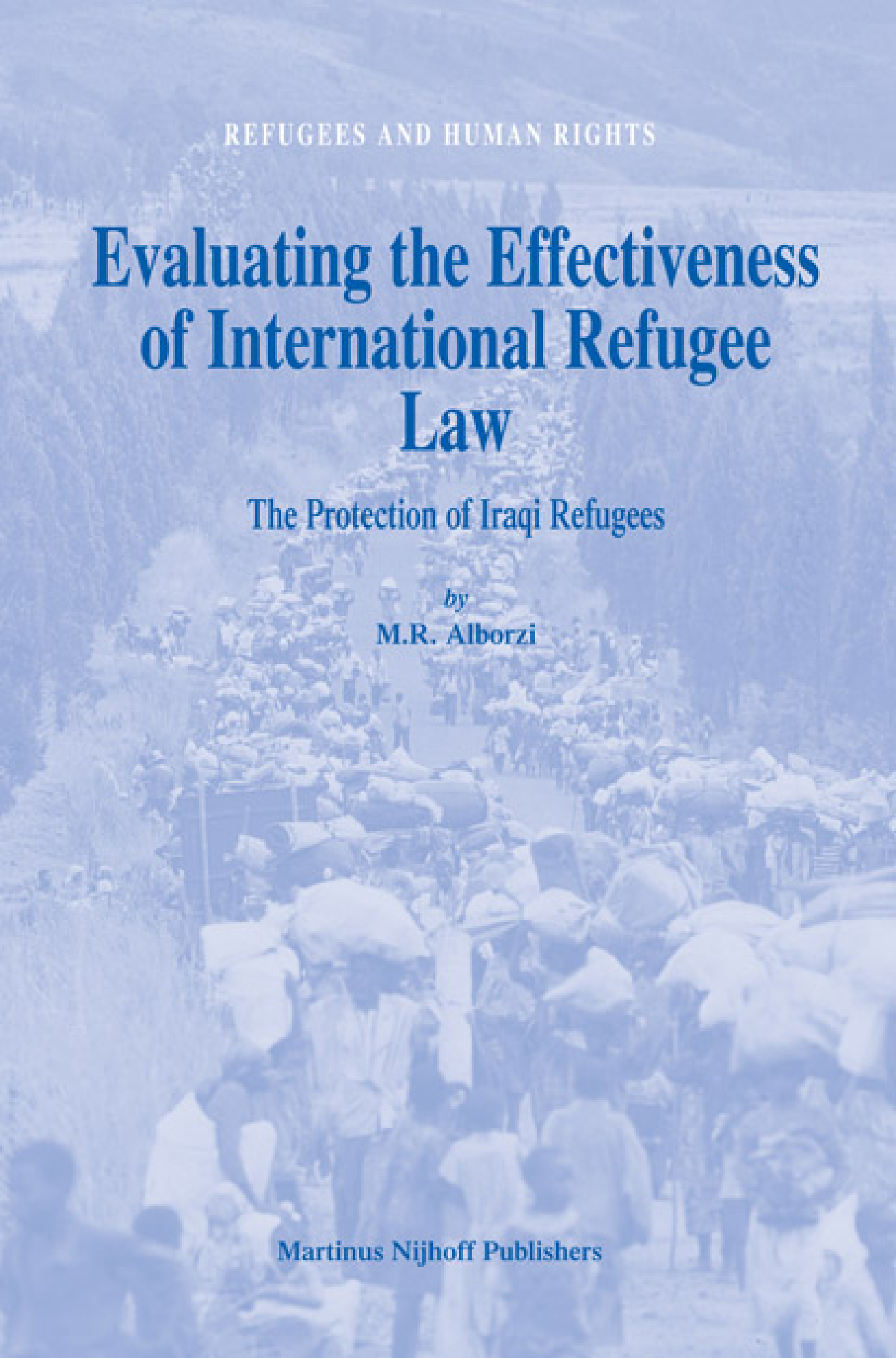
REFUGEES AND HUMAN RIGHTS

Evaluating the Effectiveness of International Refugee Law

The Protection of Iraqi Refugees

by

M.R. Alborzi



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EVALUATING THE EFFECTIVENESS OF INTERNATIONAL REFUGEE LAW

Refugees and Human Rights

Volume 11

The *Refugees and Human Rights* Series aims to meet the increasing need for literature which probes the nature and causes of forced migration, the modalities and procedures employed when refugees present themselves, and the manner in which the human rights of refugees are, or should be, promoted and protected.

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Preface and Acknowledgment

This book is based on a Ph.D. thesis submitted to the Law Faculty of the University of Neuchâtel. It is an attempt to analyse and discuss the status of refugee law, by examining its trends and implications as applied to one specific outstanding case.

Refugee law is a comparatively less-developed branch of international law in terms of hard law, while being rich in terms of soft law. The purpose of this book is to examine the relevance and effectiveness of refugee law, and the protection regime for refugees, and their application to the Iraqi refugees in recent years.

As a leading refugee-producing country, Iraq represents one of the best case studies of the successes and shortcomings of refugee law. To address the problem, the international community has envisaged different types of solutions, some of which have become precedents and guidelines in international law.

This book argues that:

- The provisions of contractual international refugee law are not sufficiently developed to cover the needs of refugees today;
- A modern, legally binding framework is the *sine qua non* of an effective protection regime;
- Commendable efforts have been made to develop soft laws. However, endeavours should now be focused on a gradual transformation of these soft laws into customary norms;
- The situation of Iraqi refugees has provided a challenging experimental case, but has not necessarily resulted in their successful protection.

I hope that this book will serve as a source of insight and motivation for those who tirelessly work for the protection of refugees, and will encourage efforts to further develop refugee law in the interest of human beings and the international community.

I am most grateful to the University of Neuchâtel for supporting my research. I would like to thank Professor Eric Wyler for his kind encouragement and advice, and Professor Petros Mavroidis to whom I owe a particular debt of gratitude for supervising an earlier draft and making valuable suggestions. This book would have been significantly poorer without his insightful ideas and stimulating thinking. I would also like to thank Professor André de Hoogh who read the earlier drafts and offered much valued criticism and advice.

During the research phase, I received a great deal of practical assistance from Mrs. S. Abegglen who also edited the first drafts. I am especially thankful to her. My thanks also go to Mrs. P. Buhayer for editing and proofreading the final text. I am grateful to all those, too numerous to mention by name who contributed to the production of this book.

Finally, my greatest thanks must go to my wife who spared no effort in providing the calm environment I needed for my work.

Mohammad Reza Alborzi

Abbreviations

AALCO	Asian-African Legal Consultative Organization
APN	Architects for People in Need, German NGO
ARAMCO	Arabian American Oil Company
ASAM	A Turkish NGO
ASEAN	Association of Southeast Asian Nations
BAFIA	Bureau for Aliens and Foreign Immigrants Affairs of the Iranian Ministry of the Interior
C Documents	Legal acts adopted by the European Commission
CARICOM	The Caribbean Community
Cartagena Declaration	Cartagena Declaration on Refugees, 1984
CAT	Convention against Torture, 1984
CCPR	Covenant on Civil and Political Rights
CEAS	Common European Asylum System
CEC	Commission of the European Communities
CEDAW	Convention on the Elimination of Discrimination Against Women, 1979
CERD	Convention on the Elimination of All Forms of Racial Discrimination, 1965
CERF	UN Central Emergency Revolving Fund
CESCR	Covenant on Economic, Social and Cultural Rights
CEU	Council of the European Union
CIREFCA	International Conference on Central American Refugees, Returnees and Displaced Persons

