refugee in International Law, (Clarendon Press, Oxford, 1983).

rules and the expansion of the activities of the international refugee regime occurred in a series of successive U.N. resolutions enabling UNHCR to assist Chinese refugees in Hong Kong, Algerian refugees in Tunisia and Morocco, "refugees within his (the High Commissioner's) mandate and those for whom he extends his good offices," and all the various groups within his competence and, finally, by the adoption of new legal instruments, most prominently the 1967 Protocol to the U.N. Convention on Refugees, the 1969 Convention on Refugee Problems in Africa and the Cartagena Declaration of 1984. The international refugee regime was now empowered to provide assistance to the vast majority of the world's refugees and displaced persons without having to make individual determinations of their eligibility.

Western governments were willing politically and financially to support UNHCR's operational expansion into the developing world because international action on the refugee issue was also now viewed as a way to deal with potential sources of instability in the Third World. During the 1960s and 1970s, the Cold War extended beyond Europe into parts of the Third World. Both the East and West vied for influence in Africa and Asia and, at the same time, tried to minimize the ability of their ideological opponent gaining political advantage in these regions. Western governments began to perceive refugee situations in developing countries as sources of instability which the Soviet Union could exploit for its own advantage in extending communism in the Third World. In the face of an escalating Cold War struggle, Western governments came to perceive assistance to refugees as a central part of their foreign

policies towards newly independent states, thus using foreign aid as one of the principal tools in this East-West struggle for influence. Governments made little distinction between military aid, development assistance and refugee relief aid.

At a time when the majority of the world's refugees originated and stayed in the Third World, Western states had little difficulty in extending the regime's rules to include a much broader category of refugees. These "states were not in danger of confronting masses of third world arrivals" <sup>43</sup> and, therefore, could avoid the question of whether these groups were in fact formally within the High Commissioner's mandate. Thus, the refugee situation evolved into one characterized by a lack of state consensus on a single refugee definition and requiring multiple definitions for multiple purposes. During the 1960s and 1970s, this 'pragmatic' and principally 'non-legalistic' approach served the interests of the international community and the vast majority of the world's refugees. The inherent inadequacies of this different approach, however, became apparent by the 1980s when deteriorating political conditions in the third world not only generated, but also pushed increasing numbers of refugees northward to claim political asylum in industrialized nations.

**(d) The 1980s: Dealing with Refugee Outflows from Superpower Rivalry and Regional Conflicts**

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<sup>43</sup> Gil Loescher, 'The International Refugee Regime: Stretched to the Limit?', Journal of International Affairs, Vol.47, No.2, (Winter 1994).



Until the late 1970s, the relatively liberal attitude of most states and their willingness to accept additional responsibilities to assist refugees and strengthen measures to protect them characterized the post-Second World War regime. During the 1980s, however, states within the regime began to develop not only restrictive but also conflicting policies regarding the refugee issue. In addition, despite its phenomenal organizational growth during the 1970s,<sup>44</sup> the international refugee regime still fell short in addressing the new and seemingly intractable refugee problems of the decade.

The intensification of the Cold War during the 1980s shifted the structure of the bipolar conflict. Both 'established' Third World governments and their opposing political forces were patronised, enjoying relatively easy access to weapons. As a result, internal wars in Indochina, Afghanistan, Central America, the Horn of Africa and Southern Africa became protracted and debilitating affairs. Such conflicts perpetuated endemic violence which, in turn, generated large waves of refugees.

In the light of such developments, during the 1980s, long-term care and maintenance in the enclosure of camps for the majority of refugees fleeing regional conflicts in Africa, Asia and Central

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<sup>44</sup> Between 1975 and 1980, the number of UNHCR offices increased from fewer than 50 to more than 80, and the total staff rose from 380 to 1,700. The annual expenditures rose from approximately \$12 million in 1972 to more than \$500 million in 1980. See Ronald Scheiman, 'Refugees: Goodbye to the Good Old Days,' in Gil Loescher and John Scanlan, eds., 'The Global Refugee Problem: U.S. and World Response,' Special issue of 'Annals of the American Academy of Political and Social Sciences,' No.467, p.88, (Sage Publications, 1983).

America characterized the global refugee relief situation.<sup>45</sup> The international community failed to devise comprehensive long-term political solutions or to provide any alternatives to prolonged camp existence. At the same time, a growing number of Third World refugees appeared on the doorsteps of Western countries to seek asylum. Unlike in earlier periods, these refugees were no longer confined to their regions of origin, and now travelled directly to Western countries by air.

**(e) The Post-Cold War Era**

The 1990s represent a new era for refugees.<sup>46</sup> The end of the Cold War brought about major changes in the general pattern of refugee emergencies and challenges posed to the international refugee regime in providing relief and protection. Most major refugee crises of the 1990s have been triggered by internal conflicts in which ethnic identity is a prominent element in both the goals and methods of adversaries. The number of wars involving secession and state formation are increasing. In such conflicts, civilians are often used as shields and targets in warfare, and large-scale displacements comprise a political strategy in claiming control over territory. Refugee movements are more likely the result of ethnic, communal and religious conflicts, fueled by the increasing availability of arms, due to the aftermath of the Cold

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<sup>45</sup> This 'enclosure movement' is sought to be perpetuated, in the recent past, through the concept of 'safe havens.' Safe Havens are dealt as part of a later section.

<sup>46</sup> UNHCR, 'The State of World's Refugees,' (Penguin, New York, 1993).

War, as well as of sharp socio-economic divisions and human rights abuses. UNHCR must confront refugee emergencies in rapid, sometimes overlapping, succession. Refugee crises in Iraq, Bosnia, Croatia, Kenya, Somalia, Bangladesh, Nepal, the Caucasus, Tajikistan, Benin, Ghana, Rwanda and Burundi strain the capacities of the organization almost to the breaking point. At the same time, UNHCR is trying to resolve the long-standing refugee problems of the previous decade primarily through repatriation in the context of continuing instability and insecurity.

It is time for a major debate as to how the United Nations, regional bodies and states can 'effectively intervene' in internal conflicts and humanitarian emergencies. The most difficult political and humanitarian questions confronting the international community in the 1990s are how governments and international organizations can intervene to prevent refugee flights within countries or across international borders; how they can provide assistance and protection to internally displaced people when their own governments object to such intervention as an infringement of sovereignty; or, when, as in Somalia, Rwanda or Bosnia, it is impossible to determine the legitimate government or authority in the country. The most immediate short-term problem for international agencies is to determine when and how repatriation and reintegration are most appropriate, particularly as some past regional conflicts in Central America, Indochina and Africa subside.<sup>47</sup>

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<sup>47</sup> Gil Loescher, 'The International Refugee Regime', op.cit.

## 2.2 THE REFUGEE AND IDP UNDER INTERNATIONAL LAW

### Alienage, Asylum and Non-Refoulement

'The bases for an international legal concept of the refugee must ... be sought in treaties, in UN practice and in the UNHCR statute.'<sup>48</sup> The Office of United Nations High Commissioner of Refugees has been designated the principal UN agency concerned with refugees and its competence *ratione personae* has been considered more fully below. However, it is helpful to appreciate related developments within the UN that have affected the content of the refugee concept. Article 14 of the Universal Declaration of Human Rights declares:

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

UNHCR was established by the General Assembly to provide 'the necessary legal protection for refugees' and to seek 'permanent problems for the problem of refugees.' According to its Statute, the work of the Office shall be of an entirely non-political character, to be 'humanitarian' and 'social' and to relate, as a

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<sup>48</sup> Guy Goodwin-Gill, 'The Refugee in International Law', (Clarendon Press, Oxford, 1983).

rule, to groups and categories of refugees.<sup>49</sup>

The Statute first brings within UNHCR's competence refugees covered by various earlier treaties and arrangements. It next includes refugees resulting from events occurring before 1 January 1951, who are outside the country of origin and are unable or unwilling to avail themselves of its protection 'owing to a well-founded fear of being persecuted' or 'for reasons other than personal convenience.' Finally, the Statute extends to: 'Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence because he has or had well-founded fear of persecution by reasons of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.'

The term "refugee" has a specific legal connotation. The 1951 United Nations Convention<sup>50</sup> and its 1967 Protocol,<sup>51</sup> which expanded

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<sup>49</sup> Guy, Goodwin-Gill, 'The Refugee in International Law', op.cit.

<sup>50</sup> United Nations Convention relating to the Status of Refugees, adopted by the Conference of Plenipotentiaries of the Status of Refugees and Stateless Persons, adopted under U.N. General Assembly (UNGA) resolution 429(V), 14 December 1950, adopted 28 July 1951, entered into force 22 April 1954: United Nations Treaty Series (UNTS), 189, no.2545, p.137, text in UNHCR, Collection of International Instruments Concerning Refugees, (1990).

<sup>51</sup> United Nations Protocol relating to the Status of Refugees, adopted by ECOSOC resolution 1186(XLI), 18 November 1966; see also UNGA resolution 2198(XXI), 16 December 1966, entered into force 4 October 1967: UNTS, 606, no.8791, p.267, text in UNHCR, Collection

the temporal and geographic coverage of the Convention, together define "refugee" as a person who is outside her<sup>52</sup> country of nationality and who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.<sup>53</sup> If an individual does not fit this definition, then she is not entitled to protection under the Convention or Protocol; such protection includes the right not to be returned to a place of persecution and various civil, economic and social rights, non-discrimination, practice of religion, retention of property, freedom of association, access to courts, employment, entitlements to share in any rationing schemes, housing, public education, public assistance, social security, freedom of movement, identity papers, travel documents, transfer of assets and facilitation of naturalization.

The UNHCR Statute, however, contains an apparent contradiction.<sup>54</sup> On the one hand, it affirms that the work of the UNHCR shall relate as a rule to groups and categories of refugees. On the other hand, it proposes a definition of the refugee which is essentially individualistic, requiring a case by case examination

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of International Instruments Concerning Refugees, (1990).

<sup>52</sup> Pronouns herein are phrased in the feminine voice in recognition of the fact that "refugee women and girls constitute the majority of the world's refugee population, and that many of them are exposed to special problems in the international protection field", Conclusion No.39, Executive Committee, UNHCR, (1985).

<sup>53</sup> Art. 1A(2), 1951 United Nations Convention relating to the Status of Refugees.

<sup>54</sup> Guy, Goodwin-Gill, 'The Refugee in International Law', op.cit.

of subjective and objective elements. The escalation in refugee crises has made it necessary to be flexible in the administration of UNHCR's mandate. In consequence, there has been a significant broadening of the concept of 'refugees of concern' to the international community.

A major role in these developments has been played by the UNGA and the ECOSOC, whose policy directions the High Commissioner is required to follow.<sup>55</sup> A similar influence has been exercised by the Executive Committee (EXCOM) of the High Commissioner's Programme. Established in 1957, the EXCOM's terms of reference included advising the High Commissioner, on request, in the exercise of the statutory functions; and advising on the appropriateness of providing international assistance through UNHCR in order to solve such specific refugee problems as may arise.

It was also in 1957 that the UNGA first authorized the High Commissioner to assist refugees who did not come fully within the statutory definition.<sup>56</sup> Given the need for assistance, express authorization to the High Commissioner 'to use his good offices to encourage arrangements for contributions' was an effective pragmatic solution. Assistance to other specific groups was authorized in the years which followed. Concurrently, the UNGA developed the notion of the High Commissioner's 'good offices' as an umbrella idea under which to bring the refugees who did not come

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<sup>55</sup> Paragraph 3 of the Statute, op.cit.

<sup>56</sup> UNGA res. 1167(XII), 26 November 1957.

within the competence, or 'immediate competence',<sup>57</sup> of the United Nations. The type of assistance which might be given was initially limited, often to the transmission of financial contributions, but that restriction was soon dropped.<sup>58</sup>

However, Guy Goodwin-Gill has opined that 'General Assembly resolutions are never consistent in their language, and their rationale, too, is often hidden.' The nature of the activities in which UNHCR was involved suggests that the class of refugees assisted were either clearly not within the Statute or had not been specifically determined to be within the Statute. At the same time, the situations in question shared certain factors in common: the people in need (a) had crossed an international frontier, (b) as a result of conflict, or radical political, social, or economic changes in their country of origin.

The very size of the refugee problem in Africa in the 1960s made individual assessment of refugee status impractical, as did the absence of appropriate machinery. Moreover, the pragmatic, rather than the doctrinal, approach to the new problems was influenced by factors such as the desire to avoid the imputation on newly independent states which is carried by every determination that a well-founded fear of persecution exists; and the feeling, not always made manifest, that while 'political conditions' had compelled the flight of the entire group in question, it might not

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<sup>57</sup> The term is employed but not defined in GA res. 1499 (XV), 5 December 1960. Quoted from Guy Goodwin-Gill, 'The Refugee in International Law', op.cit.

<sup>58</sup> Ibid.,



be possible to establish a well-founded fear on an individual case-by-case basis. The 'group approach', by concentrating on the fact that those concerned are effectively without protection of their own government, thus avoids the restrictions of the legal definition.

The reference to 'displaced persons' dates from 1975, when it was contemporaneous with UNHCR's first involvement in the Indo-China peninsula.<sup>59</sup> If the term was intended to cover groups, besides refugees, who had crossed international frontiers, then it may have been something of a misnomer. Displaced persons had a special meaning in the constitution of the IRO, but had otherwise been commonly employed to describe those displaced within their own country, for example, by the effects of civil strife or natural disasters.<sup>60</sup>

In 1977, the High Commissioner sought advice from the Executive Committee on the distinction between a refugee and an IDP. No formal response was forthcoming. This query was reiterated in 1980. Although again no formal advice was tendered, there was considerable support for the view that refugees were those who had crossed an international frontier, whereas displaced persons had not. This view still has its adherents<sup>61</sup> but the UNGA resolutions

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<sup>59</sup> UNGA res. 3455(XXX), 9 December 1975.

<sup>60</sup> Guy Goodwin-Gill, 'The Refugee in International Law', op.cit.

<sup>61</sup> The representative of Turkey, at the 1980 session of the Executive Committee, expressed the view that 'the time had to ensure that UNHCR did not, by virtue of precedents, become a body which cared for anyone compelled for whatever reason to leave his country or to move to a different area inside his country':

indicate an extension of the mandate from 'refugees strictly so-called' to include a class of 'displaced persons' who have fled their countries of origin.<sup>62</sup>

Apart from purely humanitarian considerations, this tendency indicates an awareness of the difficulty of determining in the case of massive exodus that each and everyone has a well-founded fear of persecution in the sense of the UNHCR Statute. It may also suggest, although not obvious from the resolutions themselves, that something more general, such as lack of protection, should serve as the criterion for identifying 'persons of concern' to the High Commissioner.

Guy Goodwin-Gill has further stated that 'lack of protection by the government of the country of origin is already an element in the statutory definition of the refugee.' Given the impracticability of individual determinations in case of large scale movements of asylum-seekers, that element acquires great significance. Protection implies both 'internal protection', in the sense of effective guarantees in matters such as life, liberty and security of person; and 'external protection', in the sense of diplomatic protection, including documentation of nationals abroad and recognition of the right of nationals to return. The 'right to

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A/AC.96/SR.319, paragraph 12-15. See Goodwin-Gill, 'The Refugee in International Law', op.cit.

<sup>62</sup> This began primarily in 1973 when the UNGA requested the High Commissioner 'to continue his assistance and protection activities in favour of refugees within his mandate as well as for those to whom he extends his good offices or is called upon to assist in accordance with relevant resolutions to the General Assembly'.

return',<sup>63</sup> in particular, is accepted as a normal incident of nationality.<sup>64</sup>

Despite the protests of individual governments, the international community at large has hitherto not demurred when UNHCR has exercised its protection and assistance functions in cases of large-scale movements of asylum-seekers. This permits the conclusion that the class of 'persons' within the mandate of, or 'of concern' to UNHCR includes: (1) those having left their country of origin, and can be determined on a case-by-case basis to have a well-founded fear of persecution on certain specified grounds; and (2) those large groups or categories of persons who, likewise having crossed an international frontier, can be determined or presumed to be without, or unable to avail themselves of, the protection of the governments of their state of origin. This is the broad meaning of the 'refugee' for the purposes of the United Nations, and this is the class which benefits from the principle of *non-refoulement* and from minimum standards of treatment. Beyond this minimum, both the obligations of the state and the activities of the UNHCR with regard to refugees in the broad sense may be limited to the provision of temporary refuge and material assistance, and the pursuit of voluntary repatriation. The refugee with a well-founded fear of persecution alone, perhaps, enjoys the full spectrum of protection and the expectation of a lasting

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<sup>63</sup> See Bill Frelick, 'The Right to Return', International Journal of Refugee Law, Vol.2, No.3, July 1990.

<sup>64</sup> Guy Goodwin-Gill, 'The Refugee in International Law', op.cit.

solution in a country of asylum or resettlement.<sup>65</sup>

Traditionally and by definition, therefore, refugee protection is reserved for those who have have been forced to leave their countries of origin. The decision to leave and cross a national border transforms an individual into an object of international concern under refugee law when she has lost, or been deprived of, the protection under law in the country of origin, and is in need of another source of protection from persecution.

Individuals who are driven from their places of origin, but do not cross a national boundary cannot appeal to international legal standards governing refugees, even if they fear persecution or other serious harm. The IDP's 'plight may be every bit as serious as that of individuals who cross borders, yet the Convention definition of refugee status excludes internal refugees from the scope of global protection.'<sup>66</sup> Thus, while often outnumbering and having similar protection needs as refugees, internally displaced persons have no guarantee of freedom from forced return nor any of the civil, social and economic entitlements set forth in the refugee treaties.

Occasionally, however, at the request of the Secretary-General and/or the General Assembly of the United Nations, the Office of the United Nations High Commissioner for Refugees extends its mandate to such displaced persons under a "good offices"

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<sup>65</sup> Guy Goodwin-Gill, 'The Refugee in International Law', op.cit.

<sup>66</sup> James Hathaway, The Law of Refugee Status, (Butterworths, Toronto, 1991).

jurisdiction, which is based on the UNHCR statute.<sup>67</sup> The statute provides UNHCR with a mandate for assistance and protection outside the framework of international refugee treaties. Acting through the United Nations, governments have also established special authorities to assist displaced persons, such as the United Nations Border Relief Operation (UNBRO). UNBRO was created in 1982 along the Thai-Cambodian border to coordinate assistance to Cambodians held in border camps.