COM documents	European Commission legislation, communications and preparatory papers
CPA	Comprehensive Plan of Action on Indo-Chinese Refugees
CRC	Convention on the Rights of the Child, 1989
CRS	Catholic Relief Services
DAR	UNHCR's Development Assistance for Refugees
DFID	UK's Department for International Development
DHA	UN Department of Humanitarian Affairs
DLI	UNHCR's Development through Local Integration
DMZ	Demilitarised Military Zone
DPA	UN Department of Political Affairs
DPKO	UN Department of Peace-Keeping Operations
ECHO	European Union Humanitarian Aid Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ECOSOC	UN Economic and Social Council
ECWA	UN Economic Commission for Western Asia
EEC	European Economic Community
ERC	UN Emergency Relief Coordinator
EU	The European Union
EXCOM	Executive Committee of the High Commissioner's Programme
FAO	The Food and Agricultural Organization of the United Nations
FYR	Former Yugoslav Republic
4 Rs	UNHCR's programme of sustainable Repatriation, Reintegration, Reconciliation and Reconstruction
GA RES	UN General Assembly Resolution
GPs	Guiding Principles on Internal Displacement
HC	UN Humanitarian Coordinator
HIC	Humanitarian Information Center
HOC	Humanitarian Operations Center of Kuwait
IASC	UN Inter-Agency Standing Committee
IAWG	UN Inter-Agency Working Group
ICARA	International Conference on Assistance to Refugees in Africa
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 1966

ICEM	Intergovernmental Committee for European Migration
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICVA	International Council of Voluntary Agencies
IDP	Internally displaced person
IFA	Internal Flight Alternative
IGO	Inter-governmental organization
ILO	International Labour Organization
IMC	US International Medical Corps
IOM	International Organization for Migration
IRC	US International Rescue Committee
IRIN	Integrated Regional Information Network
IRO	International Refugee Organization
KDP	Kurdistan Democratic Party
KRG	Kurdish Regional Government
MOU	Memorandum of Understanding
MSF	Médecins sans frontières
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
OAS	Organization of American States
OAU	Organization of African Unity (African Union from 2002)
OAU Refugee Convention	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969
OCHA	UN Office for the Coordination of Humanitarian Affairs
ODA	UK Overseas Development Administration
ODA	UN Official Development Assistance
OECD	Organization for Economic Cooperation and Development
OFAC	US Office of Foreign Assets Control
OFDA	US Office for Disaster Assistance
OHCHR	Office of the UN High Commissioner for Human Rights

OIC	Organization of the Islamic Conference
OPEC	Organization of the Petroleum Exporting Countries
ORCI	UN Office for the Research and Collection of Information
ORHA	US Office of Reconstruction and Humanitarian Assistance
OXFAM	The Oxford Committee for Famine Relief
POW	Prisoner of War
PUK	Popular Union of Kurdistan
RSG	Representative of the UN Secretary-General
SARC	Syrian Arab Red Cross
SCF	Save the Children Fund
SCHR	Standing Committee for Humanitarian Response
SPHERE	Humanitarian Charter and Minimum Standards in Disaster Response
SUNEM	Senior UN Emergency Manager
UN	The United Nations
UNDP	UN Development Programme
UNDRO	UN Disaster Relief Office
UNEP	UN Environment Programme
UNESCO	UN Educational, Scientific and Cultural Organization
UNFPA	The UN Population Fund
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHUCS	UN Humanitarian Centers
UNICEF	United Nations Children's Fund
UNOHCI	UN Office for the Humanitarian Coordinator for Iraq
UNOPS	UN Office for Project Services
UNRRA	UN Relief and Rehabilitation Agency
UNRWA	UN Relief and Works Agency for Palestine Refugees in the Near East
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UNV	United Nations Volunteers Programme
USCR	US Committee for Refugees
WFP	World Food Programme
WHO	World Health Organization

Chapter 1

Introduction

1. Purpose of Study

International refugee law is one of the branches of public international law that has gained in contemporary relevance during recent decades. Since the adoption of the Convention relating to the Status of Refugees of 28 July 1951 and its Protocol of 31 January 1967, the problem of refugee protection has been a constant preoccupation of the United Nations organization and international humanitarian agencies.

War, internal conflict, violation of human rights and oppression have been the main causes of refugee production in the world. At the same time, insecurity, wide-ranging economic problems, unemployment and the lack of a minimum of economic and social prospects in the less developed societies generate migration that works hand in hand with the refugee phenomenon, in many instances in an indistinguishable manner. In the age of the global village and fast transportation it is no longer possible to contain refugees of an erupting crisis within specific borders. Therefore, the refugee problem has increasingly become a global issue which requires an international response.

In addition to Refugee Law, two other branches of public international law, namely human rights law and humanitarian law have a direct impact on the situation of refugees, while interacting with one another as well. Although the need for refugee law has been

increasing steadily, it has been stagnant on the development front. The newest international treaties were written four decades ago while the issue of refugees has witnessed a striking evolution during the past two or three decades. This is ironic because, over the same period of time, human rights law – which has similar objectives for the protection of human beings – has gone through an enormous qualitative and quantitative development and scored significant achievements.

What could be the reason behind the willingness of states to engage in the development of international law regarding their own citizens while remaining less than enthusiastic to undertaking more and developing laws relating to aliens who seek refuge from them? In other words, why has greater regard for human rights failed to be accompanied by a corresponding respect for refugee rights? The reality is that the heavy costs which are inflicted on the refugee receiving countries by accepting more refugees, have gradually made countries disinclined to embark upon the development and codification of new rules which can only mean taking on and carrying out even more exacting obligations than those that already exist. Out of necessity, therefore, the international community has developed a hybrid regime, including international treaty obligations, customary rules, consensual resolutions, and decisions of the international organizations, as well as state practices and behaviour. This regime is known as the refugee protection regime which is applied on an ad hoc basis or for as long as a given crisis endures.

The purpose of this study is to examine the trends in international law and the protection regime of refugees, and their application to the Iraqi refugees during recent years. The case of Iraq represents one of the most comprehensive cases in refugee law, since:

- It has occurred over a relatively long period of time (at least three decades);
- It has generated different types of refugees, covering all the categories;
- Different types of solution have been envisaged and some have been turned into precedents in international law;
- It still keeps all of its potential to produce new flows of refugees.

Studying the plight of Iraqi refugees can therefore be considered highly relevant for an evaluation of the applicability of international law to refugees the world over.

2. Summary of Questions and Arguments

The main arguments this work presents are contained in chapters two, three and four. In Section A of chapter two we will review the background and *raison d'être* of the crises in Iraq that have caused the outflows of refugees primarily among the Kurds and Shiites. The questions that we attempt to answer are:

- Who are the Kurds, who are the Shiites, what are the ethnic difficulties facing Iraq?
- At what stages were refugees generated and during which particular crises?
- How do we qualify the international management of the crisis?

In Section B of chapter two we will focus on countries neighbouring Iraq and examine their legal obligations vis-à-vis refugees, as well as giving a brief history of their treatment of the Iraqi refugees. The argument here is that there is conspicuously no unified pattern of behaviour or even perceived obligation on the part of the regional players that are so instrumental in the process of international protection of refugees in one of the most troubled regions today. They are divergent in their political will, legal undertakings, responsiveness to the world and sense of liability towards the UN refugee agency UNHCR. This in itself represents a challenge to the protection regime that the international community needs for refugees.

The purpose of Section C of chapter two, is to argue that, bearing in mind the historical background and political and ethnic realities of Iraq, it would be simplistic to believe that the refugee producing phase of Iraq is over simply because of a regime change. Therefore, it will be our contention that the international community should not close its eyes to the threats that may still be posed to the stability of the country that could lead to the production of a new wave of refugees.

Discussion will focus on topics such as the possibility of ethnic clashes and ethnic cleansing, the disintegration of Iraq along ethnic and religious lines after the departure of the occupying forces, challenges from within groupings (for example among different parties, and divisive tendencies among the Shiites or the two main Kurdish parties), efforts for the rectification of politically motivated mass displacement of people by the old regime which may *per se* cause trouble and tension among the population, and the return of refugees who are vulnerable and in danger of becoming the new

displaced persons, since their homes and living environments have been destroyed, their families uprooted, forced into migration or dispersed. It will be pointed out that in post-occupation Iraq, more energy will necessarily be released by certain segments of the Iraqi population than we can anticipate at present, resulting in potential population movement and refugee flows.

The objective of Section A of chapter three will be to introduce and analyze the role which has been played by humanitarian agencies for Iraqi refugees especially from 1990 onwards. The following questions will be answered:

- What are the agencies (IGOs/NGOs) who have been involved in dealing with Iraqi refugees over the past several years?
- What was the justification for their involvement?
- What did they do to assist? What were their challenges?
- Where did they prove to be effective?
- How were they coordinated? Was there any system of coordination?

In Section B of this chapter, dealing with legal terms of reference, we will describe international law principles, rules and regulations that are theoretically applicable in studying the legal status of the Iraqi refugees. We will explain under provision of which rules the international community, neighbours and humanitarian agencies acted and dealt with refugees and how they invoked them. We will also elaborate on the body of international law which can be utilized to protect specific types of refugees.

Chapter four will provide answers to the following general questions:

- Did the provisions of international law (refugee law, human rights law and humanitarian law) succeed in dealing effectively with the refugee problem of Iraq?
- Which were the shortcomings of laws in the text and in their application?
- What did the international community do to redress those shortcomings?

Section A of this chapter will portray the inherent shortcomings of the 1951 Convention and the 1967 Protocol. First and foremost is the lacuna of definition and the fact that, except for the principle of *non-refoulement*, the obligations of states are not clear cut. There are also shortcomings in application, i.e. for the states which are not party to the treaties and therefore not obliged to comply. We will describe different lacunae. One is the scope of the definition in terms of time and locality. The second is the individual charac-

ter of the definition. There are also gaps relating to the obligatory nature of the two treaties. The easy-going manner of the Convention and the Protocol regarding reservations – even on the definition – has made them flexible enough for countries to derogate easily from basic treaty obligations. It will further be argued that all these flaws might account for the fact that the refugee definition has come to be qualified as old and outdated and no longer sufficient to the needs of our time.

Examination of the protection regime for refugees, as compared to that for IDPs in general, and the experience in Iraq in particular will be the focus of Section B of chapter four. It is frequently suggested that while refugees enjoy an international system of protection under certain provisions of international law, IDPs are deprived of a viable protection system supported by the international community. This dilemma has long been discussed by advocates of the so-called "*droit d'ingérence*" as an example of the discriminatory approach adopted by international law to two categories of victims of persecution and violence with only one difference separating them: the ability to have crossed a border.

At the same time it would be unrealistic to believe that international law can be overstretched to effectively address the issue of IDPs. Legally speaking, the maximum influence the international community could exercise in this regard would remain in the realm of human rights. It will be maintained that the legal basis for the protection of refugees who are outside the jurisdiction of their own country is essentially different from that of IDPs.

Therefore, the following questions would require to be answered:

- Does international law protect internally displaced persons? Which international instruments can be applied to IDPs?
- What are the differences between refugees and IDPs in international law and in the actual regime of protection?
- What are the implications of constraints such as non-interference in internal affairs (UN Charter) or lack of treaty obligations in favour of IDPs (including lack of treaties or lack of adherence to the existing ones) on the necessity for protection?
- Which international organizations, based on which mandates, are responsible for the protection and help of IDPs and to what extent? What are their legal and operational limits?
- Is it possible to apply protection regimes to refugees and IDPs without implying discrimination? Do we learn a lesson in Iraq? Is international humanitarian law effective and applicable in this context?

- Can we diagnose shortcomings in the body of international law for the protection of IDPs in general, and in comparison to that for refugees?

The failure of the international protection regime for refugees to properly and completely address the refugee issue in Iraq, is to be blamed principally on its theoretical and conceptual deficiency to foresee the phenomenon of mass influx. It will be illustrated in Section B of chapter four that the Convention and the Protocol ignore mass influx as a source of refugee production. Other, later attempts to codify this need also failed due to the lack of readiness on the part of states to accept more legal undertakings.

The UNHCR and others have, however, tried to create public awareness and capacity building. The UNHCR has also made dissemination efforts to convince countries to voluntarily adopt expanded and more liberal refugee definitions, such as, for example, those found in the OAU 1969 Convention or the Cartagena Declaration of 1984. However, there is still no serious multilateral effort to codify the obligations of countries vis-à-vis refugees in mass exodus in the form of a binding treaty. This is in sharp contrast to the worldwide need.

Lack of reference to mass influx remains a missing provision of international law in the context of Iraq. Both individual and collective refugees were produced in Iraq. But, no doubt, the overwhelming majority was mass influx refugees though with far less legally binding protection. The reluctance of some of Iraq's neighbors to accept waves of refugees in certain instances (like the flight of Kurds from chemical weapons) can be viewed in the light of a lack of legal international obligations on mass influx.

Arguments will be put forward that international law could not be effectively applied to protect Iraqi mass influx refugees due to its lack of necessary provisions in favor of non Convention refugees. Even alternative ways and means promoted by the UNHCR such as temporary protection and an expanded refugee definition that can generally be utilized, were not applied in favour of Iraqi refugees. Receiving countries mainly exercised their national discretion in this regard. That is why their behavior and the protection offered by them varied significantly. If in some cases mass influx refugees were accepted and well treated, it is not international law that could claim credit.

Section D of this chapter will describe the notion of burden-sharing which is a cherished principle for the developing countries. The evolution of this concept in international documents will be reviewed,

and the need will be argued for such a principle to become a binding provision of international law in particular in response to mass influx, so as to free refugees from discrimination on political and geographical grounds.

It will be demonstrated how important it could be to take advantage of burden-sharing to provide incentives to Iraq's neighbors to act in the interest of enhanced protection for Iraqi refugees. Obviously the receiving countries like the idea and argue that mere geographical proximity should not be the determining factor as to who should pay for the refugees. They believe it is the international community that should take the responsibility for refugees world wide, and that neighboring states can only act on its behalf. There is also a development argument involved, since countries find themselves obliged to forgo their development goals simply because a crisis erupts next door. On the other hand, donor countries prefer to maintain the voluntary nature of their assistance.

Burden sharing would alleviate such concerns in the absence of a true contractual global responsibility. It will be argued that especially in cases of mass influx the existence of a more automatic and compulsory burden-sharing system is indispensable. Without a binding burden-sharing mechanism in place, some refugees get better international protection and assistance in the countries more friendly to the donors than in other cases. This constitutes discrimination based on the geographical proximity of the refugees and the political affinity of states. We will examine the validity of the conclusion that lack of legal provisions on burden-sharing prevented Iraqi refugees from enjoying equal treatment by the international community and organizations.

In Section E of chapter four the argument will be that while refugees are generally covered and protected by refugee law and to a certain extent by international humanitarian law, human rights law can also be invoked. This would have a complementary effect by guaranteeing the minimum required protection in cases where shortcomings of refugee law, or lack of adherence to that law by states involved, failed to provide satisfactory coverage of protection and assistance.

The aim of this Section is to see how human rights law could fill in the gaps and protect Iraqi refugees where necessary. For this purpose we will discuss the domain of application and the interrelations between human rights and humanitarian law. The obligations of the Iraqi government, as well as those of neighbouring host countries, will be discussed, together with the argument that governments that systematically violate human rights cannot be

trusted to protect human rights of the IDPs and refugees who have been clearly defiant to them. We will then evaluate the applicability and effectiveness of the utilization of human rights law for refugees.

We should therefore be able to answer the following questions:

- How does the inter-relation between refugee law, humanitarian law and human rights law function?
- What are the fields of application of human rights law in favour of refugees?
- How relevant, effective and binding is human rights law to protect refugees in the absence of concrete contractual obligations of states in favor of refugees?
- What are the fundamental rights of refugees that states should respect regardless of their adherence to refugee instruments? How binding is such an exercise for states in the region?
- What action was expected from the neighbors of Iraq and the others according to human rights law?
- Was human rights law considered as effective in providing the minimum required protection for the refugees and IDPs in the case of Iraq? Could it bridge the gap?

The last Section of Chapter four is devoted to studying the measures taken by the international community to redress shortcomings and to enhance the effectiveness of refugee law in the absence of a new treaty or an additional protocol.

It is obviously easier for the UNHCR and other international organizations to work with a modern and updated legal instrument where obligations of states are clearly stipulated and which – through ratification processes – has become an integral part of their national laws. Nevertheless, several years of efforts by UNHCR and other humanitarian activists have shown that there is significant resistance on the part of governments to accept more obligations in favor of refugees.