In addition, those individuals who cross a border while fleeing war or civil disturbance are outside the scope of international refugee law; they are also denied legal protection from return and the other rights promulgated in the treaties. Such persons are considered not to have a sufficiently individualized fear of persecution. Member states of the Organization of African Unity (OAU), however, subscribe to a broadened refugee definition, which includes those displaced by war and civil disorder.<sup>68</sup> In general, movements of people caused by deforestation, desertification and other environmental factors would not be

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<sup>67</sup> Statute of the Office of the UNHCR, adopted by UNGA res.428(V), 14 December 1950. See UNGA res.37/175, 38/91, 40/133, concerning assistance to displaced persons in Ethiopia, and UNGA res. 39/106 and 40/136, concerning assistance to displaced in Chad, for more recent examples of mandate extentions in 1982, 1983, 1984 and 1985. A recent extension of the mandate concerns the former Yugoslavia.

<sup>68</sup> Article I(2), OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Heads of State and Governments at its Sixth Ordinary Session, 10 September 1969, entered into force 20 June 1974; UNTS, 1001, no.14691, p.45, text in UNHCR, Collection, (1990), op.cit.

covered by either the expanded or conventional refugee definitions.<sup>69</sup> Governments and refugee experts in Latin America<sup>70</sup> and Asia<sup>71</sup> also recognize the merit of a broadened definition addressing causes such as external aggression or civil conflict. But even in these regions, such arrangements have not yet been adopted.

According to James Hathaway, "the strict insistence on ... territorial criterion has prompted concern that there is a mismatch between the definition and the human suffering consequent to involuntary migration."<sup>72</sup> In one sense, the exclusion of the 'internal refugee' is clearly unfair: it does not recognize the existence of social, legal and economic barriers which make it impossible for all to escape to international protection.<sup>73</sup>

There is a threefold historical rationale for the requirement that only persons outside their state be eligible for Convention

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<sup>69</sup> See Astri Suhrke, 'Environmental Degradation and Population Flows', Journal of International Affairs, Vol.47, No.2, (Winter 1994).

<sup>70</sup> Annual Report of the Inter-American Commission on Human Rights, 1984-85, OEA/Ser.L/V/II.66/Doc.10, rev.I, pp.190-93. Also see H.Gros Espiell et al., 'Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America,' International Journal of Refugee Law, Vol.2, (1990), p.83.

<sup>71</sup> Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia, International Institute of Humanitarian Law, San Remo, Italy, 1981. Quoted from Arthur Helton, 'Displacement and Human Rights: Current Dilemmas in Refugee Protection', Journal of International Affairs, Vol.47, No.2, (Winter 1994).

<sup>72</sup> James Hathaway, 'The Law of Refugee Status', (Butterworths, Toronto, 1991).

<sup>73</sup> Ibid.,

refugee status. First, the Convention was drafted with a specific purpose in the context of limited international resources, as has been exemplified above. Its intent was not to relieve the suffering of all involuntary migrants, but rather to deal "only with the problem of legal protection and status."<sup>74</sup> Internal refugee displacement, while of humanitarian note, "were separate problems of a different character",<sup>75</sup> the alleviation of which would demand a more sustained commitment of resources than was available to the international community.

Second, there was very practical concern that the inclusion of internally displaced persons in the international protection regime "might"<sup>76</sup> have prompted states to attempt to shift responsibility of large parts of their population to the world community.

The third reason is the most fundamental. There was the anxiety that any attempt to respond to the needs of the IDPs would constitute an infringement of the national sovereignty of the state. This anxiety remains deeply imbedded even in the contemporary world. However, the anxiety is not wholly unfounded.

Hathaway has opined that 'none of these three factors which dictated the exclusion of internal refugees -- limited resources, concern over state participation, or respect for sovereignty -- was so much a matter of conceptual principle, as it was a reflection of

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<sup>74</sup> Statement of Mr. Henkin of the USA, UN Doc.E/AC.7/SR 161, p.7, August 18, 1950. Quoted from James Hathaway, 'Law of Refugee Status', op.cit., p.30.

<sup>75</sup> Statement of Mrs. Roosevelt of the United States, 5 UNGAOR, (December 2, 1949), p.473.

<sup>76</sup> James Hathaway, 'Law of Refugee Status', op.cit.

the limited reach of international law.'<sup>77</sup> In fact, Andrew Shacknove has categorized 'alienage (as) an unnecessary condition for establishing refugee status. It ... is a subset of a broader category: the physical access of the international community to the unprotected person.'<sup>78</sup>

Ever since 1975, the UNHCR has been called upon to provide material assistance to 'various groups within their national boundaries'. This assistance has been premised on the concurrence of the state concerned and the willingness of the international community to provide funding, but is nonetheless 'indicative of an enhanced recognition of an international role in the protection of internal refugees.' More dramatic is the establishment of orderly departure programmes in collaboration with refugee-producing states, whereby refugees may make an application from within their country of origin for resettlement abroad under international auspices, as is in the case of the Vietnamese.

Both of these developments may decrease the territorial condition in the Convention refugee definition as unprotected persons within their states become more accessible to the international community.

### 2.3 THE ROLE OF THE UNHCR

#### (a) Protection

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<sup>77</sup> Ibid.,

<sup>78</sup> Andrew Shacknove, 'Who is a Refugee?', Ethics, 95, (University of Chicago, January 1985), p.274.



The concept of international protection made its appearance after the First World War, when refugees were making their entry into international law. It was in 1930 that international protection entered the vocabulary of international affairs when the Assembly of the League of Nations requested its competent bodies to ensure the legal and political protection of refugees.<sup>79</sup>

The function of protection<sup>80</sup> is mandatory for the Office of the High Commissioner. While the cases in which s/he considers that s/he should intervene and the way in which s/he intervenes, are left to his/her discretion, the function itself constitutes a strict obligation for him/her, and hence s/he does not need, as in the case with material assistance, to receive a request from the Government before s/he exercises it.<sup>81</sup>

The UNHCR is viewed increasingly as the humanitarian arm of the United Nations. Conceptual developments have not kept pace with social and political realities. Thus, according to Helton, the work of the Division of International Protection needs to be fundamentally redirected to provide a conceptual foundation for new programme approaches.<sup>82</sup>

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<sup>79</sup> Sadruddin Aga Khan, 'Lectures on Legal Problems Relating to Refugees and Displaced Persons', Collected Courses of the Hague Academy of International Law, Recueil des Cours, I, (The Hague, 1976).

<sup>80</sup> Article 8 of the Statute explains what is meant by protection and gives a detailed list of UNHCR responsibilities in this regard.

<sup>81</sup> Sadruddin Aga Khan, *op.cit.*

<sup>82</sup> Arthur Helton, 'UNHCR and Protection in the 90s', International Journal of Refugee Law, Vol.6, No.1, (1994).

Among UNHCR's most difficult current challenges is the need to identify protection strategies for its evolving work in 'countries or origin'. Protection officers bear witness and document severe human rights violations and their work is a blend of human rights monitoring, negotiation and activism, often in situations of considerable insecurity.<sup>83</sup>

UNHCR's metamorphosis into the humanitarian branch of the UN must be supported by clear and workable principles derived from law and international politics. In a fundamental sense, this will require reinventing refugee protection and reinvigorating the Division of International Protection. Law and experience needs to be synthesized in an on-going process to achieve ordered principles for action.<sup>84</sup>

#### (b) Durable Solutions

One can scarcely exaggerate the Cold War's impact on the

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<sup>83</sup> Ibid.,

<sup>84</sup> Ibid., See Guy Goodwin-Gill, 'The Language of Protection', International Journal of Refugee Law, Vol.1, No.1, (January 1989); B.S.Chimni, 'The Language of Protection and the Reality of Rejection: End of Cold War and Crises in Refugee Law', Saksena ed., 'Human Rights in 1990 and Beyond', (Lancer Publisher, New Delhi, 1994); 'Temporary Protection: Summary and Recommendations from the Report of the Inter-Ministerial Working Group', Norway, April 1993, reproduced in International Journal of Refugee Law, Vol.5, No.3, (1993); Bill Clarence, 'Protective Structure, Strategy and Tactics: International Protection in Ethnic Conflicts', International Journal of Refugee Law, Vol.5, No.4, (1993); Morten Kjaerum, 'Temporary Protection in Europe in 1990s', International Journal of Refugee Law, Vol.6, No.3, (1994); 'Note on International Protection', Submitted by the High Commissioner to the Forty-third session of the Executive Committee of the High Commissioner's Programme, UN doc. A/AC.96/799, (1992); Note on International Protection, UN doc. A/AC.96/815, (1993).

international refugee regime. It will be even more difficult to exaggerate the effects of the Cold War's passing.<sup>85</sup>

Stated less delicately, refugees are people who cannot go home for fear that they will be persecuted by their governments, or because their governments are unwilling or unable to prevent their persecution by groups not officially part of the government. The international community is made up of sovereign states that expect all people to enjoy a permanent relationship with at least one of them. Individuals with no such permanent relationship are of concern to the international community and here comes to light the role of the UNHCR.

The concept of durable solutions needs to be seen in the light of restoring or maintaining permanent relationships between individuals and states. Each of the durable solutions sought to be employed by the UNHCR - voluntary repatriation, local integration into the country of asylum and resettlement in a third country - seeks to restore individuals' permanent relationship with a sovereign nation state.

The 1951 Convention and its 1967 Protocol established safeguards against forced repatriation and a key provision in the document specifies refugees' right to *non-refoulement*. In recent years, a hierarchy has emerged among durable solutions, with preference given to voluntary repatriation, followed by local integration, and third-country resettlement as a last resort. While

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<sup>85</sup> Dennis Gallagher, 'Durable Solutions in a New Political Era', Journal of International Affairs, Vol.47, No.2, (Winter 1994).

some claim that this hierarchy reflects the preferences of refugees, in reality it more often reflects governments' preferences and expectations.

The United Nations High Commissioner for Refugees (UNHCR) has a statutory responsibility to assist '[g]overnments ... (and) ... private organizations in facilitat(ing) the voluntary repatriation of such refugees or their assimilation within new national communities.'<sup>86</sup> Signatories to the UN Convention and Protocol relating to the Status of Refugees, in turn, have an obligation to act in solidarity with the UNHCR to achieve these durable solutions. On the basis of international burden sharing, the international community is also obliged to support host countries that assist and protect refugees while durable solutions are sought.

### **(c) Political Asylum as a Durable Solution**

In Europe and North America granting asylum was equivalent to accepting refugees permanently. These countries granted political asylum mainly to individuals fleeing communist states, and they did not expect the conditions that caused their flight to change soon. In such cases there was no reason to treat asylum as temporary. Furthermore, when richer countries offered asylum to refugees from the Third World, they assumed these individuals - because of the economic disparities between their country of origin and their

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<sup>86</sup> UNGA res.428(V), 14 December 1950, Annex; Statute of the Office of the High Commissioner for Refugees, Chapter 1, General Provisions, paragraph 1, 'Collection of International Instruments Concerning Refugees', (UNHCR, Geneva, 1990).

country of asylum - would never go back voluntarily. They, therefore, expected that asylum would be permanent in these cases as well.

The current 'asylum crisis' reflects apprehension and fear of wealthier states, of being overwhelmed by people who try to gain entry through lengthy and costly procedures for determining who will receive political asylum. Even during the Cold War, this issue was gathering momentum as Western states worried about their capacity to absorb new migrants. Behind the issue is the question of how prepared states are to accommodate people of different races, cultures and religions.

When the number of people from poor states seeking asylum started to rise in the 1980s, industrialized countries began reviewing their asylum laws. This trend began a bit sooner in Europe, which historically had seen itself more as an area of asylum, than of resettlement.<sup>87</sup>

The United States, on the other hand, saw itself as a country of resettlement, rather than of political asylum. Indeed, political asylum was so infrequently an issue in the United States that the Refugee Act of 1980 contained only a cursory reference to it. However, this began to change with the Cuban-Haitian boat lifts of 1980 and the arrival of Central Americans fleeing civil wars in El Salvador, Guatemala and Nicaragua. The Immigration Act of 1990 introduced the concept of temporary safe haven into US law by

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<sup>87</sup> Dennis Gallagher, 'Durable Solutions in a New Political Era', Journal of International Affairs, Vol.47, No.2, (Winter 1994).

giving the Attorney General authority to extend 'temporary protected status' to nationals of countries undergoing emergencies.

Many industrialized countries seek to limit access to their territory for individuals claiming political asylum. Airlines, for example, are required to screen people without proper travel documents, even though it is obvious that many genuine refugees cannot acquire such documents from authorities. Governments may turn away people at ports of entry, claiming that they could have applied for political asylum elsewhere. Since 1981, the US Coast Guard has interdicted Haitian boats at sea on the grounds that they intended to enter the US illegally. cursory reviews of these Haitians cases for asylum were conducted on board Coast Guard vessels before forcibly repatriating them. Since 1992, they have lost even this limited opportunity to make a case for political asylum.

In sum, the Cold War significantly curtailed the range of possible solutions to refugee problems. Voluntary repatriation was impossible because the conditions that caused refugees to flee could not be changed. At the same time, both host and donor countries had an interest in the 'temporary' presence of refugees, as these populations were often closely allied to movements struggling to overthrow oppressive regimes.

While Third World countries were willing to provide temporary asylum, they were not willing to assimilate refugees into their societies. Indeed, host countries usually resisted efforts by refugees, or agencies helping them, to become more economically self-sufficient for fear that this would discourage refugees from

going home.

A few refugee groups - from the Soviet Union, Eastern Europe and Indochina - were allowed to immigrate to third countries in large numbers.<sup>\*\*</sup> Refugees from other areas of the world, however, did not ordinarily enjoy this opportunity. Refugee resettlement was used to make temporary safe haven possible for Vietnamese boat people as well as for Laotian and Cambodian refugees.

In the wealthier countries, political asylum was tantamount to a durable solution, as those who received it gained full economic rights and the opportunity to seek full legal rights. Richer states ultimately backed away from this posture, fearing that political asylum procedures were being overused and abused.

A crisis in durable solutions emerged in the mid-1980s, as many conflicts producing refugees remained unresolved and their numbers multiplied. Furthermore, rising costs threatened the viability of UNHCR.

#### **(d) Voluntary Repatriation**

The reasons states prefer voluntary repatriation to other durable solutions are obvious. Most states are not eager to absorb new members, except in cases when they choose to increase immigration. Countries hosting refugees, many of which are underdeveloped, typically make it clear both to their own citizens and to the international community that their commitments are temporary, and request international aid to help them support

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<sup>\*\*</sup> For example, Jews fearing persecution in the erstwhile Soviet Union, were resettled in Israel.

refugee populations. Often voluntary repatriation emerges as the only practical durable solution, given host states' reluctance to make a more permanent commitment and the limited opportunities for resettlement in third countries.

Mrs. Sadako Ogata, soon after her appointment as the United Nations High Commissioner for Refugees, declared 1992 as the Year of Voluntary Repatriation. This declaration signaled that regional disputes deadlocked during the Cold War might now be resolved, and that many refugees might be able to return home. Managing the repatriation of millions of Namibian, Cambodian, Laotian, Afghan, El Salvadoran, Guatemalan, Nicaraguan, Angolan, Mozambican, Ethiopian, Eritrean and other refugees are many of the larger challenges undertaken by the UNHCR.

The political settlement in Namibia and repatriation of Namibian refugees under the peace agreement are encouraging developments. In Central America, discussions about refugee repatriation were intimately connected with peace negotiations in the area. A number of participants at a regional conference on refugees and displaced persons (CIREFCA), held in Guatemala City in May 1989, contended that negotiating peace agreements, resolving the plight of uprooted populations and creating conditions for the reconstruction and development of these war-torn societies were inextricably linked.

The main lesson from the Namibian and Central American experiences - that the restoration of legitimate government and the rehabilitation of national economies are necessary for repatriation programs to succeed - was reflected in the United Nations'



implementation of the Cambodian peace accord. Under this wide-ranging agreement over 300,000 Cambodians returned after more than a decade in refugee camps along the Thai-Cambodian border. Nevertheless, elaborate operational plans for their repatriation, developed during the long period of peace negotiations, soon gave way to simpler and more flexible approaches.

While the United Nations informed the Cambodian refugees about the circumstances to which they would be returning, there was little doubt that all but a few would go back or be left to their own devices in Thailand. The long-awaited repatriation program to Mozambique from Malawi, Zimbabwe, South Africa and other countries in the region are pushing the United Nations capacity to new limits. Over one million refugees are estimated to return and internally displaced Mozambicans are sought to be reintegrated. Furthermore, as in Cambodia, the peace agreement contains provisions to establish a new government and reconstruct a country ravaged by years of war.

**(e) Local Integration**

When states review claims for refugee status on an individual basis, those individuals whose claims are judged valid receive political asylum and often are assimilated. Indeed, in several countries, approval of an asylum claim is tantamount to an offer of permanent residence and even citizenship. But the vast 'majority of refugees' under the protection and care of the UNHCR do not have their claims reviewed individually. Rather, masses of people fleeing into adjacent countries receive care and protection as

groups.

The larger the number of refugees, the less likely it is that their status will be determined on an individual basis. Time and resources may not permit the UNHCR to examine individual refugee claims at a time when all energies must be devoted to people's emergency needs. Further, many such large-scale movements have occurred in Africa, where the Organization of African Unity (OAU) has agreed to an expanded definition of who should be protected and assisted as a refugee. These states' agreement to treat such exoduses as refugee movements does not include any agreement on their part to assimilate these populations. Often, however, they extend 'temporary'<sup>89</sup> asylum because the circumstances that caused the flight have not been resolved.

It is comparatively easier for the UNHCR to raise funds to address new refugee emergencies. However, when these emergencies are prolonged, the 'compassion fatigue' creeps in, to make it harder to support long-term care and maintenance programmes.

Initiatives to reduce the dependency of refugees - such as the establishment of refugee settlements - have rarely succeeded. In any case, it is questionable whether increased economic self-sufficiency constitutes a durable solution. Because refugee status is based on political, not economic, considerations, a durable solution requires that refugees' permanent legal status be normalized as well. It is questionable and uncertain, as to how

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<sup>89</sup> Article II(5), OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, 'Collection of International Instruments Concerning Refugees', (UNHCR, Geneva, 1990).

much will host countries use local integration as a durable solution. Western European countries, as well as the United States, have already begun to curtail their obligations to migrants seeking asylum or temporary safe haven. There is no reason to believe that developing countries will be any more inclined than they have been in the past to integrate refugees whom they have allowed to enter and remain in their countries on a temporary basis.