This highlights the important difference between this branch of international law and other branches that have developed enormously in the course of the past several years. Countries view refugees as a burden that hampers economic and social development and eats up national resources. On the one hand, they find no national interest or international incentives for promotion of an open door policy and, on the other, no one to censure closed door practice. As there is no compelling reason to shoulder more contractual obligations, countries simply prefer soft laws which are easier to deal with.

For reasons already outlined above, it is argued that the international community has had no choice but to develop and modernize the protection regime for refugees by resorting to resolutions and decisions of the United Nations, UNHCR and other organizations.

The focus of this Section would also be on Iraqi refugees to see how such provisions could be implemented to protect refugees and to assist the receiving countries. The provisions which may be particularly relevant are those relating to the definition of refugees, lack of treaty obligations, mass influx, voluntary repatriation and reintegration, resettlement, *non-refoulement*, temporary protection, safe havens, burden-sharing, and protection of the IDPs. We will see whether the additional and complementary measures adopted by the international community could help bridge the lacunae in refugee law in particular in Iraq and if so to what extent.

Iraq turns out to be an interesting case illustrating the shortcomings of the international protection regime as in almost every proven general failure of refugee law, Iraqi refugees have a case to make from definition and mass influx refugees to burden-sharing and IDPs protection. It will prove an absorbing case study where failures must be portrayed in the sense that states could have done more, individually and collectively, to empower the protection regime sufficiently to act on their behalf in the interest of victims and the international community alike.

This study provides a lesson from the past. But it can also represent a caution for the future if the situation deteriorates and the same experience is repeated. Legal and operational unpreparedness of the region and the international community was not only a cause of suffering in the past, it may be so again in the future. Changes in Iraq should not impede our foresight concerning the disturbing capacity for disruption inside Iraq and within the region as a whole.

Chapter 2

Description of the Situation

A. Background of Refugee Crises of Iraq

1. The Kurds of Iraq

In the first days of April 1991, network TV news programmes came to life with scenes of mass displacement. The screen was dominated by pictures of tens of thousands of Kurds in flight out of Iraq after an armed uprising had failed. A mass exodus of refugees, exposed to the low mountain temperatures common at that time of the year, was building up and moving towards the border regions to Turkey and to Iran.

But if, for spectators, the sight of moving columns of humanity came as a terrible shock, for Iraqi Kurds there was something of a sense of *déjà vu* about the whole situation. Although they were Sunni Muslims and, in that sense, co-religionists of the ruling Sunni elite in the country, their propensity to resort to arms and fight government forces had turned them into a disobedient, troublesome minority and the object of much persecution which, in turn, drove them out of their homes, forcing them to flee to the mountain areas and border zones in their thousands and throw themselves on the mercy of neighbouring countries.

The Kurd minority group constitutes a community of several million people, spread over Iraq, Turkey, Iran and Syria, with small

numbers also residing in Lebanon and Armenia. Their exact number is still a matter of controversy and has been estimated at anything between 11 and 25 million. Statehood has not come their way for many reasons, not the least of them being the fragmentary nature of their own society, beset by contradictions, their propensity to factionalism, the absence of a unified language, even, in fact, of a common ethnic identity. Yet they have never really been integrated in the countries in which they have been born and have intermittently rebelled against central governments, allying themselves to outside powers whenever the opportunity arose. Various governments in the region have, in turn, retaliated by showing little leniency towards their citizens of Kurdish origin after each vanquished attempt to abolish existing territorial boundaries and form a state of their own.

The first Iraqi Kurdish insurgency dates back to British Mandate days. In 1919, then again in 1923, Kurdish leader Shaikh Mahmud Barzinji took up arms against British rule, but his rebellion was cruelly crushed as the British showed no aversion to the use of massive air power to get the better of their adversaries. In 1931, Barjinzi tried a third and final time to set up a united Kurdistan. Once again he was defeated. But a successor stepped almost immediately out of the wings to take over Kurdish insurgency. His name was Mulla Mustafa Barzani and till his death in 1979 he would be connected with each rebellion mounted by Iraqi Kurds. In the process he was imprisoned and amnestied several times, spent long years in the Soviet Union, joined the KDP (Kurdish Democratic Party), fell out with Ahmad Ibrahim and Jalal Talebani, foremost among KDP politburo members and flirted outrageously with the Western powers, Israel and imperial Iran in the hope of furthering his cause. Perpetual war seemed to become a permanent feature of Kurdish life, so much so that "Baghdad's war against the Kurds became one of the most constant realities of life in Iraq", writes David Mcdowall.[1] In winter 1960–61 Barzani, better known under the name of Mulla Mustafa, led the revolt against General Qasim. In 1964 a ceasefire was declared, but did not hold and fighting recommenced until a truce then a peace agreement was reached in 1970. This, too, was only short-lived.

In the mid-1970s, the Kurds mounted a revolution under Mulla Mustafa which was crushed with quiet efficiency by the armed

[1] David McDowall, The Kurds, A Nation Denied, Minority Rights Publication, 1992, p. 87.

forces of the then Iraqi President Ahmad Hassan al-Bakr, a cousin of Saddam Hussein. Saddam himself, by that time, after an initially inauspicious start to his political career, had risen to become "the second most powerful man in Iraq".[2] "In summer 1972, Mulla Mustafa, encouraged by Iran, the United States and Israel, consolidated his control over the Kurdish area, and increased his demands to include wider military and political authority, making provocative statements about foreign support."[3] Tension built up on both sides and by April 1974 full-scale war broke out, which came to an end only after the Algiers agreement was signed by the Shah of Iran and Saddam Hussein, putting an end to Iranian support for the Iraqi Kurds. Mulla Mustafa himself disappeared into honourable exile in the USA.

The Kurdish rebellion ended badly through a series of political developments. Their long-time supporter, the Shah of Iran, turned his back on the Kurds and accepted overtures from the Baath Iraqi government instead. He agreed to cut off their supply of arms and seal the borders. The Kurds also found themselves left in the lurch by former allies like the USA and Israel. The result was the failure of the Kurdish revolution. The repression that followed led to thousands of Kurds belonging to the Kurdish Democratic Party (KDP) fleeing to Iran from where they were eventually sent on to the USA and other countries.[4]

In 1980, a year after openly taking over power following the departure of ailing Iraqi President Bakr, Saddam Hussein embarked on a long bloody war with the newly founded Islamic Republic of Iran. In 1988, a year before the war finally came to a close, Iraqi forces found themselves on the verge of defeat. The Kurds in northern Iraq, always a disruptive force when it came to harrying the government in Baghdad, were held in part responsible for the events. Not wholly surprisingly, for as Andrew and Patrick Cockburn point out, the Kurds had, of course, also been carrying out secret and less secret cooperation with the enemies of Baghdad. In retaliation for the Kurdish "role as 5th columns during the war",[5] a systematic campaign, the so-called Anfal operation, was launched to eliminate all villages controlled by the peshmerga or Kurdish fighters

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[2] Andrew Cockburn and Patrick Cockburn, Saddam Hussein, An American Obsession, Verso, 2002, p. 75.
[3] David McDowall, op. cit, p. 92.
[4] David McDowall, A Modern History of the Kurds, I.B. Tauris, 1996, p. 338
[5] Michael M. Gunther, The Kurds of Iraq, St Martin's Press, 1992, p. 46.

and relocate the population. These attacks and their consequences are described in detail in the section entitled The Refugee crisis of 1988.

What overtook the resulting outflow of approximately 60,000 refugees is recounted by Charles Kemp in the following terms: "At the Turkish border, these refugees were forcibly routed by the Turkish authorities to four primary refugee camps set up inside Turkey: Diyarbakir, Silopi, Mardin and Mush. Here they remained for an average of two years or more, some up to five years, under variable but frequently severe conditions until the international community selected some for resettlement. Many others were pushed back to Iraq."[6]

Although western media gave the matter little or no coverage at the time, some 100,000 refugees crossed simultaneously into Iran,[7] bringing the total of Iraq Kurds seeking shelter there to some 250,000. To the refugees from the 1975 war had been added another 50,000 Kurds, the Faili (Kurds of the Shiite faith), expelled by the Iraqi government in the late 1970s and another 50,000 who had already made the border crossing in 1987.

The Iraqi Kurds who fled Iraq after the Kuwait War and whose plight so moved viewers in western countries had no doubt learnt their lesson from earlier experiences. They headed more towards Iran than Turkey, their numbers estimated at upward of some 1.5 million. Those trapped in the mountains of the Turkish border became the object of an important humanitarian relief effort, with the US airlifting supplies to the starving Kurds,[8] before using military means to turn the whole area into a "safe haven" for Kurds or, in other words, a de facto autonomous Kurdistan.

In September 1996, even while UN sanctions were bringing fatigue and gradual debilitation upon the people of Iraq, Kurdish unrest flared up again. "Northern Iraq, the land of the Kurds had been freed from Iraqi government control in 1991, under pressure from Western public opinion, outraged by the spectacle of a million Kurdish refugees on the borders of Turkey and Iran," write Andrew and Patrick Cockburn in their biography of the Iraqi president, entitled "Saddam Hussein, an American Obsession". By 1996, "they go on to say, "the US presence in Kurdistan had taken on the

[6] Charles Kemp, Kurdish Refugees from Iraq, In: Refugee Health, 6.1.2000, p. 1.
[7] David McDowall, op. cit., p. 361.
[8] Andrew Cockburn & Patrick Cockburn, op. cit., p. 231.

appearance of permanence, US aircraft patrolled the skies above the 36th parallel, a visible sign of US protection as they enforced the northern "no-fly zone" for Iraqi aircraft."[9] In the meantime, the two leading Kurdish factions, Massoud Barzani's KDP and Jalal Talabani's PUK were at each other's throats, struggling for supremacy. What ensued was civil war with no holds barred. Barzani, fearing to find himself at the losing end, applied and got help from Saddam Hussein, thus triggering off another refugee crisis. It was reported then that thousands of Iraqi Kurds had flooded the town of Penjwin on the Iraqi-Iranian border and thousands more were on their way following the fall of Sulaymaniyah to a Kurdish faction allied with Iraqi president Saddam Hussein. Robert Colville in Geneva, a spokesman for the UN High Commissioner for Refugees, confirmed the first influx of refugees, maintaining that "a total of around 70– or 75,000 people were heading for the border or were already at the border."[10]

2. The Shiites of Iraq

Whereas the various mass displacements of the Kurdish people have been described over and over again, another group in Iraq, the Shiites, who constitute the natural majority in the country, have also often been forced into flight from their homeland following political turmoil of one kind or another.

The majority Shiite community of Iraq, generally said to have been deprived of equality of opportunity in Sunni-led Iraq, has always formed a spiritual community with political undertones within the country. For instance, the Iraqi Shiite community, answerable above all to the authority of their own *mujtahids* (religious leaders) and working in conjunction with the powerful, warlike tribes of southern and central Iraq, has rarely hesitated to adopt a strategy of resistance against aggression. Thus, the Iraqi revolt of 1920 against the British military occupation, broke out following a *fatwa* pronounced in Kerbala by the leading Shiite dignitary at the time, Ayatollah al-Shirazi.[11] The entire mid-Euphrates region

[9] Ibid.
[10] Rupert Colville, More Turmoil in Iraq, UNHCR Refugees Magazine, Issue 106, Focus: 1996 in review, 1 Dec. 1996.
[11] Charles Tripp, op. cit., p. 43.

took up arms in a month-long struggle which cost the lives of an estimated 6,000 Iraqis and over a 1,000 British troops.

Yitzhak Nakash in his book "The Shi'is of Iraq" argues with a degree of plausibility that Iraqi Shiism, strongly marked from the onset by foreign influences coming out of Persia or India, was, contrary to the generally held belief, a phenomenon of recent origin. His claim that the majority of Iraq's nomad tribes converted to Shiism only in the 19th century, as they gradually gave up earlier forms of life in favour of a sedentary existence based on agriculture,[12] bears out our personal contention that in the holy cities of Iraq a whole series of charismatic Shiite clerics put their eloquence to good use and had little difficulty in persuading large number of Arabs to come over to their way of thinking.

In more recent years, the history of Iraq has been dominated by outstanding religious figures. In 1969, for instance, Ayatollah Muhsin al-Hakim, at great personal cost, opposed efforts by the government in its territorial disputes with Iran to manipulate the Iraqi Shiite hierarchy, an opposition which also led to the expulsion from Iraq of about 20,000 Shiites of allegedly Iranian descent. His death only a year later offered Ayatollah Mohammad Baqir al-Sadr, one of the founders of the al-Dawa movement, the opportunity to play a more prominent role in Shiite affairs. He was at the forefront of political events involving the Shiites, in the turmoil following the establishment of the Islamic Republic of Iran, an activity which also cost him his life.

2.1. *The Faili Kurds*

Apart from the group alluded to earlier on in connection with Ayatollah al-Hakim's firm stand against the government in 1969, the first Shiites to be systematically expelled from Iraq were forced to leave the country less on grounds of their religious beliefs than because of their Kurdish ethnicity. Since Ottoman days or even earlier, the 100,000–150,000-strong Shiite Faili Kurd group had settled on the Western side of the huge Zagros mountain range, which was divided between Iran and Iraq after the First World War. The Faili Kurds themselves claim they count among the oldest inhabitants of the region. Yet they were not granted citizenship when

[12] Yitzhak Nakash. The Shi'is of Iraq, Princeton University Press, 2003, p. 4.

Iraq became a recognised international entity and modern state.[13] In the autumn of 1971, the Arabization policy in Kurdistan, pursued by the Baath party, and aimed at keeping the oil fields of Mosul and Kirkuk out of Kurdish hands, reached a climax and the central government decided simply to expel about 40 to 50,000 Faili Kurds to Iran.[14] The move was officially justified on the grounds that the Faili Kurds were in any case Iranian rather than Iraqis, but the argument failed to impress either Kurdish or Shiite leaders, many of whom felt greatly angered by this example of government arbitrariness. Deportation of Faili Kurds continued during the rest of the 70s, doing nothing to ease tensions between the Iraqi Kurdish community as a whole and the authorities in Baghdad.

A large number of Faili Kurds also entered Iran during the Iran-Iraq war and stayed there according to the UNHCR Global Report which states that among the three categories of Iraqi refugees in Iran, there were, apart from Iraqi Kurds, the Faili Kurds (Shiites) and the Arab Shiites from areas in the central and southern provinces of Iraq.[15] We will elaborate more on this later.

2.2. *The 1979 Shiite Repression*

"The Shiites as a rule handled whatever intercommunal resentments and grievances they may have stored up against the leaders in Baghdad better than their Kurdish compatriots, eternally driven by their desire for a separate state. In 1979, however, after the success of the Islamic revolution in Iran, things came to a head. Militant Iraqi Shiite groups saw no reason why the revolution in Teheran should not be repeated in Baghdad," write A. and P. Cockburn.[16] After all, Ayatollah Khomeini had resided for over 16 years in Najaf after being exiled from Iran by the Shah. Before Iraq, too, expelled him in October 1978, the Imam had had sufficient time to win over quite a few people to his own clearly stated views concerning the future of Islam in an increasingly secular world. Militant Islamist underground organisations such as the al-Dawa movement "began to organise attacks on public symbols of the regime in Iraq."[17]

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[13] David McDowall, op. cit., p. 330.
[14] Ibid., p. 11.
[15] UNHCR Global Report 1999: Islamic Republic of Iran, p. 207.
[16] Andrew and Patrick Cockburn, op. cit., p. 79.
[17] Charles Tripp, op. cit., p. 220.

A campaign of repression on the part of the government followed. Members of militant Shiite groups were arrested. Shiite leaders now began to voice protest. Chief among those to express dissent was the Shiite dignitary Ayatollah Muhammad Baqir al-Sadr who was placed under house arrest in June 1979. This had the effect of fuelling the unrest even further. Huge demonstrations took place, as much to show support for al-Sadr as to protest against the government. In Najaf or Kerbala, Kufa or Madinat al-Thawra, the housing estate of the Shiites in Baghdad, protest marches seemed to shake the very foundations of government. Order was finally restored after much police violence and the arrest of some 5,000 people, among whom were to be found many leading Shiite clerics. Some were executed, others were expelled from the country. Membership of the militant group al Dawa was outlawed. As for Ayatollah al-Sadr, he remained under house arrest, but tape recordings of his fiery sermons denouncing the brutal conduct of the regime were circulated throughout Iraq.