There are a few exceptions to this general rule. For example, at the end of a 15-year effort to resettle refugees from Southeast Asia, the countries in the region may integrate the relatively small residual refugee populations that neither can go home nor be resettled in another country. Similarly, as countries resolve long-standing disputes and establish large-scale voluntary repatriation programs, some refugees may be allowed to remain in their countries of asylum or move back and forth between them and their countries of origin. Ethiopian and Eritrean refugees, for example, have lived in Sudan for years. Despite constraints, many refugees did manage to find jobs and participate in the Sudanese economy. Now that the causes of flight from Ethiopia and Eritrea have been resolved and some of the political tensions between countries in the region have abated, a more formal regional approach to economic development, including common labour markets, should be considered.<sup>90</sup> The United States government has extended 'temporary protected status' to several hundred thousand refugees

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<sup>90</sup> Dennis Gallagher, 'Durable Solutions in a New Political Era', Journal of International Affairs, Vol.47, No.2, (Winter 1994).

who came during the civil war in El Salvador and this status is due to expire soon. The United States can extend the temporary status again, repatriate the people or integrate them. Alternatively, it might allow their status to expire but neither legalize the population nor undertake repatriation. In Pakistan, it is unlikely that all Afghan refugees will go back home, and soon international assistance will be terminated. Over time, either by legal action or simply on a *de facto* basis, some Afghan refugees will be integrated permanently into Pakistani society.

This readiness to integrate residual refugee populations at the end of a crisis does not imply, however, that states are willing to integrate populations while crises are still underway. As donor governments cut back resources for long-term refugee relief programs, relief organizations, and especially the UNHCR, will come under pressure to find durable solutions.

One approach that has been demonstrated by UNHCR's camps along the Kenyan-Somalian border is to avoid camp conditions that encourage refugees to remain for extended periods. In Kenya, UNHCR decided to begin the process of voluntary repatriation to Somalia as soon as possible, using Quick Impact Projects inside Somalia to make return easier. We can expect international organizations to collaborate with the UNHCR and undertake more initiatives of this type.

#### **(f) Third-Country Resettlement**

Western governments often refer to third-country resettlement as the least desirable durable solution. This, again, reflects

these governments' preferences more than those of refugees themselves; many refugees actually might prefer third-country resettlement. UNHCR and governments, however, insist that refugees are not free to choose among durable solutions.

Third-country resettlement is nevertheless a viable and often-used solution. In many instances, securing temporary safe haven for refugees depends on a third country's willingness to accept them for resettlement. Resettlement in third countries has been used as a safety valve when an area's 'absorptive capacity' has been exceeded or when refugees' ethnic or cultural backgrounds could create tension in host countries.

The United States, Canada and Australia have been the principal countries accepting refugees for resettlement. Because large distances separate them from refugee-producing countries, they have shared in providing durable solutions through third-country resettlement programs. As immigration countries, they have tended to treat refugee resettlement as an emergency extension of immigration programmes. Their resettlement priorities, particularly those of the United States, have been strongly biased by foreign policy and ideological considerations.

Third-country resettlement is likely to decline in the post-Cold War era. The United States has given preference to refugees of 'special humanitarian concern.' Proposals to interpret this as people who have especially compelling needs have fallen on deaf

ears.<sup>91</sup> Indeed, increasing proportions of those resettled have weak claims to refugee status and have never left their countries; they are not, by definition, refugees.<sup>92</sup> Instead, these individuals are being processed through 'orderly departure' or in-country procedures. Even though the number of refugees worldwide has grown to over 18 million, the US resettlement programmes will probably shrink over the next few years on the grounds that fewer refugees are of special concern to the United States. It is unlikely that any reduction in US refugee resettlement will be compensated by increases in the resettlement programs of other governments, such as Canada and Australia.

#### **(g) Repatriation in the Midst of Continuing Conflicts**

The standard practice for repatriation is for the country of asylum, the country of origin and UNHCR to negotiate Tripartite Agreements, which spell out the conditions and modalities of repatriation. Typically, such agreements cannot be negotiated while the conditions that caused the refugees to flee persist. While UNHCR supports the principle that individual refugees have a 'right to return' at any time, it is reluctant to support voluntary repatriation programmes when conflicts are still in progress.

Recent experience, however, demonstrates that refugees do not

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<sup>91</sup> Dennis Gallagher et al., 'Of Special Humanitarian Concern: US Refugee Admission Since Passage of the Refugee Act', (Refugee Policy Group, Washington D.C., September 1985).

<sup>92</sup> Dennis Gallagher, 'Durable Solutions in a New Political Era', Journal of International Affairs, Vol.47, No.2, (Winter 1994).

always wait for peace agreements before deciding to go home."<sup>93</sup> This appears to be particularly common when the refugees have maintained some sense of community and political organization in the countries of asylum. In 1985, the humanitarian arm of the Tigrean People's Liberation Front organized the repatriation of many Tigrean refugees from Sudan. Initially, UNHCR hesitated to participate in the repatriation process because it was not based on any agreement. Finally, UNHCR agreed to help arrange transport from the refugee camps in Sudan to the Ethiopian border. In the same year, Salvadoran refugees expressed a similar resolve to return from Honduras to their homeland. Again, UNHCR was reluctant to support the repatriation effort, because the civil conflict was still underway and there was no Tripartite Agreement defining the terms of the repatriation. Non-governmental organizations assisted the refugees in returning to El Salvador. UNHCR ultimately helped move the refugees to the border and opened an office in El Salvador from which their return could be monitored. More recently, Guatemalan refugee leaders in Mexico decided that it was time to go home despite continuing civil conflict in their country. UNHCR has agreed both to facilitate negotiations with the Guatemalan authorities to make return as safe as possible and to provide economic assistance to the areas to which the refugees are returning.

UNHCR decided to help Afghan refugees who chose to return even

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<sup>93</sup> Frederick Cuny, Barry Stein and Pat Reed, eds., 'Repatriation During Conflict in Africa and Asia', (The Center for the Study of Societies in Crisis, Dallas, 1992).

though the conflict in Afghanistan was still underway. Following the regional agreement that led to the Soviet troops' withdrawal from Afghanistan, the international community hoped that many refugees living in Pakistan and Iran would return home. Initially, however, such voluntary repatriation did not proceed on a very large scale. As conflicts continued following the Soviet withdrawal, many refugees decided to stay in their countries of asylum. But without the incentive that the Cold War provided for refugee relief programmes, particularly in Pakistan, key donor countries made it clear that they would no longer back these efforts on the scale they had in the past. The UNHCR, therefore, decided to mount a programme to help refugees return voluntarily. Unable to monitor circumstances closely once refugees returned to Afghanistan, UNHCR nevertheless offered to buy back their refugee ration cards and to help arrange their transportation back to Afghanistan. Hundreds of thousands of Afghans eventually decided to return.<sup>94</sup>

In contrast, UNHCR long opposed repatriation of Sri Lankan refugees in India on the grounds that they did not have sufficient access to guarantee that the refugees' decisions to return were voluntary.<sup>95</sup> Following the Sri Lankan Tamil extremists' assassination of Indian Prime Minister Rajiv Gandhi in 1991, the Indian government began returning Tamil refugees with the consent

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<sup>94</sup> Report on 'Afghanistan: Trends and Prospects for Refugee Repatriation', (Refugee Policy Group, Washington D.C., April 1992).

<sup>95</sup> Asia Watch, 'Halt Repatriation of Sri Lankan Tamils', Vol. 5, No. 11, (New York, August 1993).



of the Sri Lankan government. While opposing this practice and continuing to request access to the Tamil refugee camps in southern India, UNHCR gained New Delhi's agreement to interview Tamil refugees to ensure that they had chosen to return. Negotiations led to a Tripartite Agreement for the refugees' repatriation. Inasmuch as the civil war in Sri Lanka has not ended, Sri Lankan Tamils claim human rights violations by the Sri Lankan government continue, and UNHCR has no access to refugee camps in south India, this repatriation has provoked particular controversy among refugee advocates.<sup>96</sup>

In sum, it is clear that UNHCR, faced with a growing worldwide refugee population and the need to provide protection and assistance in the midst of conflicts, is supporting solution-oriented approaches that recognize the limits of host country tolerance and donor support.

#### **(h) UNHCR in the Cold War Period**

During the Cold War, protracted conflicts that made it unsafe for refugees to return home, host countries' unwillingness to integrate refugees permanently and resettlement countries' strong political biases made durable solutions hard to achieve. Between 1960 and 1970, in Africa and other parts of the third world, many refugees fled countries embroiled in independence struggles. With a few important exceptions, when these struggles ended, displaced

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<sup>96</sup> Sumit Sen, Ayesha Mago and Hekali Zhimoni, 'The Status of Refugees under the Protection of the UNHCR in New Delhi', (South Asia Human Rights Documentation Centre, New Delhi, 1 May 1995).

populations either returned home or were assimilated in the areas to which they had fled. When displacements were not connected to Cold War politics, durable solutions could often be achieved. But, as third world refugee movements became intertwined with Cold War politics in Somalia, Ethiopia, Afghanistan, Nicaragua, Vietnam and elsewhere, the conflicts underlying them grew harder to resolve.

As civil conflicts dragged on, voluntary repatriation seemed less and less feasible in the short-term. At the same time, countries of asylum or resettlement became less willing to contribute durable solutions for refugees because they feared that there would be no end to such commitments. Furthermore, in many instances, they had an interest in keeping refugees close to their countries of origin, as many refugees were linked to political struggles underway there.

For example, Western powers wished to prolong the debilitating effects of the communist-led Eritrean and Tigrean liberation struggles on the Ethiopian government, although they did not care whether these movements ultimately succeeded. Donor governments supported refugee programmes in neighbouring Sudan that provided safe havens for large numbers of Eritreans and Tigreans. Governments, on a clandestine basis, also secretly provided the 'humanitarian arms' of these liberation movements with relief aid, which was transported from Sudan into the Eritrean and Tigrean controlled areas of Ethiopia. Similarly, after the Soviet invasion of Afghanistan, Western governments, determined to thwart the USSR's efforts, supported Afghan refugees in exile. At the very least, they were interested in making the USSR pay as much as

possible - militarily, politically and financially - for the occupation.

Despite the flight of refugees and spiraling costs for refugee relief, Western states did not want many liberation struggles to end. Instead, they raised their payments to UNHCR - a response that soon proved too costly. Between 1979 and 1992, the number of refugees multiplied from 5.7 million to 18.2 million. In the same period, UNHCR's expenditures rose from approximately \$300 million to \$1 billion,<sup>97</sup> a trend that troubled donor states. Host countries, too, were concerned that international assistance did not even begin to match the economic and political burdens posed by the growing numbers.

In the 1980s, two conferences on international assistance to refugees in Africa (ICARA I and II) highlighted the opposing attitudes of donor and host countries. The African host governments, on one hand, sought resources beyond the aid they were getting for refugee relief to help offset the refugees' impact on their societies. Donor countries, on the other hand, demanded commitments by the African host governments to durable solutions, that is, to integrate refugees into their societies, as a condition for such support. The host governments rejected this stipulation and the donors offered little support.

The short-term alternative to legal integration of refugees was to give them more opportunities to earn money in host countries. Some argued that this would lighten the burden refugees

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<sup>97</sup> UNHCR, 'The State of World's Refugees: A Challenge of Protection', (Penguin, New York, 1993).

imposed on host societies and the international community. Many refugee advocates pointed out the debilitating effects of long-term care and maintenance programs on refugee communities.<sup>98</sup> But large-scale refugee movements during the Cold War period involved migration from one very poor country to another, severely limiting the refugees opportunities for productive activity even under the best of circumstances. The restrictions many host countries placed on refugees participation in commercial and economic activities, fearing that this could encourage them to remain, complicated matters further.

Unable to promote durable solutions or activities which would allow refugees to become self-sufficient, UNHCR found itself increasingly short of funds by the late 1980s.<sup>99</sup> While UNHCR could raise money to support key donor states' specific interests, they lacked general funds for long-term care and maintenance programs, projects which required a growing percentage of UNHCR's already limited resources.

From the late 1970s to the early 1980s, the flight of thousands of Vietnamese 'boat people' to countries throughout Southeast Asia, and this influx of Cambodian and Laotian refugees to Thailand presented the international community with an urgent need to find durable solutions. Whereas most host countries were prepared to offer at least temporary asylum until a durable

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<sup>98</sup> Barbara Harrell-Bond, 'Imposing Aid: Emergency Assistance to Refugees', (Oxford University Press, Oxford, 1986).

<sup>99</sup> Report on 'The Status of Contributions to UNHCR Voluntary Funds and the Overall Voluntary Fund Requirement for 1988 and 1989', A/AC.96/712, (EXCOM, Geneva, 31 May 1988).

solution could be found, Southeast Asian countries were unwilling to provide safe haven unless third countries - the United States, Canada, Australia and various European states - were ready to resettle the refugees expeditiously. At a July 1979 conference in Geneva on Indochinese refugee resettlement, the necessary compromises took shape. Following assurances from Western governments that they would accept large numbers of Vietnamese refugees for resettlement, the countries of the Association of Southeast Asian Nations (ASEAN) admitted the refugees and permitted UNHCR to establish and run camps providing temporary accommodations. Since 1979, over one million Indochinese refugees have been resettled.<sup>100</sup>

By the mid-1980s, however, the key resettlement countries' commitment faltered as the influx of refugees continued. Several European states stopped their resettlement programmes altogether. Indeed, countries receiving asylum-seekers in the region expressed increasing concern that the resettlement program was drawing people out of Vietnam and that boat people would continue arriving as long as they all were treated as refugees. In response, the United States and other countries expanded an Orderly Departure Programme (ODP), which enabled Vietnamese to apply for resettlement without having to leave their country. Designed to resettle former political prisoners and certain other groups, these procedures allowed Vietnamese to immigrate to the United States, especially because an increasing number of Vietnamese had now resided in the

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<sup>100</sup> UNHCR, Information Sheet, (Geneva, 31 August 1993).

United States long enough to acquire citizenship and petition to bring their close relatives into the country. ODP procedures also provided US officials with one of their direct channels of communication with the Vietnamese government. The Vietnamese ODP program was the precursor of other similar in-country processing arrangements in the Soviet Union and Haiti.

In 1989 a second International Conference on Indochinese Refugees produced the Comprehensive Plan of Action (CPA).<sup>101</sup> According to this plan, screening for refugee status was implemented in each country of temporary asylum by national authorities with monitoring by UNHCR. Resettlement countries would agree to accept persons who qualified. Those refugees who did not qualify would be returned to their home countries.

The Thai government did not require the same third-country commitments to resettlement before it accepted Cambodians. The buffer Cambodian factions created between Thailand and Vietnamese-dominated Cambodia was one of several reasons. Only a minority of Cambodian refugees were permitted to apply for resettlement; most lived along the Thai-Cambodian border in camps allied with one of the Cambodian factions. For these people, the only possible durable solution was voluntary repatriation, which depended upon Vietnamese withdrawal from Cambodia and a political agreement among the various Cambodian parties, including the Hun Sen government based in Phnom Penh. Once these conditions were met

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<sup>101</sup> Shamsul Bari, 'Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Statement', International Journal of Refugee Law, Vol.4, No.4, (1992).

there was no doubt that refugees would go back to Cambodia, as the Thai government would no longer tolerate their presence.

During the Cold War, prohibitions on exit from Eastern Europe and the Soviet Union prevented large refugee flows into Western Europe. Western governments could denounce abuses against these populations without worrying about a flood of Eastern bloc asylum-seekers. People who managed to leave were accepted either by Western European countries or the key countries of resettlement, the United States, Canada and Australia.

When thousands of refugees were allowed to leave Czechoslovakia in 1948, Western governments welcomed them, and many resettled in third countries. When Hungarians surged into Austria in 1956, resettlement countries again accepted tens of thousands of refugees. During periods when the Soviet Union granted some of its Jewish citizens visas to Israel, resettlement countries cooperated with the 'transit' countries (Italy and Austria) to offer them other immigration options. Polish refugees found durable solutions in various Western European countries as well as in the principal countries of resettlement. During Poland's Solidarity period, however, resettlement countries tightened quotas to encourage Polish dissidents to remain rather than leave the country at a crucial time.

In the late 1950s and 1960s the United States accepted hundreds of thousands of refugees from Cuba. Like the abortive coup in Hungary, the failure of US-led action against Castro instilled a deep sense of obligation to people fleeing the communist regime. The Cuban Adjustment Act of 1966 committed the United States to

accept for permanent residence any Cuban who reached its shores.

Asylum-seekers from other countries in the region have not been so lucky; very few have been allowed to remain in the United States. Furthermore, until the passage of the Refugee Act of 1980, Washington defined as refugees only those fleeing from communist countries. Similarly, during the Carter, Reagan and Bush years, biases persisted against people seeking resettlement or asylum from non-communist states such as El Salvador, Guatemala and Haiti. As a result, few people from non-communist countries resettled in the United States and the claims of those who did arrive from non-communist countries and applied for political asylum were routinely denied.

#### **2.4 THE CONTEMPORARY REFUGEE DILEMMA**

Even should the United Nations or regional intergovernmental organizations expand treaty protections and strengthen enforcement mechanisms, governments may still reduce the protection of refugees and displaced persons through various approaches that have been recently attempted. The end of the Cold War changed the context in which refugee protection is conceived. Governments, particularly those of Western developed countries, are increasingly treating those once considered to be refugees as unauthorized migrants. Budgetary constraints now supplant foreign policy considerations, and governments see the refugee issue not as an ideological frontline, but rather as a problem in migration management. Today, host countries consider most asylum-seekers from less-developed



countries as economic migrants.<sup>102</sup>

Contemporary policy makers often discuss one or more of three possible approaches to refugee emergencies. First is a strategy of refugee containment, including the organization of internal safety areas by governments such as those made in 1991 for Kurds in northern Iraq, and the implementation of humanitarian assistance programs in Somalia and the former Yugoslavia, sometimes with provisions for military escort. Second is the concept of burden sharing, or shifting, from one to another country of asylum, including regional screening arrangements such as those made in 1989 by governments under United Nations auspices for Vietnamese and Laotian asylum-seekers in Asia. Third is the collective effort by states to deter asylum-seekers, occurring recently in Western Europe and elsewhere.

**(a) UNHCR in the Post-Cold War Period**

Refugee policy and practice, deeply embedded in the framework of the Cold War, shifted dramatically in the post-Cold War period. The fall of the Berlin Wall and the escape of the Eastern European states from the Soviet Union's grip shook the international refugee regime to its foundations. The West's assumption that internal policies would prevent disgruntled populations from leaving their countries was no longer valid. Indeed, between 1989 and 1991, people flooded from the East into Western Europe, and Western

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<sup>102</sup> Lawyers Committee for Human Rights, 'Uncertain Haven: Refugee Protection on the Fortieth Anniversary of the 1951 United Nations Convention', (New York, 1991).

countries feared that, as the Soviet Union's power crumbled, their numbers could rise still higher.

When the Soviet Union itself came apart, it triggered another set of anxieties. Borders became porous, eroding assumptions held throughout the Cold War period. Ethnic, religious and national rivalries, long suppressed, were let loose in the process. The prospect of massive population movements and consequent relocations alarmed a Western Europe that was preoccupied with the closer integration of the European Community.

The 1991 Persian Gulf War demonstrated that the United States, could now, in concert with its allies, engage its enemies directly without risking a nuclear war. At the end of this conflict, however, Saddam Hussein's regime remained in place. Thousands of Kurds opposed to the regime fled into Turkey and Iran, and Turkey refused to grant them asylum. Stranded in mountains on the Iraqi-Turkish border, the Kurds presented the international community with a dilemma. The UN Security Council decided, in Resolution 688, that their plight represented a threat to international peace and security. The Kurds were escorted by the international community into a UN-protected zone in Iraq.

The Kurdish case was a clear example of refugees fleeing danger and being rejected at the frontier. Rather than affirming the refugees right to seek asylum, the international community affirmed its own right to establish conditions allowing repatriation by citing a threat to international peace and security.

These developments in the former Soviet Union, Eastern Europe

and Iraq gave rise to discussions about just what sovereignty means. Do national governments violate their sovereign responsibilities when they fail to extend minimum rights and protections to their citizens? Do such transgressions provide a basis for intervention by the international community? These deliberations became joined with debates over whether humanitarian organizations were obliged to gain access to nations in order to provide emergency humanitarian aid. It was increasingly clear that the problem of displaced populations involved more than just refugees. Over 24 million people were living in their home countries under refugee-like circumstances. The international community devoted increasing attention to assisting and protecting these internally displaced persons.

Somalia, where anarchy reigned and tens of thousands of people were dying of starvation, epitomized this dilemma. Did the international community not have a responsibility to restore conditions under which the conflict victims could receive relief that would save their lives? As the adverse security situation was the main barrier to life-saving humanitarian relief, the international community decided to stabilize the situation through military force.

Similarly, ethnic conflicts flared up in Yugoslavia, fragmenting the country and displacing hundreds of thousands of people. In the midst of the chaos, the international community, led by UNHCR, mounted humanitarian operations to prevent ethnic cleansing and the mass flight of refugees. The migration issue gathered momentum as one with important, if ill-defined,

implications for international security, and of particular domestic sensitivity in many Western states.

At the same time, the end of the Cold War holds out the promise that long-standing regional conflicts can be resolved and that, under the terms of the negotiated peace plans, millions of refugees can return home. The prospect of the return of masses of Namibian, Cambodian, Laotian, Afghan, El Salvadoran, Guatemalan, Nicaraguan, Angolan, Mozambican, Ethiopian, Eritrean and other refugees looms as one of the larger challenges. Can these returns take place without disrupting fragile peace agreements and on a totally voluntary basis? Can funds be raised to support repatriation programmes that address the rehabilitation and development concerns of the societies to which refugees are returning? Can aid to those returning be coordinated with aid to internally displaced persons and others who have been affected by these longstanding conflicts? How will these events influence the development of durable solutions? Surely in very fundamental ways and here the role of the UNHCR is crucially important.

**(b) Prevention**

In recent speeches, the UN High Commissioner for Refugees, Sadako Ogata, has articulated the concept of 'preventive protection'<sup>103</sup> as the right to remain in one's home in safety and

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<sup>103</sup> Sadako Ogata, 'Statement at the Roundtable Discussions on United Nations Human Rights Protection of Internally Displaced Persons, (Nyon, Switzerland, 5 February 1993), Selection of Speeches and Statements by Mrs. Sadako Ogata, (UNHCR), Vol.I, (January-July 1993).

dignity, regardless of one's ethnic, national or religious origins. This implies that prevention is the best durable solution. The international community must work harder to remedy the root causes of displacement. Failing this, it must assist and protect people within their own countries. To these points, Ogata adds the following important qualifier by stating that 'the notion of prevention...can only be effective if backed by political action for a peaceful settlement.'<sup>104</sup>

Donor states favour 'preventive protection' for several reasons. Such an approach strengthens what appears to be a developing international consensus that sovereignty is not unconditional, but it also implies governments have a responsibility to protect their citizens basic human rights.<sup>105</sup> In this interpretation, the international community can take action when the breakdown of sovereignty leads to the mass exodus of populations and threatens international peace and security. Similarly, when sovereign governments fail to cope with emergencies that threaten the lives of large numbers of people, the international community should have access to deliver emergency relief. The international community has, in turn, a collective interest in restoring responsible sovereignty in the state concerned.

Donor states also support the concept of preventive protection

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<sup>104</sup> Statement of the UNHCR in the International Meeting on Humanitarian Aid for Victims of the Conflict in Former Yugoslavia, (Geneva, 29 July 1992), p.2.

<sup>105</sup> Roberta Cohen, 'Human Rights Protection for Internally Displaced Persons', (Refugee Policy Group, Washington D.C., 1991).

because such an approach limits <sup>106</sup> the number of people who leave their countries as refugees or asylum-seekers. Furthermore, the possibility that people can be assisted in place appears to be persuading the richer states that they can restrict commitments to political asylum and to third-country resettlement. Haiti should be viewed as a prime example. Despite campaign declarations that, if elected, he would lift the policy of interdiction and immediate return of Haitian refugees, President Clinton failed to do so. He, however, mounted a political initiative, directly and through the United Nations, to try to restore constitutional rule in Haiti. Clinton also supported the continuation of in-country screening procedures for Haitians who believed they had a claim to political asylum, as a substitute for allowing them to exercise their right to seek asylum.<sup>107</sup>

Seen very optimistically, the concept of preventive protection might reflect the international community's desire to address the root causes of involuntary, mass movements of people and to find durable solutions quickly. Viewed more cynically, states' interest in preventive protection may not necessarily show increased commitment to 'effective political action,' to which Ogata referred. In the former Yugoslavia, for example, humanitarian intervention has been used to help prevent ethnic cleansing and the

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<sup>106</sup> David Petrsek, 'New Standards for the Protection of Internally Displaced Persons: A Proposal for a Comprehensive Approach', Refugee Survey Quarterly, Vol.14, Nos, 1 and 2, (Centre for Documentation on Refugees, UNHCR, Geneva, Spring/Summer 1995).

<sup>107</sup> Iain Guest, 'Repression in Haiti: A Challenge for Multilateralism', (Refugee Policy Group, Washington D.C., 1993).

mass exodus of refugees, but political action to achieve a peace settlement has not been forthcoming. Furthermore, this commitment to addressing humanitarian problems in the countries of origin may simply reflect many states' increased anxiety about rampant international migration.

In the post-Cold War period, many states have collapsed or are unstable; war and human rights abuses are common. Some of these states are nearer to Western states than was previously the case. There is growing awareness of how small the world has become and how easily people can learn of and avail themselves of policies, such as those governing political asylum, that permit them to start life anew in a country that is democratic, respects human rights and provides basic economic opportunities. Today, many countries are concerned not only with the burden that new arrivals will place on their economies, but also with growing ethnic, racial and religious diversity within their borders. Having no profound ideological reason to overlook these concerns, their commitment to uphold and enforce the refugee convention is eroding.

### **(c) Containment**

The seminal instance of refugee containment as a modern strategy was the arrangement made for Kurdish asylum-seekers in northern Iraq. The arrangements to provide internal protection to Kurdish people in northern Iraq are based on a fragile equilibrium. To the extent that coalition military forces stand ready to intervene and international organizations remain present, the Kurds

in northern Iraq consider themselves protected from the Iraqi military. However, recent attacks by Iraqi forces have prompted more Kurds to flee north. Past shelling by government forces suggests that aggression remains likely. Long-term protection thus may depend on maintaining this holding pattern indefinitely.

The UN humanitarian action plan for Iraq for April 1993 to March 1994 requests about \$500 million from donor governments, including about \$50 million to deploy up to 300 UN guards in northern Iraq to help maintain a sense of security, to escort relief convoys and to protect UN staff and property. About one-third of the amount requested has been granted by donors, mostly earmarked for the northern region.

It is uncertain whether the extraordinary measures taken in northern Iraq can be translated into workable arrangements elsewhere in the world. Acting through the United Nations, governments have attempted analogous arrangements to provide assistance and protection *in situ* to would-be refugees in Somalia and the former Yugoslavia, but the effectiveness of these particular arrangements remains to be seen.<sup>108</sup>

What is clear, however, is that refugee containment strategies<sup>109</sup> have severe limitations. Humanitarian assistance is provided to ameliorate the causes of flight and the consequences of the

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<sup>108</sup> See B.S.Chimni, 'The Incarceration of Victims: Deconstructing Safe Zones', in Dr. Najeeb Al-Nauimi and Richard Messe eds., Proceedings of the Qatar International Law Conference '94, (Martinus Nijhoff, Dordrech/Boston/London, Forthcoming).

<sup>109</sup> See Andrew Shacknove, 'From Asylum to Containment', International Journal of Refugee Law, Vol.5, No.4, (Oxford University Press, Oxford, 1993).



conflict. In addition to meeting essential humanitarian needs, the presence of international staff is intended to deter abuses and thereby provide protection. Yet, local authorities who continue to exercise jurisdiction, and who may be embroiled in civil strife, can restrict access to the concerned populations, as witnessed recently in Croatia as well as Bosnia and Herzegovina. In such situations, external authorities simply cannot guarantee respect for basic human rights. Protection can thus be illusory.

Moreover, receiving countries may abuse containment strategies. For example, the US Coast Guard vessels have intercepted Haitian boat people on the high seas for more than a decade. From 1981 to 1992, the US Immigration and Naturalization Service summarily screened over 50,000 Haitians and, as they did not obviously appear to be refugees, returned most of them to Haiti. In May 1992, President George Bush ordered the direct return of Haitians without any inquiry into their claims of persecution.

It is a policy which violates the basic tenets of refugee protection, including the principle of *non-refoulement*. A programme of interdiction, while generally intended to prevent unauthorized migration, can easily infringe upon the rights of refugees. There should be provision for an independent review of denied claims. Even more fundamentally, enough money should be invested by governments to ensure that full asylum adjudications are fair and expeditious.

## 2.5 PROTECTION ASPECTS OF THE UNHCR ACTIVITIES ON BEHALF OF IDPs

The Office of the United Nations High Commissioner for Refugees has frequently been called upon to address the needs of persons who have been forced to flee their homes for the same reasons as refugees, but who have not left their own countries.<sup>110</sup>

It has been recognized that the involuntary displacement of persons within their own countries is a problem of 'global dimensions' and 'a matter of grave humanitarian concern.' However, it remains to be 'emphasize(d) that since internally displaced persons remain within the territorial jurisdiction of their own countries, the primary responsibility for their welfare and protection lies with the state concerned' and the Executive Committee '(u)rges the Governments of States where there are internally displaced persons to fulfil their responsibility for their welfare and protection.'<sup>111</sup>

The Executive Committee of the High Commissioner's Programme

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<sup>110</sup> See Sadruddin Aga Khan, 'Lectures on Legal Problems Relating to Refugees and Displaced Persons', Collected Courses of the Hague Academy of International Law, Recueil des Cours, I, (The Hague, 1976), p.287-352; and UNHCR's Operational Experience with Internally Displaced Persons, 'Protection Aspects of UNHCR Activities on Behalf of Internally Displaced Persons', Annex II, (Director of International Protection, UNHCR, Geneva, September 1994); originally discussed by Sub-Committee of the Whole of International Protection, 24th meeting, Executive Committee of the High Commissioner's Programme, Forty-fifth session, EC/SCP/87, GE.94-03354, 17 August 1994; reproduced in Refugee Survey Quarterly, Vol.14, Nos.1 and 2, (Centre for Documentation on Refugees, UNHCR, Geneva, Spring/Summer 1995).

<sup>111</sup> Executive Committee Conclusion, No.75 (XLV), 1994, reproduced in Refugee Survey Quarterly, Vol.14, Nos. 1 and 2, (Centre for Documentation on Refugees, UNHCR, Geneva, Spring/Summer 1995), p.173-175.

has 'note(d) that the many and varied underlying causes of involuntary internal displacement and refugee movements are often similar, and that the problems of both refugees and the internally displaced often call for similar measures with respect to prevention, protection, humanitarian assistance and solutions;'<sup>112</sup> In the past, and still to a large extent today, UNHCR's involvement with the IDPs have been in the context of voluntary repatriation of refugees, where return movements, rehabilitation and reintegration programmes have included both returning refugees and displaced persons. In many instances, the IDPs are present alongside refugees, returnees, or a vulnerable local population, in situations where it is neither reasonable nor feasible to treat the categories differently in responding to their needs for assistance and protection.<sup>113</sup> This has been exemplified in UNHCR operations in southern Sudan and Tajikistan.

In other cases, the UNHCR activities in the countries of asylum on behalf of refugees from neighbouring countries also include people displaced in their own country who are essentially victims of the same regional conflict, as is in Croatia. Therefore, a growing number of UNHCR operations have included refugees, returnees and IDPs, together with local residents who have not left their homes, often as part of comprehensive regional schemes aimed at addressing the root causes of forced displacement. By

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<sup>112</sup> Executive Committee Conclusion No.75 (XLV), 1994, reproduced in Refugee Survey Quarterly, Vol.14, Nos.1 and 2, (Centre for Documentation on Refugees, UNHCR, Geneva, Spring/Summer 1995), p.173-175.

<sup>113</sup> Ibid.,

recognizing that the problems of the IDPs and of refugees are manifestations of the same phenomenon of coerced displacement, UNHCR has increasingly considered activities for the IDPs in Sri Lanka, Tajikistan, Azerbaijan, Georgia, the former Yugoslavia, the Horn and Central Africa, Liberia, Mozambique, and Central America, among others, in search of 'prevention and solution oriented strategies.'

For the international community as a whole, there are clear advantages in adopting a global approach to situations of coerced displacement, actual or potential. The measures necessary to solve a refugee problem through voluntary repatriation 'are the same' as those required to relieve the plight of the internally displaced and of those at risk of displacement; and preventing internal displacement by removing the factors that force people to flee their homes will also remove the immediate cause of refugee flows.<sup>114</sup>

The UNHCR and the international refugee regime have undergone a dynamic four-and-a-half decades of change. The purpose of this chapter was essentially two-fold. First, it traced the role of the UNHCR in activities relating to protection, durable solutions, voluntary repatriation, local integration and third country resettlement. Also, the role of the UNHCR was seen in the Cold War era and her performance in repatriation in the midst of continuing

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<sup>114</sup> UNHCR's Operational Experience with Internally Displaced Persons, (Director of International Protection, UNHCR, September 1994), Annex II, p.2.

conflicts. The contemporary refugee regime related to the post Cold War norms in preventive activities, along with the new emerging concept of 'safe haven' containment. This set the foundation for a possible use of traditional UNHCR functions for IDPs.

As has already been stated, a growing number of UNHCR operations have included refugees, returnees and IDPs, together with local residents who have not left their country. In this regard, and in tracing the role of the UNHCR, the following chapter provides an analyses on whether the High Commissioner has a mandate to act on behalf of IDPs, the content and situations of UNHCR activities, with a country profile of UNHCR action in Sri Lanka.

## Chapter 3

### *The Reality of UNHCR Experience with IDPs*

Internal displacement has become a monumental crisis in both scope and intensity. The total number of internally displaced persons is now believed to be around 30 million, surpassing the world refugee population of 20 million. The figure of 30 million, although not definitive and requiring further investigation, represents the best estimates of UN agencies, Governments, Non-Governmental Organizations and research bodies working with these populations.<sup>115</sup>

According to the Norwegian Refugee Council, the number may in fact be higher because in some countries, where significant displacement exists, reliable estimates are unavailable. In addition, countries with minimal or no operation by the United Nations or other international agencies, these groups remain hidden from the international community.<sup>116</sup>

The UNHCR estimates that out of the world population of 5.5 billion, roughly one in 130 people is being forced into flight and

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<sup>115</sup> Report of the Representative of the Secretary-General, submitted pursuant to Commission of Human Rights resolutions 1993/95 and 1994/68, Commission on Human Rights, UN ECOSOC, E/CN.4/1995/50, (2 February 1995).

<sup>116</sup> Norwegian Refugee Council, 'Institutional Arrangements for Internally Displaced Persons: The Ground Level Experience'. See Analytical Report of the Secretary-General on Internally Displaced Persons, E/CN.4/1992/23.

has become externally or internally displaced.<sup>117</sup> The conflicts taking place inside state borders are a major reason for the growing number of displaced persons. In the past two years alone, internal conflicts have combined to force an estimated 10,000 persons every day to flee their homes and either cross borders or become displaced in their own countries.<sup>118</sup>

It is in this background, that the following issues will be raised as regards the operational experience of the UNHCR in relation to IDPs. First, issues arising out of UNHCR's involvement with IDPs. Second, the appropriate situations when the UNHCR can act. Third, the content of UNHCR's activities on behalf of IDPs. Finally, the issues would be linked by running a thread through crucial issues such as the causes, protection and assistance concerns, the special needs of women and children, approach to governments, the presence of the international community and areas under insurgent control. The above-stated issues would be viewed through a country profile of Sri Lanka. As part of the review exercise, it should be borne in mind the outcome of a 'round table consultation' on UNHCR's operational experience with the IDPs.<sup>119</sup> The key issues raised were of the problem of definition,

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<sup>117</sup> UNHCR, 'The State of World's Refugees', (Penguin, New York, 1993).