A first massive wave of Shiite refugees to leave Iraq coincided with these events, all leading up to the 1980–1988 Iran-Iraq war. After a failed attempt to kill the deputy Prime Minister Tariq Aziz and a bomb attack on a funeral procession, the government reacted with extreme ferocity. The decision taken by the Iraqi government finally to raise a hand against a prominent cleric was to have far-reaching consequences, the effects of which can be felt until today. In 1980, Ayatollah Baqir al-Sadr and his sister, Bint al-Huda, a leading Muslim scholar, were removed from house arrest in Najaf, and transferred to Baghdad. There both of them were summarily executed. In Charles Tripp's words: "This was the first time in the history of Iraq that so senior a cleric had been killed and was an ominous indicator of the regime's determination to force the Shiite leaders into a posture of obedience."[18]

The government further proceeded to confine the highest ranking *mujtahid* at the time, Ayatollah al-Khoi, to his home in Najaf. Deportations of so-called "Iranian" Shiites (i.e. those suspected of showing sympathy for the Islamic Republic of Iran) now began in earnest. 30 to 40,000 such Shiites were expelled from the country to seek refuge in the newly established Islamic Republic of Iran and much of the property they left behind was duly confiscated and auctioned off.[19]

[18] Ibid., pp. 229–230.
[19] Ibid., p. 230.

2.3. *The 1991 Shiite Uprising and Repression*

The Kuwait war, in which the Shiites, along with the Kurds, made up the rank and file of the Iraqi army, ended in a humiliating defeat, which hurt the pride of many Iraqis, whatever their origin. Regime change seemed like a good idea. All the more so since on several occasions US president George Bush senior had urged "the Iraqi military and the Iraqi people to take matters into their own hands and force Saddam Hussein, the dictator, to step aside."[20] In early March 1991, smarting from the shame of defeat in Kuwait and believing that US backing was imminent, the Shiites rose up in revolt against the Iraqi government.

The Cockburns write "the revolt spread with the speed of a whirlwind through the cities and towns of the south."[21] In a spontaneous demonstration of strength, one after the other, the Shiite cities of Basra, Amara, Nasiriya, Najaf and Karbela fell into the hands of the rebels.

At the other end of the country, the Kurds, spurred on by the Shiite example, also followed suit, taking up arms against the government and apparently strengthening the position of the south. But calls for an Islamic revolution in Iraq coming out of Shiite areas were disquieting for some in the region and for the US and its then allies. Sayid Majid al-Khoi, the second son of the grand ayatollah – who died in a clash in Najaf in 2003 – joined the small group of Shiite officers trying to convince US forces to intervene on their behalf. But nothing came of it.

In fact, neither the Shiites, nor the Kurds achieved the hoped-for victory, government forces proving the stronger and better organised. Within a couple of weeks, the rebellion had been put down. Grand ayatollah al-Khoi was placed under house arrest in Kufa until his death a year later. Large-scale revenge was wreaked on Shiites, both prominent and obscure. The result as far as the Shiite community was concerned was in the words of Charles Tripp: "More than 50,000 refugees poured over the border into Saudi Arabia and thousands of others sought sanctuary in Iran, whilst many fled to the marshes of the south in an attempt to escape the vengeful pursuit of the Iraqi armed forces."[22] The indifference and silence of the international community in this case as in others is widely documented. Most of the international documents dealing with the

[20] Andrew and Patrick Cockburn, Ibid., p. 13.
[21] Ibid., p. 15.
[22] Charles Tripp, A History of Iraq, p. 256.

situation in the region following the Kuwait war and the uprisings within Iraq deal exclusively with the Kurdish population and their lightning exodus and return to Northern Iraq, with no reference being made to the refugees and displaced Shiites in the south.

Even after Iraq had been pacified by government forces, the death toll among important Shiite clerics, continued to remain high. and in February 1999, Ayatollah Sadiq al-Sadr and both of his sons suffered the same fate, even though the government had at first fostered his religious leadership, only to see the prominent cleric "emerge as a focal point for opposition".[23] This particular assassination apparently triggered the departure of tens of thousands of Shiites, once again seeking refuge in Iran from persecution or arbitrary arrests.[24] Whether all these killings should be attributed to the machinations of the central government or to other factors is far from clear. The history of Iraq is full of Shiite clerics dying under unexplained circumstances at providential moments.

2.4. *The Marsh Shiite Arabs*

As the Baghdad authorities reasserted their control over the country, the Marsh Arabs or Madans, Shiite Arabs, many of whom had also taken part in the 1991 uprising, suddenly found their homeland signalled out for a massive hydro-engineering project in the marshes with the declared aim of reclaiming agricultural land. This onslaught on their original habitat forced them to flee to neighbouring Iran. The wetland region where the Tigris and Euphrates rivers split into meandering streams and lakes before flowing into the Persian Gulf has been home to human communities for five millennia. The Madan had lived there peaceably, growing rice and dates, raising water buffalo, fishing and building boats and houses from reeds until modern politics and drainage schemes caught up with them. By 1993, some 40,000 Marsh Arabs were known to be living in camps in Iran.[25] Once again, these and similar events were barely reported by the international media at the time, more taken up with the flight of Iraqi Kurds into Turkey and Iran, than with the plight of Iraqis in the south.

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[23] Kamil Mahdi. Iraqis will not be pawns in Bush and Blair's war game. The Guardian, Feb. 20, 2003.

[24] Karen Dabrowska, Hopeless, hapless, homeless, stateless: Iraqi refugees in Iran, In: Kurdish Media, United Kurdish Voice, 25 Oct. 2001.

[25] Heather Sharp, BBC News: Iraq's devastated Marsh Arabs, 14.4.2003.

3. The Mesopotamian Background

The question inevitably arises as to why this particular region has turned into such an unstable, crisis-prone area, attracting armed conflict and creating wave upon wave of refugee influx and displacements at irregular intervals. A brief look at history may be instructive, if one is to seize the meaning of the underlying factors which have gone into building up the picture of refugee-producing Iraq.

Ancient Mesopotamia, the so-called cradle of civilization and a veritable cauldron of culture that gave the world its earliest urban and literate communities, cuneiform writing inscribed on clay tablets, the sexagesimal system for the calculation of time and angles still applicable today, or works of legal theory embodied in collections such as the Codes of Hammurabi, somehow never managed to form a geographical whole or settle upon one capital city for all. Unlike ancient Egypt, which early discovered unity around the river Nile and propagated a culture of uniformity, Mesopotamia was informed by multiplicity and variety. It never seemed to achieve a unified state. Many languages, many cultures, broken into many historical periods, flourished in the land between the Tigris and the Euphrates. In fact, "throughout 3,000 years of Mesopotamian civilization, each century gave birth to the next one"[26] the Sumerian civilization being followed by the Akkadians which in turn gave way to the Ur III Empire; then came Babylonia, Assyria, Chaldia rubbing shoulders with each other or succumbing to mutual assaults, and so on and so on. The Fertile Crescent was always a battleground of opposing forces of separatism and of unification.

The Arab conquest in the 7th century brought Iraq its name, but the area ceased to exist as a political entity. Its flatlands between Baghdad and the Persian Gulf served henceforth simply as a passageway between Central Asia and the Mediterranean. The three ethnic giants of the Muslim world, the Arabs, the Persians and the Turks fought incessantly to gain control over the region, while Iraq itself calmly flourished as a great centre of Islamic culture where several religious sects that would come to divide the community of Islam found a fertile ground to grow and develop. The Buyid dynasty of Iran, the Seljuk Turks, Mongol invaders, and other Persian and

[26] Encyclopedia Britannica, Mesopotamia and Iraq, History of, vol. 11, p. 964.