<sup>118</sup> Sadako Ogata, 'Displacement or Development: Bridging the Gap', Address by the United Nations High Commissioner for Refugees to the World Bank/ International Monetary Fund, (Washington D.C., 8 June 1994).

<sup>119</sup> The Round Table Consultation was held in Geneva on 9 and 10 May 1994. Twenty-three UNHCR staff and one UNHCR consultant, who had done extensive research on IDPs, had participated.

identification and decision-making for the UNHCR's involvement. Discrete points were made about intervention during conflict, the return of refugees/IDPs and also post-conflict/post-return intervention.

### 3.1 DOES THE HIGH COMMISSIONER HAVE A MANDATE ?

Although the Statute of the UNHCR does not include any general competence for IDPs, the effect of various UNGA resolutions has been to confer upon the UNHCR a 'selective and limited' mandate to undertake humanitarian assistance and protection activities on behalf of the displaced, provided certain specific conditions are met. General Assembly resolution 2956 (XXVII) requested the High Commissioner 'to continue to participate, at the invitation of the Secretary-General, in those humanitarian activities of the United Nations for which his Office has particular experience and expertise.' This resolution has provided the legal basis for numerous special operations undertaken by UNHCR at the request of the Secretary-General, most of them including IDPs.

At its forty-eighth session, the UN General Assembly provided a 'more precise and explicit'<sup>120</sup> statement which 'encourage(d) the High Commissioner, on her broad humanitarian experience and expertise, to continue to explore and to undertake protection and assistance activities aimed at preventing conditions that give

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<sup>120</sup> UNHCR's Operational Experience with Internally Displaced Persons, (Division of International Protection, UNHCR, Geneva, September 1994).



rise to refugee outflows...<sup>121</sup>

Though the resolution lists a number of factors, two mandatory aspects emerge, (a) a specific request from a principal UN organ i.e. the General Assembly, The Security Council or the ECOSOC, and (b) the consent of the concerned state. It should also be borne in mind that the UNHCR potential concern relate to those 'in a refugee-like situation' i.e. persons fleeing persecution, armed conflict or civil strife, rather than victims of physical disasters.

### 3.2 IN WHAT SITUATIONS CAN THE UNHCR ACT ?

The High Commissioner's limited mandate to undertake activities on behalf of the IDPs is both conditional and, in principle, discretionary. In addition to the requirements mentioned by the UNGA, the Executive Committee<sup>122</sup> has called for regard to the availability of sufficient resources along with institutional capacity and the possibility of deploying qualified staff. Consideration must be given, for example, to the presence, availability and operational capacity as well as the mandates of other relevant organizations, whether the situation demands for UNHCR's particular expertise, the likely impact of proposed activities on the Office's mandatory responsibility for the international protection of refugees and on the availability of asylum and how activities will contribute to the 'prevention or

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<sup>121</sup> United Nations General Assembly res. 48/116.

<sup>122</sup> See Executive Committee of the High Commissioner's Programme, doc. A/AC.96/821, paragraph 19 (s).

solution of refugee problems.'

There are certain preconditions that the UNHCR considers essential for its involvement. Among these are: (a) UNHCR's involvement must not in any way detract from the possibility to seek and to obtain asylum, (b) UNHCR must have full and unhindered access to the affected population, (c) there must adequate provisions of security for the staff and its operating partners and the existence of acceptable operating conditions, and (d) UNHCR's involvement should have the consent of all concerned parties and enjoy the support of the international community.

The UNHCR has understood the magnanimity of the problems of displacement and has realised that 'it would clearly be impossible for UNHCR to assume responsibility for the internally displaced in every situation ...'<sup>123</sup> Based on the requirements contained in UNGA resolutions and the guidance provided in Executive Committee guidelines, it has been necessary for UNHCR to re-examine and redefine its operational criteria.

The UNHCR considers assuming responsibility for international action on behalf of the IDPs in situations where there is a direct link with the UNHCR's activities under its basic mandate to protect refugees and to seek solutions to refugee problems. Such situations include where (a) IDPs are present in or returning to the same areas as repatriating refugees, or to areas where refugees are

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<sup>123</sup> See 'Protection Aspects of UNHCR Activities on Behalf of Internally Displaced Persons,' Sub-Committee of the Whole on International Protection, 24th meeting, Executive Committee of the High Commissioner's Programme, Forty-fifth session, EC/SCP/87, 17 August 1994, reproduced in Refugee Survey Quarterly, Vol.14, Nos.1 and 2, (Spring/Summer 1995).

expected to return, (b) refugees and IDPs are present in similar circumstances and are in need of humanitarian assistance and protection in the same area of a country of asylum, (c) the same causes have produced both internal displacement and refugee flows and there are operational and humanitarian advantages in addressing the problems within a single operation and (d) there is a potential for 'cross-border' movement and the provisions of humanitarian assistance and protection to IDPs may enable them to remain in safety in their own country.

Other situations may include where there might be no direct link but where there are strong humanitarian arguments in support of UNHCR involvement as exemplified by a need to respond immediately to life-threatening emergencies. In such situations, UNHCR would consider involvement, but where there is no link to the Office's refugee mandate, UNHCR activities should, to the extent possible, be supplementary to the humanitarian efforts of other international organizations.

Even in situations which appear to meet all applicable guidelines, requests for UNHCR involvement on behalf of IDPs must be carefully assessed with regard to all factors mentioned, including the Office's capacity at any given time to respond effectively in a particular situation while continuing to meet urgent needs for humanitarian assistance and protection elsewhere.

### **3.3 WHAT IS THE CONTENT OF UNHCR ACTIVITIES ?**

The nature of UNHCR's involvement will be determined by the character of the displacement, the need for protection and the

solutions envisaged. The particular activities undertaken by the UNHCR on behalf of IDPs will depend on their immediate situations and needs, the factors that generated displacement, the relations of the IDPs with their respective Governments or the *de facto* local authority both in the areas of origin and in the areas to which they have been displaced, the immediate and long term solution prospects, as well as on agreements and understandings between Governments and the UNHCR. Above all, in promoting and planning solutions, it is crucial to take cognizance of the 'wishes' of the displaced themselves.

The content of the UNHCR activities must be consistent with its basic mandate for protection and solutions. While the provisions of humanitarian assistance is normally a major component of UNHCR programmes for the IDPs, these also include, wherever necessary and feasible, protection activities aimed at enhancing their safety and to ensure respect for human rights for the persons concerned.

Since armed conflicts and systematic human rights abuses are the major reasons of displacement, UNHCR activities on behalf of the IDPs involves presence in areas affected by serious tension, outbreaks of violence or civil war.

The specifically protection-related tasks that UNHCR staff have recently been called upon to perform in various situations include monitoring, at the request of the Governments concerned, the treatment of a threatened minority (or majority) groups, reporting violations of fundamental human rights, and intervening with the relevant authorities to request protective action, as well

as investigation and prosecution of specific cases of abuse; assistance and de facto protection to IDPs in temporary relief centres; prompting tracing and family reunion of unaccompanied children; and assisting Governments to provide personal documentation.

In circumstances of armed conflict, the UNHCR helps provide safe passage to civilians through front lines; facilitating, in acute life-threatening situations, in cooperation with the International Committee of the Red Cross (ICRC), the organised evacuation of civilians; intervening with local authorities to prevent involuntary return of the IDPs to areas of danger; facilitating genuine freedom of movement, including the possibility for persons in danger to seek asylum; and promoting the right of the IDP to return - or not to return - voluntarily to their homes.

Elsewhere, the UNHCR has participated in mediation and reconciliation efforts between returning displaced persons and local residents. The Office has also participated in negotiating, been a party to, and/or taken part in ensuring compliance with repatriation agreements involving IDPs and refugees.

UNHCR's work with IDPs has included participation in comprehensive peace settlements, as in El Salvador and Cambodia, where the return of refugees was linked with monitoring the human rights situation affecting returnees, the displaced and those who had never moved, as well as relief, rehabilitation and development assistance. In such cases, UNHCR has closely worked with United Nations agencies and peacekeeping forces.

UNHCR has considered ensuring access to food, shelter, health

care and other basic necessities as another form of protection.<sup>124</sup> Ensuring humanitarian access and the delivery of vital relief supplies in areas of conflict to the displaced and to besieged local populations, through the international humanitarian presence that this entails, may also in certain circumstances have a deterrent effect in averting some abuses.

By drawing the attention of the international community to the plight of victims of conflict, it can also help to stimulate political efforts to resolve those conflicts. Recent events make it abundantly clear that humanitarian action and presence cannot by themselves end conflicts, prevent human rights abuses, or provide effective protection where the authorities concerned are unwilling or unable to do so.

After tracing the three normative queries as regards UNHCR action on behalf of the IDPs: Whether the High Commissioner has a mandate for the IDPs, the situations in which the UNHCR can act and the content of UNHCR activities, it becomes fair to provide a country profile in order to analyse the extent to which the normative issues have been addressed.

#### **3.4 A COUNTRY PROFILE - SRI LANKA**

Internal displacement manifests itself differently in various countries. In Sri Lanka, the Sudan, Somalia, Rwanda and the former Yugoslavia, the displaced were identifiable as large clusters of

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<sup>124</sup> UNHCR's Operational Experience with Internally Displaced Persons, (Division of International Protection, UNHCR, Geneva, September 1994).

people in camps, uprooted from their homes, and divested from the entire natural resource-base, as a result of which they were entirely dependent on humanitarian assistance and precarious protection from the controlling authorities. In El Salvador, on the other hand, the IDPs in the aftermath of the peace agreement were largely villagers integrated into rural areas but still constrained by the lack of land and vital services and precarious security conditions. In Colombia, the displaced, representing approximately 1 to 3 per cent of the population, found their security by merging into the community to avoid being clearly identified, but since the communities into which they merged were equally poor and inadequately protected, their plight and that of their host communities did not differ much.

In a way, Burundi, where up to 10 per cent of the population is displaced, brought these various forms of displacement together: the 'displaced' in the army protected camps represented the typical form seen in many countries, whereas the 'dispersed', who merged into rural areas to avoid the security forces, were somewhat comparable to the displaced of El Salvador and Colombia, but unlike the latter, they did not disappear into rural communities, but dispersed into the hills, the marshes or the valleys away from the roads.<sup>125</sup>

Different manifestations of internal displacement have

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<sup>125</sup> Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to the Commission on Human Rights resolutions 1993/95 and 1994/68, Commission on Human Rights, Fifty-first session, UN ECOSOC, E/CN.4/1995/50, 2 February 1995, Refugee Survey Quarterly, Vol.14, Nos.1 and 2, (Centre for Documentation on Refugees, UNHCR, Geneva, Spring/Summer 1995).

implications for solutions to the problem. When IDPs are congregated in camps or settlements, assistance can be provided to them as such. When they are integrated into communities, assistance is better organized on a community basis, targeted towards the entire affected population without distinction as to category. When IDPs are dispersed and in hiding, access to them and provision of protection may be particularly difficult.<sup>126</sup>

The main 'cause' of displacement is violence in the context of internal conflicts. These conflicts have different manifestations and it is the underlying historical, political and socio-economic factors that explain and determine the nature of conflict in each country. Often they are related to differences between groups of distinct ethnic, religious, economic or political background.

In Sri Lanka, where civil war and intercommunal violence has been carrying on for the past 10 years, the groups are essentially split along ethnic, linguistic and religious lines, which determine the preoccupations and interests of each group with regard to power and land control.

**(a) Government of Sri Lanka Response to IDPs**

Since 1983, there have been hostilities and military confrontations between the Sinhala-dominated Government of Sri Lanka and Tamil insurgents, where the latter is determined to establish by force an independent state of Tamil Eelam in North-East Sri Lanka.

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<sup>126</sup> Ibid.,



Caught in this never ending conflict are a large number of Tamils who have been forced into a nomadic existence, dividing their time mainly between refuge in India and internal displacement in Sri Lanka. This situation has been cause for a serious dilemma to UNHCR. On one hand, it cannot refuse to facilitate the repatriation of those refugees who choose voluntarily to return home from India despite continuing problems in Sri Lanka. On the other hand, UNHCR knows that the returning refugees will, for the most part, be confined to camps or holding centres in Sri Lanka thereby joining the ranks of the over 600,000 IDPs.<sup>127</sup>

The Government of Sri Lanka has shown a commitment to address, within the limits of its abilities, the humanitarian problems presented by the chronic situation of internal displacement. Of the 600,000 IDPs, approximately 250,000 are sheltered in some 473 Government-sponsored centres or camps spread around the country. The remaining 350,000 are registered as staying with friends and relatives. Both groups benefit from Government food rations, which cost the national treasury nearly US\$ 5 million per month. Due to the Government's budgetary constraints and its inability to attract adequate donor funding, whether bilateral or through the UN system, the facilities in the camps and the holding centres are believed to fall short of nationally acceptable standards.<sup>128</sup>

Since 1992, the Government of Sri Lanka has been promoting its

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<sup>127</sup> UNHCR's Operational Experience with Internally Displaced Persons, (Division of International Protection, UNHCR, Geneva, September 1994).

<sup>128</sup> Ibid.,

resettlement programme initiated in 1988 and known as the 'Unified Assistance Scheme'. Under the programme, the Government is first to 'clear' and bring under its control an area and then resettle the displaced there on a voluntary basis and with monetary grants, three-month food rations and some help in rehabilitating the infrastructure, as well as guarantees for their security and protection. It is only very recently that the Government has allowed people to resettle in LTTE-controlled areas if they so wish, and even then without extending the full assistance package of the programme. In view of the fact that the programme takes place amidst continuing conflict, it is fair to assume that the Government's resettlement policy is geared more towards military and political objectives rather than humanitarian imperatives.<sup>129</sup>

**(b) UNHCR's Open Relief Centres (ORC)**

The UNHCR established its presence in Colombo in November 1987 in order to monitor the implementation of a programme of limited assistance to returnees and displaced persons in the North-East of the country, after having responded to a request by the Government of Sri Lanka.

In the following year, UNHCR field offices were opened in almost all principal districts of refugee return, i.e. Mannar, Jaffna, Trincomalee and Vavuniya. In June 1990, just as security and socio-economic life in the affected areas were beginning to improve reasonably enough as to persuade UNHCR to start phasing out

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<sup>129</sup> Ibid.,

its assistance programme, fighting between the Government forces and the LTTE resumed, and UNHCR found itself in the midst of a mass exodus of asylum seekers including a sizable number of former refugees who had repatriated from India. In response to this suddenly changed situation, UNHCR came up with the concept of Open Relief Centres (ORCs), as an in-country 'safety net' system which vulnerable persons could avail themselves of as a possible alternative to flight to India.<sup>130</sup>

An ORC has been defined as a 'temporary place where displaced persons on the move can freely enter or leave and obtain essential relief assistance in a relatively safe environment.'<sup>131</sup> However, while apparently similar, the concept of an ORC is different from that of a Safety Zone.<sup>132</sup>

In a November 1990 memorandum, the UNHCR representative in Sri Lanka called for 'the much less ambitious and more pragmatic system of Open Relief Centres.' Its objectives were to be four fold: (a) to maintain UNHCR's presence in the area so as to monitor developments regarding returnees, (b) to assist returnees and displaced/destitute persons in areas where there is a high concentration of returnees, (c) to reduce the pressures on

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<sup>130</sup> UNHCR's Operational Experience with Internally Displaced Persons, op.cit.

<sup>131</sup> W.D.Clarance, 'Open Relief Centres: A Pragmatic Approach to Emergency Relief and Monitoring during Conflict in a Country of Origin', International Journal of Refugee Law, Vol.3, No.2, (1991).

<sup>132</sup> B.S.Chimni, 'The Incarceration of Victims: Deconstructing Safety Zones', in Dr. Najeeb Al-Nauimi and Richard Messe eds., 'Proceedings of the Qatar International Law Conference '94'', (Martinus Nijhoff Publishers, Dordrech/Boston/London, 1995).

returnees and other persons who may otherwise feel compelled to leave the country due to unrest and, (d) to promote the conditions for the spontaneous voluntary repatriation of refugees from Tamil Nadu.<sup>133</sup>

The UNHCR 'Note for the File' which mentioned these objectives went on to state that 'UNHCR's activities in Sri Lanka should be considered something of a test case to establish to what extent the international community would be prepared to see UNHCR undertake activities in a country of origin which could have the effect of reducing the number of persons seeking asylum.'<sup>134</sup>

The UNHCR is currently operating three ORCs, and several sub-centres, on the Mannar Island. Mannar District was the most appropriate focal point for the operation of the ORCs. Mannar was the home area of the largest number of returnees numbering over 22,000 by June 1990. It also received a massive influx of people displaced from other districts as a result of the June 1990 events. Most people fled to Mannar District either to seek sanctuary in the Catholic shrine of Madhu or to use it as a stepping stone to India across the Palk Strait off Mannar Island. Thus, two ORCs were established in Mannar District: one on the mainland at Madhu shrine in an area largely dominated by LTTE forces and the other at Pesalai, a fishing village on the northern coast of Mannar Island and under the control of the Sri Lankan armed forces. Attached to each of these two principal relief centres are decentralized sub-

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<sup>133</sup> B.S.Chimni, 'Incarceration of Victims: Deconstructing Safety Zones', op.cit., p.86.

<sup>134</sup> Ibid.,

centres, four in mainland Mannar and two in Pesalai. By channeling relief delivery at the community level through the six sub-centres, destitute people who would otherwise feel compelled to move all the way to either one of the two ORCs or to displace themselves in some other localities in search of assistance could remain in their home areas.<sup>135</sup>

Assisting the UNHCR in Sri Lanka are a number of NGOs including *Medecins sans Frontieres*, Save the Children Fund and CARE International. Initially no formal agreement was worked out with the government or the LTTE regarding the status or security of these centres, although the centres were, generally speaking, not interfered with. In February 1993, the Office of the UNHCR signed a Memorandum of Understanding with the Government of Sri Lanka in which it has been agreed that 'subject to availability of funds and security, UNHCR will continue its Open Relief Centres and Sub-Centres in Mannar District until 31 December 1994 at which time the programme will be reassessed.'<sup>136</sup>

**(c) UN Authorization and Consent of the Parties**

At the time of the launching of the ORCs programme in November 1990, UNHCR's primary concern was the safety and welfare of the returnee population subjected to, or threatened by, forcible

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<sup>135</sup> UNHCR's Operational Experience with Internally Displaced Persons, op.cit., p.48.

<sup>136</sup> See para 4, Memorandum of Understanding among the Government of the Socialist Republic of Sri Lanka and the Office of the United Nations High Commissioner of Refugees Relating to the Repatriation of Sri Lankan Refugees and Displaced Persons, (1 February 1993). Quoted from B.S.Chimni, op.cit.

displacement as a result of the June 1990 events. Obviously, the programme was not, and could not have been, intended to place the returnees on a different footing from other similarly situated persons particularly the internally displaced. It would, nonetheless, seem unnecessary for UNHCR to seek prior authorization of the UN Secretary General in order to implement the ORCs programme which, although having significant importance and immediate value for IDPs, was aimed principally at persons falling within the Office's general mandate. In any event, the Secretary General requested UNHCR on 5 September 1991 to continue the programme.<sup>137</sup>

The establishment of the ORCs was based on an informal acceptance by the parties that humanitarian assistance to and physical safety of the population in the Centres would be respected. Once the ORCs became operational, their neutrality has been frequently challenged especially by the LTTE cadres, who beginning in September 1992 took measures amounting to the militarization of the Madhu ORC as well as preventing residents of the Centre who wanted to move to and resettle in Government-controlled areas from doing so. In October 1993, the LTTE instigated the beneficiaries of the Madhu ORC to wage a violent demonstration against the UNHCR staff. There have been problems with the Government also, particularly since the end of July 1993 when it cut off food rations to displaced persons at Madhu ORC who originated from LTTE-controlled Vavuniya District. This was in

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<sup>137</sup> UNHCR's Operational Experience with Internally Displaced Persons, op.cit.

spite of the provisions of the Memorandum of Understanding signed between the Government and UNHCR in February 1993. While mainly concerning itself with the voluntary repatriation of refugees, the Memorandum expressly acknowledges that 'the principles established for assistance and protection of returnees will apply also to displaced persons wherever they live with returnees.' The cumulative actions of the LTTE and the Government led the UNHCR to temporarily suspend its operations in November 1993 and to advise the UN Secretary General accordingly. At the time, some 30,000 people were benefiting from the ORCs programme, which had gone beyond relief assistance to include a number of community-based micro-projects.<sup>138</sup>

**(d) Impact of UNHCR's Involvement**

The UNHCR has been the most active UN agency in the conflict zones of North-East Sri Lanka. Within the framework of 'humanitarian diplomacy,' it has been engaged in a constructive dialogue with both the Government and the LTTE, on operational issues pertaining to returnee assistance and protection and programmes for the material and physical well-being of IDPs, as well as on the humanitarian needs of besieged communities of the Jaffna Peninsula. Concerning this last issue which remains to be resolved, UNHCR has been involved since December 1992 as a mediator between the two parties with a view to exploring the possibility of opening of a 'safe passage' in and out of Jaffna, an LTTE

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<sup>138</sup> Ibid.,

stronghold which was encircled by Government forces. Had an agreement been reached, such a passage would have provided relief for as many as 800,000 affected civilians.<sup>139</sup>

The ORC should not be judged for what they initially purported to achieve in terms of prevention and solution, but should be taken simply for what they actually and successfully accomplished in a situation of open conflict: the provision of humanitarian assistance in a relatively safe environment to the most vulnerable population who were caught in the midst of an armed conflict but who either could not avail themselves of the protection and assistance of their Government (or the established de facto authority) or were unable to have recourse to flight as refugees. The ORCs did not, contrary to original assumptions, serve as 'alternatives' to flight to India.<sup>140</sup>

The ORCs in Sri Lanka have generally met with approval of independent observers. 'The protection available to displaced persons in the ORCs still is substantially better than anything else to be found in the North-East' Sri Lanka.<sup>141</sup> However, Bill Frelick has opined that 'the circumstances under which such operations truly promote safe haven without compromising the right to asylum need further exploration.'<sup>142</sup>

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<sup>139</sup> Ibid.,

<sup>140</sup> Ibid.,

<sup>141</sup> U.S. Committee for Refugees, 'Sri Lanka: Island of Refugees, (October 1991).

<sup>142</sup> Bill Frelick, 'Preventing Refugee Flows: Protection or Peril?', World Refugee Survey, (1993).



**(e) The Present Situation**

One of the major issues explored during the mission of Francis Deng,<sup>143</sup> the Representative of the Secretary General, was the question of the return of internally displaced to their homes and home areas. As return was not always voluntary, specific recommendations were made to ensure that resettlement would not be coerced.

The Government in its reply insisted that all resettlement, including temporary relocation, was of a voluntary nature, and the UNHCR officials also reported that there have been no recent reports of coercion in the resettlement process. However, they also reported that there still exists no formal procedure for displaced persons to register their willingness to resettle, and the resettlement guidelines are always not adhered to.

Upon taking office in mid-1994, the new Minister of Ports, Shipping, Rehabilitation and Reconstruction (PSR&R) announced that he would like to resolve the problem to resettlement within one year and would like to see the centres disappear and the IDPs resettled on land and leading productive lives. His Ministry, it is reported, is currently finalizing an analysis of the situation and drawing up a plan of action to be discussed with all those who might potentially a role, including the United Nations agencies having a presence in the country.

Resettlement meanwhile has accelerated in areas where the

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<sup>143</sup> See Report of the Representative of the Secretary General, Francis Deng, submitted pursuant to the Commission on Human Rights resolution 1993/95 and 1994/68, Commission on Human Rights, Fifty-first session, UN ECOSOC, E/CN.4/1995/50, 2 February 1995.

security situation has improved, such as in the east, but has slowed down in areas of confrontation. The Government has indicated that for those communities unable to return, it is exploring the possibility of a programme of 'temporary location.' The UNHCR has noted that the problems faced by the communities that are unable to return home (principally the Muslims displaced from the North and those displaced from areas which form army bases in the north) remain unresolved due to expected frictions with the local population in areas of temporary location and considerations of availability of land and ethnic balance.

It is particularly noteworthy that the Government stated in its follow-up reply that in keeping with its relentless commitment to restoring peace in the country, which is the durable solution of the problem of internal displacement, it recommended the second round of talks with the LTTE on 3 January 1995. It also noted that among the points of convergence achieved in the talks, the need to observe cessation of hostilities remains the foremost. In reaffirming its original stance that the problem is an internal one that does not require international involvement, the Government noted that the steps it had taken towards the amelioration of the human rights situation and a political solution to the problems of the Northern and Eastern Provinces, in which the solution to the problem of internal displacement lies, proves its positive disposition towards achieving these goals on its own accord.<sup>144</sup>

A number of specific proposals were also made with regard to

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<sup>144</sup> Refugee Survey Quarterly, Vol.14, Nos. 1 and 2, (Centre for Documentation on Refugees, UNHCR, Geneva, Spring/Summer 1995).

the role of the international community in the country. It is commendable that the Open Relief Centres in the north, administered by the UNHCR for the IDPs and returnees continue to operate, and that UNHCR has returned to ORC Madhu. According to UNHCR officials, progress on developing projects to cover the entire island continues to be slow although complementarity of projects in the north and east is being worked upon. To this end, a small information unit was being formed, to be managed by a steering committee made up of representatives from the UN agencies, the Government, the donors and the NGOs. The Government, in its response, expressed the view that donor assistance could be best coordinated through the United Nations.

UN officials reported that the donor community was interested in ameliorating the effects of the conflict on the civil population, especially in the north and the east, and that funds for that purpose were mostly channelled through the UNHCR or the NGOs. Although it was difficult to monitor projects in 'unclear' areas, some donors did plan to play a more active role in these areas. There is scope for small projects and initiatives that would support the economy and civil society in the north and the east, thereby maintaining conditions conducive to the promotion of the peace process in Sri Lanka.

## Chapter 4

### *The Legal Basis of UNHCR Action for the IDPs*

A legal framework specific to the protection of the internally displaced persons is conspicuous by its absence. No legal instrument covers the particular needs of the IDPs and no institution has been mandated to address those needs. The Office of the United Nations High Commissioner for Refugees (UNHCR) and the Department of Humanitarian Assistance (DHA) have underlined the importance of establishing a legal framework that could be used by humanitarian organizations in their discussions with relevant authorities. 'The value of having a legal framework ... has become increasingly evident.'<sup>145</sup>

The 'definitive resolution'<sup>146</sup> establishing the Office of the United Nations High Commissioner for Refugees also decided to convene a conference to adopt a Convention, where the principal definition of a refugee was those *outside their country of nationality* and unable or unwilling to avail themselves of its protection.

The existing political circumstances have confined the principal functions of UNHCR to cases of external displacement.

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<sup>145</sup> Report of the Representative of the Secretary-General, Francis Deng, submitted pursuant to the Commission on Human Rights resolution 1993/95 and 1994/68, Commission on Human Rights, Fifty-first session, UN ECOSOC, E/CN.4/1995/50, 2 February 1995.

<sup>146</sup> Richard Plender, 'The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced', International Journal of Refugee Law, Volume 6, Number 3, 1994, p.346.

However, as was seen in the previous chapters, the functions and responsibilities of the High Commissioner have been enlarged repeatedly by use of the concept of 'good offices.'<sup>147</sup>

The United Nations first voiced the question of institutional protection for IDPs at the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa held in Oslo in 1988. In 1989, the International Conference on Central American Refugees (CIREFCA) addressed itself to the subject. In 1990, the Economic and Social Council requested the General Secretary 'to initiate a system-wide review to assess the experience and capacity of various organizations, in the coordination of assistance to all refugees, displaced persons and returnees and the full spectrum of their needs'.<sup>148</sup>

The first explicit reference to IDPs, from the General Assembly regarding the Office of the UNHCR, was adopted in 1992. It commended 'efforts by the High Commissioner, on the basis of specific requests from the Secretary General or the competent principal organs of the United Nations and with the consent of the concerned State, to undertake activities in favour of internally displaced persons, taking into account the complementarities of the mandates and expertise of other relevant organizations'.<sup>149</sup>

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<sup>147</sup> The precedent was established by the United Nations General Assembly resolution 1388 (XIV), 20 November 1959.

<sup>148</sup> ECOSOC Resolution 1990/79, 27 July 1990, see Richard Plender, *op.cit.*, p.348.

<sup>149</sup> See Richard Plender, *op.cit.*, p.349.

A subsequent resolution of the General Assembly <sup>150</sup> welcomed the decision of the Executive Committee of the Office of the UNHCR to extend, on a case-by-case basis and under specific circumstances, protection and assistance to the internally displaced and encouraged the Representative, through dialogue with Governments, to continue her review of the needs for international protection of internally displaced persons and assistance to them.

The Statute of the Office of the UNHCR, annexed to the UNGA resolution 428(V) of 14 December 1950, directs the High Commissioner to 'to engage in such activities ... as the General Assembly may determine within the limits of resources placed at (her) disposal'. Various resolution of the Economic and Social Council and the General Assembly have provided a basis for UNHCR to become involved with internally displaced populations in the context of humanitarian actions undertaken by the United Nations. In the resolution 2956 (XXVII) of 1972, the General Assembly requested the High Commissioner to continue to participate, at the invitation of the Secretary-General, in such United Nations endeavours for which UNHCR has particular experience and expertise.

The main requirements derived from the above-mentioned references can be summarized <sup>151</sup> as follows:

- (a) there must be a specific request for involvement or a need to undertake additional activities as a 'natural extension' of the

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<sup>150</sup> UNGA resolution 48/135, 20 December 1993.

<sup>151</sup> UNHCR, Inter-Office Memorandum/Field Office Memorandum No.33/93, Ref. 609.1, 28 April 1993.

mandate given by the General Assembly. Where applicable, the specific request may emanate from the General Assembly, the Secretary-General or another competent principal organ of the United Nations, such as ECOSOC;

- (b) UNHCR has the relevant expertise and experience to begin assisting and protecting internally displaced persons;
- (c) the concerned State and, where applicable, other relevant entities should consent to UNHCR's involvement;
- (d) UNHCR's activities must remain within the limits of the resources placed at its disposal for the activities in question.

#### **4.1 Definition of IDPs**

The issues of defining an IDP has been central to many deliberations. Referring to the ECOSOC resolution 78/1990, the Secretary-General <sup>152</sup> uses the term 'internally displaced person' to mean 'persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country'.

This definition has been used as workable for most purposes

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<sup>152</sup> Analytical Report of the Secretary-General on Internally Displaced Persons, E/CN.4/1992/23.

and is, for the most part, an adequate description of the phenomenon of internal displacement. It contains the two elements of internal displacement : coerced movement and remaining within one's national borders, as also including the major causes of displacement. The definition 'appears to anticipate that it is to be used for the purpose of defining a category of persons to whom an appropriate agency could supply the essentials of life in an emergency'.<sup>153</sup>

There is no firm agreement on what should be included in the definition. There are those who would prefer to see the IDP defined as persons in a 'refugee-like situation', who have not crossed the borders of their country. The UNHCR<sup>154</sup> supports the contention that the definition should focus on those who, if they had left their own country, would be considered refugees.

The adoption of a definition similar to the definitions of refugee contained in the 1969 Organization of African Unity Convention<sup>155</sup> and the 1984 Cartagena Declaration<sup>156</sup> are favoured.

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<sup>153</sup> Plender, op.cit., p.357.

<sup>154</sup> See UNHCR's Operational Experience with Internally Displaced Persons, Division of International Protection, UNHCR, Geneva, September 1994.

<sup>155</sup> The definition reads as follows :

'1) ... the term 'refugee' shall mean every 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 ...'

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



The definitions that follow are the definitions adopted by CIREFCA<sup>157</sup> and also the one used by the Permanent Consultation on Internal Displacement in the Americas (CPDIA).<sup>158</sup> The assumptions in these definitions are the 'element of fear of persecution' and the need for protection from large scale human rights abuse emanating from internal strife or armed conflict.<sup>159</sup>

There has been opposition to the inclusion of disasters, essentially because persons so displaced would not qualify as refugees. Rainer Hofmann has suggested the exclusion of natural or

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place outside his country of origin or nationality'.  
See United Nations Treaty Series, vol.1001, no.14, 691, entered into force on 20 June 1974.

<sup>156</sup> See Annual Report of the Inter-American Commission on Human Rights, OEA/SER 1/V/II 66, doc.10, 1984.

<sup>157</sup> 'Displaced persons are persons who have been obliged to abandon their homes or usual economic activities because their lives, security or freedom have been endangered by generalized violence, massive violations of human rights, an ongoing conflict or other circumstances which have or are seriously disturbing the public order, but who have remained within their own countries'.

<sup>158</sup> An IDP is 'every person who has been forced to migrate within the national territory, abandoning his place of residence or his customary occupation, because his life, physical integrity or freedom has been rendered vulnerable or is threatened due to the existence of any of the following man-caused situations: internal armed conflict, internal disturbances and tensions, widespread violence, massive violations of human rights or other circumstances originating from prior situations that can disturb or disturb drastically public order'.

<sup>159</sup> The definition proposed by Richard Plender reads as follows: 'any person who, owing to well-founded fear of persecution or of death, bodily injury, deprivation of the freedom of the person or of basic necessities of life, attributable to military or paramilitary conflict or other circumstances which seriously disrupt the public order, has been forced to leave his or her home but is not unable remain within, or return to, the country of his or her nationality', in 'The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced', International Journal of Refugee Law, Vol. 6, No.3, 1994, p.358.

man-made disasters because in these cases there is no lack of assistance and protection from the Government, and because if the displaced had crossed an international border, they would not have qualified as refugees since there is no element of persecution. He proposes the following definition:

'The term internally displaced person shall apply to every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or owing to external aggression, foreign occupation, armed conflict, internal strife, systematic violations of fundamental human rights, or forcible displacement, has been forced to leave his/her habitual residence; and who is within the territory of his/her own country, the government of which is either not willing or not in a position to effectively protect such (a) person against the commission of such acts of the effects resulting from such acts or situations'.<sup>160</sup>

There are others who contend that there are too many cases where natural disasters such as famine are in actuality 'man-made' disasters or the response of the national authorities is so inadequate that international attention is called for. Moreover, there have been well-documented cases of massive displacement

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<sup>160</sup> Report of Francis Deng, Commission of Human Rights, Fifty-first session, UN ECOSOC, E/CN.4/1995/50, 2 February 1995, quoted from Refugee Survey Quarterly, Vol.14, Nos. 1 and 2, (Centre for Documentation on Refugees, UNHCR, Geneva), 1995.

resulting from a combination of natural causes and racial, social or political causes, in which serious and widespread human rights violations have occurred.

#### **4.2 Definition and UNHCR 'concern'**

As part of the review exercise, a round-table consultation on UNHCR's operational experience with IDPs was held in Geneva on 9 and 10 May 1994. The basis of an implicit 'working definition' of an IDP was termed as a person who, had s/he managed to cross an international border, would have fallen within the definition of a refugee of concern to the UNHCR. However, it is important to point out that this definition cannot serve, in and by itself, to prescribe UNHCR's competence in the same way as the 'refugee' definition does. UNHCR undertakes certain activities on behalf of the IDPs and other non-refugees because such activities are integral components of the Office's overall strategy of prevention, protection and solutions.

Many UNHCR staff and independent researchers have been questioning the usefulness of the IDP label as a discrete legal, operational or social category for UNHCR purposes. In the same vein, they are also concerned that UNHCR's statistics on 'internally displaced' do not reflect the operational reality in the field.<sup>161</sup>

Therefore, it has been stated, the Office should focus on

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<sup>161</sup> UNHCR's Operational Experience with the Internally Displaced Persons, Division of International Protection, (UNHCR, Geneva), September 1994, p.76.

operational criteria at the organizational level and not preoccupy itself with developing further definitional elements. Any attempt at defining an 'IDP of concern to the UNHCR' would fail, as the focus of UNHCR's involvement in countries of origin has been on solutions rather than on categories of persons.<sup>162</sup> There is a further risk in formulating a UNHCR definition for a group of beneficiaries, as this may imply that all persons coming within the ambit of such a definition could consider themselves as having acquired an international status which qualifies them for UNHCR's assistance and protection.

In order for the UNHCR to better address the needs of populations benefitting from its programmes, the use of terms should be more precise. At a minimum, it should reflect the phase of displacement involved. Thus, former internally displaced persons,<sup>163</sup> should be clearly distinguished from those still in a state of displacement.