Turkmen dynasties all imposed their will upon the land before relative calm returned under four-centuries of Ottoman rule.[27]

4. British Occupation and Mandatory Regime

World War I changed all that. The British gradually drove out the Turks from the area and merged the three provinces of Mosul, Baghdad and Basra, creating one political entity, Iraq. "Iraqi (or Mesopotamian) society itself has existed since the beginnings of civilisation", points out William Pfaff) quite rightly.[28] But Iraq was no more than a manufactured state, carved into being in 1920 as a British mandate which the British then proceeded to place under a monarch appointed by themselves, Faisal I, the third son of Hussein of Mecca, the head of the powerful Hashemite family.[29] The Anglo-Iraqi Treaty of 1930 accorded Iraq its independence and in 1932 Iraq finally emerged as a full-fledged state. From the first, however, the new Iraqi monarchy was designed to be weak and weak it remained until its overthrow in 1958. "The fall of the monarchy ushered in a ten-year period of military coups, countercoups and conspiracies" write A. and P. Cockburn in their comprehensive biography of Saddam Hussein.[30]

One of the problems facing Iraq was obviously that of diversity or as one Iraqi proverb puts it "Two Iraqis, three sects" Little or no real cohesion has ever been achieved between the three main groups living in the country. The Sunni Arabs, settled in the land between Baghdad, Mosul and the Syrian border, hold the reins of power firmly in their hands. The Shiite Muslims constitute the demographic majority in the country, accounting for over half the population. To the north, the Kurds form another fifth of the population, occupying the mountains along the Iranian and Turkish borders and the plains immediately below.[31] Added to this is the fact that Iraq possesses some of the richest oil resources in the world – experts agree in attributing to it the world's second biggest proven oil reserves after those of Saudi Arabia.[32] Under these

[27] Ibid., pp. 993–995.
[28] International Herald Tribune, 15.3.2003.
[29] Andrew and Patrick Cockburn, op. cit., p. 64.
[30] Ibid., p. 67.
[31] Ibid., p. 58.
[32] Iraq – Oil, Council on Foreign Relations, April 29, 2003; BP Statistical Review of World Energy, 1996.

circumstances, one would have thought that in a volatile region such as this one, factors of destabilisation would be avoided and not constantly exacerbated. But exactly the opposite has taken place. Unrest has plagued the area since its inception, and on such a scale that it sometimes seems a wonder that Iraq is still in one piece. In searching for the elements of destabilisation, the following two areas deserve particular attention: 1. The Politics of Iraq and its governments; 2. Major powers and the international community.

5. The Politics of Iraq and its Government

If the narrative of political Iraq is picked up from the time the monarchy was overthrown in July 1958, it becomes all too clear that, as factors of dissension outweigh those of reconciliation and harmony, Iraq could do little to prevent refugee crisis after refugee crisis from breaking out. A heterogeneous population lives side by side in uneasy cohabitation without a national identity ever having really been forged. In the space of ten years, until, after a brief unsuccessful coup in 1963, the Baath party, incorporating pan-Arab and socialist elements, finally managed to seize power in 1968, three different men ruled over Iraq in quick succession; Brigadier Abd al-Karim Qasim, Abd al-Salam Arif and his brother Abd al-Rahim Arif. The first was killed in a short-lived Baath coup, the next in a helicopter crash, the last-named being sent into exile. Charles Tripp describes the first 10 years of the Iraqi republic as a period in which conspiracy and violence went hand in hand in politics, whereas "the tendency to centralise and to dominate negated attempts to create provincial or societal autonomy, frustrating efforts to represent the plurality of Iraq's diverse society in any institutional form."[33]

The Baath period that followed under President Ahmad Hassan al-Baqr, who remained some 10 years in power until his resignation in 1979 and replacement Saddam Hussein, represented no radical break with the earlier period. In fact, as one German specialist, Thomas Uwer, points out, the Baathists, after their second coup, found themselves not only applying the same policies for which Karim Qasim had been assassinated, they went even furthe for instance in the closeness of their relations with the Soviet Union,

[33] Charles Tripp, op. cit., p. 148.

than Qasim had ever intended to go.[34] Arab nationalism flourished as did secular thinking. At the same time, little was achieved towards fostering a real sense of national unity and granting representation to the Iraqi people as a whole. All the more so since Iraq was soon to be involved in two costly wars, searching in vain for a lasting solution to the puzzling question of how to pacify the Kurds.

The era of Saddam Hussein as president of the country was marked by his longevity in office. Saddam Hussein rose to power in 1979. A year later he had already launched his country into a war with neighbouring Iran which had just begun to establish its Islamic revolution. Saddam's goal was to recover the long-disputed Shatt al Arab waterway, the Tigris/Euphrates outlet south of Basra, leading to the Persian Gulf, which Saddam himself, then Vice-President of Iraq, had ceded to the Shah of Iran.[35] The pretext seized upon to justify this particular war was the need to liberate Arab lands and to shield the Arab nation from the encroaching danger of revolution. With the support of major powers of the time, as well as most of the Arab world, Saddam declared war on his neighbour, a war that would drag on for an agonising eight years and end with a cease-fire in 1988.[36]

The Iraq-Iran war left Saddam Hussein in a precarious situation. Financially, the debts Iraq had incurred to cover its military expenditures made repayment seem a gigantic task. The country ended its armed conflict owing Saudi Arabia $25.7 billion, Kuwait $10 billion, and somewhat lesser sums to other Arab countries. The USA and the rest of the industrialised world had $40 billion due to them.[37] These figures alone explain why the second war was already in the making as the first came to an end.

Taking as a pretext the territorial dispute with Kuwait over Bubiyan and Warba, two Kuwaiti islands blocking Iraq's access to the Persian Gulf Saddam's forces entered Kuwait in August 1990.[38] By this time Iraq's relations with the West (and much of the rest of the world) had begun to seriously deteriorate, turning what had begun as an annexation of neighbouring territory into the fateful war of Kuwait, twelve years of unremitting sanctions, bombard-

[34] Thomas Uwer, Im Sozialismus der edlen Seelen, in: Saddam Husseins letztes Gefecht? Konkret, Texte 33, 2002, p. 83.
[35] Charles Tripp, op. cit., p. 212.
[36] Andrew & Patrick Cockburn, op. cit., p. 81.
[37] Ibid., p. 82.
[38] Ibid., p. 84.

ments, endless obligations under UN Security Council resolutions, and a new war.

6. Major Powers and the International Community

After the June 1967 war with Israel in which token Iraqi forces were sent to Jordan to take part, Iraq broke off relations with the USA and Great Britain and instead forged closer links with the USSR and France. However, by the mid-1980's, it had not only "re-established full diplomatic relations with the United States, but it was also benefiting from the material support of a range of Western states, most notably the United States itself, France and Great Britain." Iraq thus "found itself in the happy position of being courted and supplied by both superpowers and their allies, successfully enlisting their assistance for its war effort in the waters of the Persian Gulf and on the land front."[39]

The invasion of Kuwait, however, in August 1990, which led to Saudi Arabia asking for US military assistance, totally changed the complexion of things. The United States airlifted over half a million American troops into Saudi Arabia and set up an international coalition of governments determined to drive Iraqi troops out of Kuwait in the event that Iraq refused to comply with UN Security Council Resolution 678 demanding Iraq's unconditional withdrawal from the area by mid-January 1991. UN Resolution 661 of August 6, 1990, had already decreed that all Iraqi accounts in foreign banks would be frozen and Iraq would no longer be permitted to export oil or import foreign goods.

The attack of the American-led coalition began on January 16 with a six-week long heavy and repeated bombing campaign over Iraq. Ground forces were then engaged in Kuwait; these encountered very little opposition from Iraqi troops. As its main objective, the liberation of Kuwait, had been met, the coalition saw no reason not to sign a cease-fire with Iraq at Safwan on 28 February 1991. In April of the same year, the regime of economic sanctions was somewhat modified on humanitarian grounds to allow Iraq, to import vitally needed foodstuff and medicines (UN Resolution 687).