The issue of settlement of the internally displaced as a durable solution still lacks clear parameters, UNHCR experience could suggest something similar to a 'cessation' of internal displacement may be achieved through the official documentation of residence in one of the country's municipalities.<sup>164</sup>

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<sup>162</sup> Ibid.,

<sup>163</sup> Persons whose displacement has come to an end either through return to the place of former habitual residence or through settlement in another location.

<sup>164</sup> See, UNHCR experience in El Salvador, UNHCR's Operational Experience with Internally Displaced Persons, op.cit., p.58-59.

As in the case of Sierra Leone,<sup>165</sup> for the former refugees who became displaced subsequent to their repatriation, the UNHCR would 'strongly advise against the use of the term IDP to denote such groups'. They are, essentially, former refugees who have not yet achieved a durable solution. 'UNHCR's responsibility towards these displaced is ... a matter of mandate, not of choice.'<sup>166</sup>

Thus it has been observed that the 'IDP' will be seldom a useful operational category, but has continued relevance at the political and the advocacy level. At the international level, UNHCR can continue help address the plight of the displaced within the definition that has already gained general acceptance.

#### 4.3 Consent of Host State

'Perhaps the chief difficulty of a legal character presented by the provision of humanitarian assistance to displaced persons is the question whether the consent of the host state is *cine qua non*. Both as a matter of law and as a matter of practice, its consent is normally required.'<sup>167</sup>

The importance of the question of whether the host state consent is required as a precondition to the provision of humanitarian assistance to displaced persons needs further query and illustration in view of the emerging legal norms and the legal basis of UNHCR action for the IDPs. Ongoing conflicts in the former

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<sup>165</sup> See, UNHCR experience in Sierra Leone, op.cit., p.43.

<sup>166</sup> UNHCR's Operational Experience, op.cit.

<sup>167</sup> Plender, op.cit.

Yugoslavia and in Somalia have given rise to demands on the international community to provide humanitarian assistance to ameliorate the hardships caused by fighting, irrespective of the consent of the territorial sovereign. The international community is frustrated and immobilized by notions of non-intervention and sovereignty as it witnesses apparent atrocities, mass starvation and grave breaches of basic human rights. But is such an approach to providing humanitarian assistance justified under law ? Are governments and concerned agencies authorized to dispense assistance without the consent of the sovereign ?<sup>168</sup>

The United Nations Charter prohibits Members from exercising 'the threat or use of force against the territorial integrity of any State.'<sup>169</sup> The United Nations also provides for the non-intervention 'in matters which are essentially within the domestic jurisdiction of any state',<sup>170</sup> except where enforcement measures are permitted under the Charter. Under Chapter VII of the Charter, Article 42 empowers the security of such 'air, sea or land forces as may be necessary to maintain or restore international peace or security'.

However, apart from the authorized 'collective' humanitarian intervention under the UN Charter, as has been witnessed in Iraq, there needs to be a debate as regards circumstances in which

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<sup>168</sup> Arthur C. Helton, 'The Legality of Providing Humanitarian Assistance Without the Consent of the Sovereign', International Journal of Refugee Law, Volume 4, Number 3, 1992.

<sup>169</sup> Article 2, Paragraph 4, Charter of the United Nations.

<sup>170</sup> Article 2, Paragraph 7, Ibid.,

assistance may be provided without the consent of the sovereign.

The issue is important in an era increasingly characterized by so-called 'small' conflicts and disorders which may not command the attention of the Security Council. Also, the issue of consent is crucial, particularly in situations where there is no national government, such as Somalia, or where a government is embroiled in a civil war, such as the Sudan.<sup>171</sup>

The General Assembly Resolution of December 1991 on the Strengthening of the Coordination of Humanitarian Emergency Assistance set out a basis for improving the humanitarian work of the Organization but it reaffirmed, in Article 3 of the Annex, the principle that assistance should be supplied only in response to an appeal from the affected State and with respect for its territorial integrity. However, recent international practice does not support the proposition that humanitarian assistance can never be supplied without the consent of the host State, and was not construed as an impediment to the provision of aid in Somalia, in the absence of a request from the Government.<sup>172</sup> It was on the basis of a Memorandum of Understanding with the Government of Iraq, dated 18 April 1991, that humanitarian operations were undertaken in the north of Iraq. That Memorandum was renewed on 22 October 1992 but there was an interval between the expiry of the first Memorandum and the

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<sup>171</sup> Arthur C. Helton, *op.cit.*, p.374

<sup>172</sup> It must be accepted however that the episode does not constitute clear evidence of a right to supply humanitarian assistance, since the United Nations' intervention was premised upon Article 2(7) of the Charter; and at the material time no Somali Government was firmly established.

conclusion of the second when humanitarian assistance continued to be provided without any formal consent on the Iraqi side.

No principle of international law, and particularly nothing in Article 2(7) of the Charter, excludes action short of dictatorial interference undertaken with a view to the implementation of the purposes of the Charter. This, indeed, is the part of the significance of the word 'essentially' as it appears in Article 2(7). According to Sir Robert Jennings and Sir Arthur Watts:

With regard to the protection of human rights and freedoms - a prominent feature of the Charter - the prohibition of intervention does not preclude study, discussion, investigation and recommendation on the part of the various organs of the United Nations.<sup>173</sup>

The internationalization of human rights and the identification of a new constitutive human rights-based conception of popular sovereignty has made an anachronism of the view of sovereignty. It is not necessary to go so far in order to deny the right of the territorial State to prevent the international community from providing the essentials of life to nationals of that State forcibly displaced within its territory. Nor is it necessary to rely upon the controversial and contested 'right to humanitarian intervention'.<sup>174</sup> Whatever objections there may be to

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<sup>173</sup> Oppenheim's International Law, ninth edition by Jennings and Watts, Vol 1, p.449.

<sup>174</sup> See Ian Brownlie, 'International Law and Intervention', Oxford University Press, (Oxford, 1988).



humanitarian intervention, these do not apply to humanitarian assistance to those in need in another State. Even in a situation of conflict within a State, humanitarian assistance would not constitute intervention, so long as it is made available without discrimination between the parties to the conflict. <sup>175</sup>

The human rights movement is premised upon recognition of the legitimacy of international concern over internal human rights violations and as rejected a notion that a nation's mistreatment of its citizens is exclusively within its domestic jurisdiction, at least so far as such treatment contravenes the International Bill of Rights. Fundamentally, the provision of humanitarian assistance, the supply of food, clothing, medicines, or other basic forms of relief, does not involve a use of force. At issue is a non-consensual infringement of territorial sovereignty. But sovereignty is not an immutable concept, and increasingly, with the ceding of national jurisdiction over various matters through international agreements and state practice, including those relating to refugees, it is clear that the concept of sovereignty is evolving.

Concepts of sovereignty often invoked by governments in similar absolutist terms, should be considered qualified as well as by instances of vital humanitarian assistance. A non-consensual provision of essentials to meet the humanitarian needs of civilian non-combatants should be considered authorized under law in view of the benevolent nature of the objective, and assuming appropriate

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<sup>175</sup> See the judgment of the International Court of Justice in the case of military and para-military activities in and against Nicaragua, ICJ, Reports of Judgments, Advisory Opinions and Orders, (The Hague, 1986).

limitations in terms of proportionality and duration.<sup>176</sup>

This justification for State action should extend as well to inter-governmental and non-governmental entities. The 'right of humanitarian initiative' of the ICRC and the pragmatic approach of groups such as *Medicins Sans Frontieres* would thus find further authorization. Indeed, a right to receive humanitarian assistance is specifically recognized under Article 59 of the Fourth Geneva Convention concerning the protections of the civilians in war time. The use of force to effectuate the provision of such assistance ordinarily would have to satisfy the requisites of the UN Charter. But given the 'inherently benign character' of the objective and the ease with which proportionality and duration of action can be measured, collective authorization might not always be required.<sup>177</sup>

The right of States to territorial sovereignty must be respected. The conferment and deprivation of nationality is a right which international law recognizes as being within the exclusive competence of States; but the abuse of it may give rise to an international claim.<sup>178</sup> Any arbitrary refusal<sup>179</sup> to permit the

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<sup>176</sup> Arthur C. Helton, *op.cit.*, p.375.

<sup>177</sup> *Ibid.*,

<sup>178</sup> See the Dissenting Opinion of Judge Reid in the *Nottebohm Case*, ICJ, Reports of Judgments, Advisory Opinions and Orders, (The Hague, 1955), p.37-38.

<sup>179</sup> A careful reading of even the quintessential government document, the UN Charter, suggests that territorial sovereignty is not as absolute and uncontested as is often implied by governments. Many cling doggedly to the seventh paragraph of the second article that supposedly shelters from international scrutiny 'matters which are essentially within the domestic jurisdiction of any State'. Long before the recent series of Security Council resolutions that overrode domestic jurisdiction by invoking Chapter VII

administration of humanitarian relief to internally displaced persons, in violation of human right, may constitute an *abus de droit* which cannot prevent the United Nations from discharging the tasks conferred upon it by the Charter.<sup>180</sup>

#### 4.4 Applicable Legal Norms for UNHCR

Both human rights and humanitarian norms comprise conventional as well as customary law. Although human rights apply primarily in times of peace and humanitarian norms primarily in times of international or internal conflict, the overlap in their material applicability is growing. There is also a significant convergence and parallelism between norms originating human rights instruments and those originating in humanitarian instruments. While both types of instruments contain provisions not only regulating relations between the governments and the governed, but also governing relations between States by laying down their mutual rights and duties, such latter provisions are much more central to humanitarian instruments.<sup>181</sup>

Ideally, there should be a continuum of norms protecting the

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intervention, however, governments had agreed to respect individual human rights 'without distinction as to race, sex, language or religion', Thomas Weiss, 'Intervention : Whither the United Nations ?', Washington Quarterly, 17(1), 1994.

<sup>180</sup> Richard Plender, 'The Legal Basis of International Jurisdiction to Act with Regard to Internally Displaced', International Journal of Refugee Law, Volume 6, Number 3, 1994.

<sup>181</sup> Theodor Meron, 'The protection of the human person under human rights law and humanitarian law', Bulletin of Human Rights, 91/1, (Centre for Human Rights, Geneva), United Nations, New York, 1992.

rights of human person in all situations, from international armed conflict at one end of the spectrum, through internationalized internal armed conflict, internal armed conflict, violent internal strife, internal disturbances and tensions, to situations of internal repressions at the other. The human person is interested in the substance, not in the label of a protective system of norms.<sup>182</sup>

The internally displaced or people at risk of displacement often require not only humanitarian assistance but also protection, including both protection against further displacement and protection of their human rights while they are displaced and following their return home.

When the UNHCR is called upon to extend humanitarian assistance and protection to IDPs, it invokes internationally recognized norms of human rights law and humanitarian law, as well as mandatory norms or elements of customary international law. The office also relies on the enforcement by the authorities of the relevant national laws. An additional legal basis for protection is often provided by specific formal undertakings made by the authorities concerned, for example as elements of peace settlements, repatriation agreements, Memorandum of Understanding or adhoc agreements with UNHCR or with other UN bodies or International Organizations.<sup>183</sup>

An ongoing debate has featured in discussions in international

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<sup>182</sup> Ibid.,

<sup>183</sup> EC/SCP/87, 17 August 1994.

fora concerning the protection needs of internally displaced, as to whether the existing provisions of international human rights and humanitarian law provide a satisfactory basis for promoting such protection, or whether there are gaps which must be filled for this purpose. One argument is that existing legal norms, particularly those contained in international humanitarian law are both adequate in theory and the best that can be achieved in the present international context. The main problem is not an inadequacy of existing legal principles but failure of Governments, *de facto* authorities and other parties to conflicts to comply with, or to enforce, those principles.<sup>184</sup>

It must be acknowledged that there are potential gaps in the protections provided by both international human rights and international humanitarian law with respect to IDPs. Most provisions of the International Covenant on Civil and Political Rights are subject to derogation in declared public emergencies. Although the fundamental rights to life and to freedom from torture cannot be derogated, the right not to be subjected to arbitrary arrest and detention and right to freedom of movement and residence can be derogated. The latter right is moreover generally subject to restrictions 'provided by law' on the grounds of 'public order'.<sup>185</sup>

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<sup>184</sup> Ibid.,

<sup>185</sup> International human rights treaty texts expressly provide that in time of public emergency, the application of certain rights may be modified to the extent strictly required by situation. They then stipulate that certain rights cannot be derogated from in any situation. The United Nations took the next step in recognizing that rules were applicable, even in armed conflicts, when the General Assembly adopted resolution 2444 (XXIII), entitled 'Respect for Human Rights in Armed Conflicts', following resolution XXIII of

International humanitarian law is a system of legal rules specially conceived for implementation in the event of prolonged and organized armed clashes, but it in no way supersedes the other systems of international rules protecting the individuals thus in situations of armed conflict international human rights law and international humanitarian law are applied concurrently. For a number of reasons the provisions of humanitarian law are tailored more specifically to deal with the special problems that arise during armed conflict than are those of human rights law. The applicability of international human rights instruments is often suspended during armed confrontations. The inalienable human rights remain applicable but the protection they offer would seem to be inferior to that afforded by international humanitarian law. International human rights law contains no rules on the methods and means of combat, meaning at most problems relating to the conduct of hostilities are outside its purview.<sup>186</sup> Humanitarian law contains obligations which are binding on all the belligerents, whereas in principle only States can be held responsible for human rights violations.<sup>187</sup>

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the International Conference on Human Rights are held at Teheran in 1968. This represented a significant development for the United Nations since the organisation was recognizing the need to regulate armed conflicts, Françoise J Hampson, 'Human rights law and humanitarian law : two coins or two sides of the same coin ?', Bulletin of Human Rights, 91/1, (Centre for Human Rights, Geneva), United Nations, New York, 1992.

<sup>186</sup> Denise Plattner, 'The Protection of Displaced persons in non-international armed conflicts', International Review of the Red Cross, No.291, November-December 1992, p.567-580, at 569.

<sup>187</sup> Theodor Meron, 'Human Rights and Humanitarian Norms as Customary Law', (Clarendon Press, Oxford, 1989).

The protection of humanitarian law are limited to armed conflicts involving organized armed groups 'under responsible command' but not in other situations of internal disturbances and tension.<sup>188</sup> Where applicable the prohibition of forced movements of civilians in Protocol II also provides for an exception if 'imperative military reasons so demands'.<sup>189</sup> However, all this exception in theory reduced protection against forced displacement, it would undoubtedly be impossible to obtain any practical protection whatsoever without such concessions to the reality of armed conflict.

It is certainly possible to conceive of improvements in the international legal regime applicable with respect to the problem of forced displacement, particularly in situations that do not qualify as armed conflicts. Among the issues that could usefully be addressed in normative terms or the prohibition of forced displacement, ensuring a humanitarian access to those in need of protection and assistance, whether they are in conflict or in non-conflict areas, and measures to ensure the safety of the workers and staff of humanitarian organizations.

Humanitarian law contains provisions that would merit extension to cover other situations. The rules afford protection from the effects of hostilities are those that govern the mean and methods of combat. The rules in Protocol II relating to military

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<sup>188</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 1.

<sup>189</sup> Protocol II, Article 17.

operations (Part IV) bans attacks on civilian populations, prohibits the starvation of civilian population<sup>191</sup> and attacks on objects indispensable to its survival,<sup>192</sup> and Article 17 prohibits the displacement of the civilian population unless the security of the civilians involved or imperative military reasons so demand.

International Law in no way leaves belligerents free to launch attacks causing disproportionate losses to the civilian population or have indiscriminate effects. All these practices are prohibited by rules which have not yet formally been codified in respect of internal armed conflict. Since such practices are at the root of most of the population displacements occurring today, there can be no doubt that the relevant rules should be promoted as a matter of urgency, especially by the UNHCR.<sup>193</sup>

In addition, refugee law, beginning with the 1951 Convention relating to the Status of Refugees, has developed specific standards for the treatment of persons who have been displaced, in this case across international frontiers. Some of the principles of refugee law could be adapted by way of analogy, invoking the corresponding principles of human rights law, to promote the protection of the internally displaced. The principle of non-refoulement, for example, is more explicit and focused than the human right to liberty of movement and freedom of residence as

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<sup>190</sup> Protocol II, Article 13, paragraph 2.

<sup>191</sup> Protocol II, Article 14, first sentence.

<sup>192</sup> Ibid., second sentence.

<sup>193</sup> Denise Plattner, *op.cit.*, p.571.



formulated in Article 12 of of the International Covenant on Civil and Political Rights.

The absence of a single body of principles and norms specifically for the protection of the internally displaced, equivalent to international refugee law, has also been mentioned as a deficiency in the present legal situation. It should be noted, however, that refugees have been granted a particular status because they are foreigners who do not enjoy the protection of any Government. Internally displaced persons, as nationals within their own country, require above all respect for an enforcement by the authorities of their rights as full citizens, including the right to liberty of movement and freedom of residence, whether in the place from which they were displaced or elsewhere. A specific legal status different from their fellow citizens would perhaps not be to their advantage. On the other hand, codification of legal protection against displacement as well as of remedies and protections for persons who have suffered displacement, including the right if they so wished to return to their homes, could be of value.

The further development of international legal norms against forcible displacement and for the protection of the displaced, building on the protection already provided by international human rights and humanitarian law, would be most welcome.

It must be recognized that the most serious problems with respect to the protection of persons who are either displaced or threatened with displacement in their own country result not from an absence or deficiency of legal norms but from the failure of the

parties concerned to respect and to enforce those norms, and, even more fundamentally, from the failure of warring parties, and of the international community as a whole, to achieve a peaceful resolution of the murderous conflicts that are the major cause of forced displacement. Any effective legal system must include both norms of conduct and some mechanism to ensure their observance or enforcement. The existing international mechanisms for ensuring observance of human rights principles and of humanitarian law are clearly not fully adequate to the task.

Humanitarian assistance and protection for the IDPs requires the cooperation of the States directly concerned. A non-international armed conflict is an internal affair of the State concerned, so that State can invoke the principle of non-interference to oppose third-party interventions intended to promote implementation of the relevant international rules. Article 1 common to the Geneva Conventions nevertheless provides that States have the duty to ensure respect for humanitarian law and the International Court of Justice considers that this duty obtains with respect to non-international armed conflicts as well.<sup>194</sup>

As for refugees,<sup>195</sup> international presence and humanitarian access are indispensable. Wherever the consent and cooperation of the relevant authorities have been forthcoming, the absence of any

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<sup>194</sup> Judgment of the International Court of Justice in the case of military and para-military activities in and against Nicaragua, ICJ, Reports of Judgments, Advisory Opinions and Orders, (The Hague, 1986), p.104, para. 220.

<sup>195</sup> See, James Hathaway, 'Fear of persecution and the law of human rights', Bulletin of Human Rights, 91/1, (Centre for Human Rights, Geneva), United Nations, New York, 1992, p. 100-104.

single legal instrument specifically addressing the problems of the displaced and the theoretical gaps in the legal protections available have not prevented humanitarian access and action. Where the consent of the parties is not given, legal provisions by themselves cannot secure effective access. While international legal norms have strong persuasive power and moral authority, and national laws and signed agreements are valuable practical protection tools, humanitarian access and protection depend in practice on the ability and political will of the international community to persuade States to accept and to discharge their responsibility for the welfare and safety of all the displaced, or people who have never left home.<sup>196</sup>

#### **4.5 Institutional Arrangements and Interagency Cooperation**

In all situations where the UNHCR is involved with the internally displaced, the Office works closely with other United Nations, inter-governmental and non-governmental organizations and agencies, often as part of comprehensive multisectoral programmes. As with assistance programmes for refugees, humanitarian assistance and other programmes benefiting the internally displaced involve many different arrangements for interagency cooperation and coordination.

Within the United Nations agency, UNHCR has taken on the broadest assistance and protection role for the IDPs. Although its mandate does not include the IDPs, UNHCR has increasingly become

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<sup>196</sup> EC/SCP/87, 17 August 1994.

involved in situations of internal displacement at the request of Secretary General or the General Assembly. The criteria provide that it will assume prime responsibility in situations where there is 'a direct link' with its basic activities for refugees in particular, in those situations in which returning refugees are mingled with IDPs and also where there is a 'significant risk' that the internally displaced will become a refugee problem. Although its criteria are broad, UNHCR does not become in all situations of internal displacement<sup>197</sup>.

Where UNHCR does assume responsibility for IDPs, its involvement is comprehensive, comprising both protection and assistance. The High Commissioner has affirmed, 'Humanitarian action is not only about the delivery of relief but first and foremost of about ensuring the basic human rights and security of victims of all sides of a conflict'<sup>198</sup>.

Often resident representatives of the United Nations Development Programme act in two capacities : as the senior official of UNDP in the country concerned as the resident coordinator of the United Nations system in that country. As resident coordinators they are charged with 'coordinating assistance for internally displaced persons' in close cooperation

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<sup>197</sup> Report of Mr Francis Deng, submitted pursuant to Commission on Human Rights resolution 1993/95 and 1994/68, UN ECOSOC, E/CN.4/1995/50, 2 February 1995.

<sup>198</sup> Sadako Ogata, 'Humanitarianism in the Midst of Armed Conflict', statement by the United Nations High Commissioner for Refugees to the Brookings Institution, Washington DC, 12 May 1994, quoted Ibid.,

with governments, donors and United Nations agencies in the field<sup>199</sup>. There is a recent trend however towards broadening the choice for the post of the resident coordinator so that an individual other than the resident representative can be selected in situations of complex emergency.

UNICEF has become involve in many situations of internal displacements through its efforts to improve the lives of women and children by providing services in the areas of health care, education, nutrition and sanitation. While its primary concern remains assistance, UNICEF offers a good example of a relief agency that has recognized the integral connection between assistance and protection. It has made efforts to address protection problems particularly when they affect the delivery of assistance.

The World Food Programme has been providing food aid to IDPs for the past 30 years. IDPs constitute 35 per cent of the 47 million persons to whom WFP provides assistance.

The World Health Organization becomes involve in a situation of internal displacement when health services have been disrupted, or when a specific group of IDPs have been identified as 'special' by the United Nations, in which case WHO assumes its responsibility for providing or assisting in the provision of health services to these persons.

Among the non-United Nations agencies, the International Committee of the Red Cross (ICRC) has special competence for the provision of humanitarian relief and the protection of civilians in

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<sup>199</sup> General Assembly resolution 44/136, 15 December 1989.

situation of armed conflict and for promoting observance of international humanitarian law, responsibilities which are highly relevant to persons displaced or at risk of displacement as a result of war.

ICRC has had long experience in protecting civilians in armed conflict situations and more recently has been expanding its capacity to protect and assist civilians in internal conflicts. Of all the institutions dealing with IDPs, ICRC certainly has the clearest mandate to assist and protect victims of internal conflict who constitute, if not the largest group, at least the most complex one among the internally displaced. It has also become directly involved in situations of internal strife by exercising the 'right of initiative' accorded to ICRC by the Statutes of the International Red Cross and Red Crescent Movement. Recent resolutions of ICRC's Council of Delegates have endorsed ICRC's involvement in a broad range of situations, and ICRC has allocated more than 80 per cent of its field budget to protecting and assisting civilians in non-international armed conflicts<sup>200</sup>.

The interagency cooperation, amongst various institutions and especially with the ICRC, would help for a more developed information processing and 'early warning systems'. The report of the Ad Hoc Consultation on Early Warning of New Mass Flows of Refugee and Displaced Persons would contribute to 'early listening'

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<sup>200</sup> Report of Mr Francis Deng, op.cit., UN ECOSOC, E/CN.4/1995/50, 2 February 1995.

on part of the international community<sup>201</sup>.

The International Organization for Migration (IOM) has the mandate to provide migration assistance and sometimes de facto protection to displaced persons, both internally and externally displaced, with the consent of the State concerned. IOM has been involved with IDPs in rapid analysis of migratory flows, the development of national population information systems, census taking, technical assistance to Governments and in organizing transport for IDPs, for providing health care and assistance with resettlement and reintegration.

The United Nations High Commissioner for Human Rights, with a general mandate for prevention, promotion and protection of human rights can lend authority and support to efforts to provide improved protection to the internally displaced. The High Commissioner is in a position to raise specific cases of internal displacement in his dialogues with Governments. He has indicated a strong interest in ensuring that the recommendations made by representatives and rapporteurs of the Commission are carried out, and in particular he has expressed his support for the work of the Representative of the Secretary General on internally displaced persons. Under his authority, field officers have already been

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<sup>201</sup> Ibid., also see Gregg A Beyer, 'Human Rights Monitoring and the Failure of Early Warning : A Practitioner's View', International Journal of Refugee Law, Volume 2, Number 1, January 1990 ; Timour F Dimitrichev, 'Conceptual Approaches to Early Warning : Mechanisms and Methods - A View from the United Nations', International Journal of Refugee Law, Volume 3, Number 2, April 1991 ; Centre for Refugee Studies, York University, Toronto, 'Towards Practical Early Warning Capabilities concerning Refugees and Displaced Persons', International Journal of Refugee Law, Volume 4, Number 1, January 1992.

deployed and actively looking into human rights issues of internal displacement<sup>202</sup>.

Since no one agency has a global mandate for the displaced, arriving at an appropriate division of labour among the organizations concerned is clearly of considerable importance for meeting their needs for humanitarian assistance, protection and solutions. The role of the Department of Humanitarian Assistance (DHA) and the Inter-Agency Standing Committee chaired by the Under Secretary-General for Humanitarian Affairs are central to the coordination of humanitarian assistance and the appropriate allocation of responsibilities among United Nations and other international agencies in complex emergencies, which include many situations of forced displacement.

The Office of the United Nations High Commissioner for Refugees plays an active part in the Inter-Agency Task Force on Internally Displaced Persons of the Standing Committee Working Group,<sup>203</sup> which is currently seeking to formulate recommendations for mechanisms and practical measures to ensure effective and coordinated interagency responses to the needs of the internally displaced. The needs of the IDPs include protection as well as humanitarian assistance and therefore it is essential that agencies with competence in the field of human rights are an integral part of any international effort to meet those needs.

In sum, a legal framework specific to the protection of IDPs

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<sup>202</sup> UN ECOSOC, E/CN.4/1995/50, 2 February 1995.

<sup>203</sup> EC/SCP/87, 17 August 1994.



is conspicuous its absence, since no legal instrument covers the particular needs of the IDPs and no institution is mandated to address those needs. The issues of defining an IDP has been central to many deliberations and a conclusive universal definition is yet to emerge. However, the UNHCR's operational experience has drawn upon an implicit working definition of an IDP as a person who, had s/he managed to cross an international border, would have fallen within the definition of a refugee of concern to the UNHCR. In international practice, a consent based regime is the accepted norm and the official line of the UNHCR emphasises the above practice. Finally, it should be stated that there are a number of applicable legal norms for UNHCR action, coupled with institutional arrangements and interagency cooperation.

## Chapter 5

### *In Conclusion*

When masses of people are suddenly forced to leave their homes and communities for reasons beyond their control, a humanitarian crisis sets in irrespective of the cause or location of the displacement. Although some general categories, such as displacement resulting from civil war or other form of armed conflict may be available, the one self-evident fact is that no two internal displacement situations are ever the same. Thus, just as there is no typical situation of internal displacement, nor is there a typical international approach to address the needs of the displaced. Since the dissertation traces the role of the UNHCR vis-a-vis IDPs, it should be taken note that examples essentially are based on UNHCR experiences. Also, the UNHCR's practice has confirmed the proposition that no two displacement situations are the same.

The fact that UNHCR is involved with the IDPs at different stages of conflict and displacement is an other argument against notional generalizations. It would be misleading to try and compare protection and assistance activities carried out in the midst of armed conflict and during flight. There are wide ranging variations in terms of UNHCR's role in assisting and protecting IDPs within comparable phases of conflict and displacement. These include curious variations from one-time relief assistance package in

Rwanda to the round-the-clock engagement in Bosnia-Herzegovina; or from direct involvement with mixed populations of returnees and internally displaced in Sri Lanka to only very indirect involvement in a similar situation in Sierra Leone or in the Sudan.

Comparative analysis and the search for common parameters are complicated by the fact that, with very few exceptions such as Cyprus and Azerbaijan,<sup>204</sup> UNHCR is not involved in any programme strictly designed for IDPs. As a matter of fact, if any rule is emerging from UNHCR's operations in countries of origin, it must be a product of the so-called 'mix-factor'.

It has been argued that the overall tendency to treat assistance and protection of IDPs as subordinate to 'refugee' concerns is legitimate, since UNHCR is essentially a refugee agency. Furthermore, a number of operations have demonstrated that UNHCR's use of its mandate as a 'stepping stone' for an 'incremental approach' to the broader issue of coerced population displacement may be 'tactically sound'. However, it is only fair to say that there is no unanimity within the Office as to the desirability of such an incremental approach.<sup>205</sup>

The UNHCR's deliberate decision on non-involvement exclusively with IDPs, is particularly 'revealing of the difficult dilemmas facing the Office's self-perception'. The reasons most frequently invoked against the UNHCR getting involved, or certainly involving

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<sup>204</sup> For specific case studies, see UNHCR's Operational Experience with Internally Displaced Persons, (Division of International Protection, UNHCR, Geneva), September 1994, Cyprus on p.56 and Azerbaijan on p.23.

<sup>205</sup> Ibid.,

itself more, is because of a mix of factors. The first attributable reason is the availability of funds for a particular operation. The unavailability of a steady input of financial resources from the overall United Nations budget, compounded by the proven lack of donor interest, is often cited as a major constraint to expanding UNHCR programmes in favour of the IDPs. In some situations, donors may send out a clear signal on whom to give credence. The second factor are the operational constraints and difficulties in working in countries of origin. These may relate to the absence of political settlements, problems of access to the beneficiaries, lack of security for staff and equipment, among others. Also, there is the issue that even in the presence of a strong refugee linkage, there is no justification for UNHCR to insist on a primary role since adequate coverage of needs has been provided by other agencies. This argument is fully in line with the UNHCR Executive Committee and General Assembly texts.<sup>206</sup>

There has been a greater willingness on the part of the United Nations agencies to develop more coherent collaborative arrangements. However, a vacuum of responsibility often exists in cases of internal displacement. There are too many situations, where there are a substantial number of IDPs without protection or assistance. This necessitates the establishment of a central point or mechanism to review serious situations of internal displacement and assign rapid institutional responsibility in complex emergency situations.

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<sup>206</sup> Ibid.,

The Inter-Agency Standing Committee has approved a recommendation of its Task Force on Internally Displaced Persons that the Emergency Relief Coordinator serve as the reference point in the United Nations system, to receive requests for assistance and protection on actual or developing situations of internal displacement that require a coordinated international response.

Though greater inter-agency collaboration has required agencies to cooperate, especially whose mandates and activities relate to the internally displaced, there needs to be provisions for UN staff designation to act as the focal points for the work relating to the internally displaced. There is in particular a need to strengthen capacity within the Department of Humanitarian Affairs to deal with the internally displaced.

The UNHCR undertakes certain activities on behalf of the IDPs because these activities form part of the Office's overall strategy of prevention, protection and solutions. The criteria for involvement revolve around the existence of an established link with activities which the UNHCR undertakes in fulfilment of its existing mandate. The criteria are generally perceived by the UNHCR staff as necessary and sufficient. They are necessary for the predictability of UNHCR action. By developing positive criteria for development, UNHCR has started to delineate its field of competence concerning situations involving internal displacement in such a way that other organs of the United Nations, States, international organizations, NGOs and most importantly, beneficiaries can relate to their role with a degree of certainty.

The observation has already been made that the 'internally

displaced' language is self-limiting. The real question is when conflict erupts and mass displacement follow, at what stage must UNHCR provide humanitarian assistance. Although the official UNHCR standpoint has been a host state consent-based regime, there is a need to appreciate the fact that in cases of a denial of consent, humanitarian assistance should be allowed to be provided, in proven instances of grave domestic humanitarian crises.

The crisis of the IDPs is that they fall within the domestic jurisdiction of states and are therefore not covered by the protection accorded to refugees. In the case of refugees, the need for international protection in the sense of a temporary substitute for national protection is inherent in the definition, owing to the fact that refugees find themselves under the jurisdiction of a foreign State. In the case of IDPs, however, it is not so clear what international legal norms and type of protection is required to be exercised by the international community. It should be emphasised that the fundamental rights and human needs of IDPs are as threatened, if not more, as those of refugees. On the whole, the need of the IDPs for international protection and assistance appears to be greater.

This requires a comprehensive view of the problem and of the available options for response and solution, including the availability of asylum. The reality is that the IDPs constitute millions of vulnerable people whose desperate needs are yet to be sufficiently met. More than the letter of the law in a document, it is greater awareness of the problem and practical measures to provide speedy remedies, as part of dynamic decision-making

processes.

Since the most recurrent cause of coerced population displacement is armed conflict or generalized violence, it can be argued that a 'first level' of protection would be the provision of shelter from attack against one's life or physical integrity. The contents of protection as a possible UNHCR activity will be determined according to who provides this elementary measure of safety, and whom UNHCR will have to deal with and for what specific purposes.

The nature and scope of UNHCR's involvement with IDPs does not seem to call for operational protection guidelines on this particular group. Rather, appropriate guidance on specific issues relating to the delivery of protection in areas of conflict should be incorporated into existing guidelines or handbooks dealing with UNHCR's humanitarian action.<sup>207</sup> The debate on the neutrality of humanitarian action in the framework of complex UN operations clearly goes beyond the scope of this study.

The nature of UNHCR action with regard to IDPs is an issue of insecurity and a problem of 'access'. Presence is essential in identifying the demographic composition of the beneficiary population so that specific programmes could be designed for specific groups. As a general rule, UNHCR has been, when requested to provide assistance to IDPs, carefully assessing its capacity and

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<sup>207</sup> The Handbook for Emergencies may be revised to reflect on the decision-making process and management of emergency operations in countries affected by armed conflict. Similarly, the draft Protection Guidelines on the Voluntary Repatriation of Refugees may be elaborated further to address return and reintegration aspects in situations of 'mixed' external and internal displacement.

ability to monitor the delivery of that assistance.

UNHCR's involvement with the internally displaced has revealed the tremendous complexity of solutions to the problem of violence-induced displacement. It has also manifested the limits and relative adequacy of 'refugee' landmarks in the search for global solutions. The concepts of voluntary return and local settlement<sup>208</sup> cannot have the same scope in respect of internal displacement as they do in regard for refugees. They may not provide an appropriate reference for dealing with relocation imposed by Government on security or other grounds, or with long term consequences of 'ethnic cleansing' or *de facto* exchange of populations. The demographic disruptions and population redistribution are phenomena which the international community is ill-equipped to address. 'UNHCR may need to venture outside traditional mental categories ... (to) decide whether it wishes to retain a lead in an increasingly complex search for solutions to the refugee problem in its broadest sense'.<sup>209</sup>

Over the last several years, significant progress has been made in generating an international response to the mounting crisis of internal displacement. The problem still confronts the international community with legal and institutional challenges

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<sup>208</sup> For a refreshingly new view, see David Petrasek, 'New Standards for the Protection of Internally Displaced Persons: A Proposal for a Comprehensive Approach', Refugee Survey Quarterly, Vol. 14, Nos. 1 and 2, (Centre for Documentation on Refugees, UNHCR, Geneva), Spring/Summer 1995.

<sup>209</sup> UNHCR's Operational Experience with Internally Displaced Persons, (Division of International Protection, UNHCR, Geneva), September 1994.



that must be met with compelling sense of urgency. On the normative aspect, there has been a call for the compilation and evaluation of existing legal norms, the determination of whether there are gaps in the law and the development of principles for bridging those gaps. The issues of institutional responsibility must also be resolved in order to have an effective international response to the IDPs in need of assistance and protection. With the legal and institutional issues resolved, the task of those charged with immediate responsibility would then be to develop strategies of international response to the crisis of internal displacement. In cooperation with appropriate organs, these strategies would help address the underlying problems of national and regional security, stability and development, thereby reducing dislocation producing refugees and internally displaced persons.

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## Epilogue

To say that we are all refugees is to say that we are all strangers to ourselves. To categorize certain people as refugees suggests that we deny the refugeeness inside us all, or deny the 'normalcy' that is part of all refugees. Categorizing people as refugees serves an important legal function. It allows millions of people the right of international protection which they otherwise might not enjoy. On the other hand, the categorization delimits one group from another, creating insiders and outsiders.

Daniel Warner  
'We are All Refugees'  
International Journal of Refugee Law

To say that we were all displaced at some stage, will be a truism. Are Internally Displaced Persons insiders, termed as outsiders in an 'inside story' ?