After suppressing the Shiite rebellion, which broke out in March 1991 in the south of the country, Iraqi troops took on Kurdish forces

[39] Charles Tripp, op. cit., p. 240.

to the north, putting down their insurrection and provoking the exodus of nearly two million people towards the borders of Iran and Turkey. This prompted UN Security Council Resolution 688, preparing the ground for a "safe haven" set up for the returning Kurdish refugees, north of the 36th parallel (near the town of Arbil) to be policed by coalition forces, namely USA and Great Britain. Iraq also became the object of punitive sanctions, including payment of war compensations through the United Nations Compensation Commission (UNCC) and submission to an intensive and intrusive process of inspection for weapons of mass destruction.

"Iraq had suffered extensive damage in the war with the allied coalition," writes historian Charles Tripp.[40] In fact, six weeks of modern aerial bombardment had done more damage to the country than eight years of traditional warfare with Iran. Or, as a Finnish politician, after a visit to Baghdad in March 1991 put it "The recent conflict has wrought near apocalyptic results . . . Iraq has, for some time to come, been relegated to a pre-industrial age."[41] Prince Sadruddin Aga Khan confirmed a few months later that the Iraqis were on the brink of a severe famine.[42] The sanctions were in place for twelve years. They impoverished the Iraqi population, leaving the leadership of the country intact.

7. The Refugee Crisis of 1974 – Detailed Account

As indicated above, the Kurdish refugee crisis of 1974 was a direct outcome of the war between Mulla Mustafa Barzani's peshmergas and Iraqi forces, brought on by the former's rejection of the Autonomy Law, offered to the Kurds by the government. D. McDowall estimates that Mulla Mustafa troops numbered some 50,000 trained troops, backed by a further 50,000 irregulars, all of them ill-equipped, whereas Baghdad could deploy some 90,000 soldiers, 1,200 tanks and armoured vehicles, along with 200 aircraft.[43]

The Iraqi army overran much of Kurdish controlled territory, and defeat for the Kurds, seemed almost impossible to avoid. After the March Iran-Iraq agreement over Shatt al Arab of March 6, 1975

[40] Charles Tripp, op. cit., p. 261.
[41] Martti Ahtisaari, Report of the UN Mission to Assess Humanitarian Needs in Iraq, March 10–16, 1991.
[42] Sadruddin Aga Khan, The Independent, 7.20.1991.
[43] D. McDowall, A Modern History of the Kurds, op. cit., p. 337.

and the withdrawal of all Iranian and other foreign aid for the Kurds, the rebels capitulated.

"Well over 100,000 Kurds, fighters, their families and others, crossed into Iran to join the 100,000 Kurdish refugees already there. Thousands of others surrendered to Iraqi forces, lured perhaps by generous payments for the surrender of weapons", writes D. McDowall about the end of hostilities. The distress of the refugees he describes thus: "In addition to the casualties of war, the cost to the civil population was particularly heavy. Thousands fled their homes before the Iraqi onslaught, and by the winter many were suffering from hunger and exposure. Undoubtedly it was in Bahdinan that the suffering was most serious, exacerbated by Turkey's refusal to open the border to allow a free flow of foodstuffs, and by overcrowding in such shelter as existed."[44]

Large scale deportations and resettlements followed for the Kurdish population, as the government sought to draw them away from the Turkish and Iranian border areas and closer to the major towns.[45] Among those affected by these stringent measures, apart from families of active Barzani supporters, were families of such refugees who, refusing to take up the government amnesty offer made to anyone who had run away, preferred not to return home in time, that is to say by 20 May 1975. "Of the 210,000 or so Kurds who sought refuge in Iran, only 140,000 had returned by the expiry date", says McDowall to sum up the situation.[46]

This particular military episode highlights a constant in Kurdish history, namely the inability of Kurdish nationalists to strike a balance between fighting for their rights as a population and rendering themselves guilty of treachery towards the state. The famous lines, now in the public domain, written by Mustafa Barzani to Henry Kissinger in 1975 perfectly sum up this dilemma: "Our movement and people are being destroyed in an unbelievable way, with silence from everyone. We feel, your Excellency, that the Unites States has a moral and political responsibility towards our people, who have committed themselves to your country's policy".[47]

[44] Ibid., pp. 338–339.
[45] C. Tripp, op. cit., p. 214.
[46] D. McDowall, op. cit., p. 339.
[47] Nick Cohen, The Observer, 12.8.2001.

7.1. *UNHCR Operation*

1975 was all in all a busy year for the UNHCR, focused as they were on the aftermath of the Vietnam war slowly grinding to a stop and faced with problems in various parts of Africa and Latin America. In his 13-page statement dated 30 January 1975, the UN High Commissioner for Refugees had this to say about the Kurdish crisis: "Furthermore, we are increasingly involved in the tragic plight of the Kurdish refugees who have been displaced as a result of the bitter confrontation between the Iraqi Government and the Kurdish minorities. The problem has not so far been one of material assistance. Iran is looking after one hundred thousand Kurdish refugees, but it is not unlikely that UNHCR will have a bigger role to play in this area. Our action so far has been at the diplomatic level, but we are following developments closely".[48]

8. The Refugee Crisis of 1988 – Detailed Account

After the collapse of the 1975 uprising and the subsequent exile of Mulla Mustafa, most Kurdish tribal leaders did not hesitate to go over to the government side again. The government responded by investing government funds in the region to improve the rural infrastructure. Kurd returnees were also offered compensation for lost land.[49] Iraqi Kurdistan also benefited from increased oil revenues in the 1970s, as a construction boom began in the cities and more jobs were created for the population. But even while these measures managed to contain Kurdish nationalism in the cities to an acceptable degree, armed rebellion in the north was carrying on. "As early as May 1976, the peshmerga resumed operations against the army," write Bulloch and Morris[50] and sporadic guerrilla fighting became the order of the day.

Once the Iran-Iraq war started on 22 September 1980 at the instigation of Saddam Hussein, the Iranian as much as the Kurdish side saw the advantages of concluding a strategic alliance, all the more so since, after 1982, much of the fighting took place on Iraqi soil and in Iraqi Kurdistan. As the war progressed, however, the

[48] UNHCR Statement, 30 January 1975, pp. 8–9.
[49] John Bulloch & Harvey Morris, The Tragic History of the Kurds, Penguin Books, 1993, p. 147.
[50] J. Bulloch & H. Morris, op. cit., p. 148.

Kurdish parties lost their common goals. The KDP favoured maintaining military pressure on Iraq, while Jalal Talebani's PUK sought through negotiations to make a deal with the government. But since no meeting of minds over the question of Kurdish autonomy occurred, Talebani made his peace with the KDP again and formed an alliance with the Iranian side, whose troops could now enter Iraq with the utmost ease. Baghdad began to fear the worst.

In January 1988 Iranian forces with Kurdish support penetrated ever deeper into Iraqi Kurdistan, gaining ground. Ali Hasan al Majid, the newly appointed governor of Kurdistan and later governor of occupied Kuwait as well, decided to launch a series of attacks on peshmerga-controlled areas, "using chemical and high explosive air attacks – before ground forces occupied the area."[51] These attacks came to be known as Operation Anfal in which 8 phases have been identified by commentators.

In January 1988, "Anfal I" was started to disrupt PUK-Iranian plans to capture the Dukan dam.[52] The Jafati valley near Sulaymania was bombed, inflicting heavy casualties. After three weeks the takeover of the area was complete and the population was exposed to harsh, punitive measures from which they tried to escape towards the snow-capped mountains to the east.[53]

As early as February 1988, Jalal Talebani formally accused the regime of perpetrating genocide with, according to him, 1.5 million Kurds deported and 12 towns and 3,000 villages razed to the ground. David McDowall comments on the accusations as follows: "Yet, the West was generally inclined to dismiss the Kurdish claims of genocide, either because they were politically inconvenient, or because it was suggested such reports were probably wild exaggeration. It was only in the aftermath of the Persian Gulf War that evidence collated by Middle East Watch showed that previous Kurdish claims were not only incontrovertible, but also in many cases an understatement."[54]

Whatever might have happened in February 1988, it was in mid-March that the Iraqi border town of Halabja experienced horrifying chemical attacks by the Iraqi army. Mustard gas, nerve gas, cyanide, sarin, tabun, and VX are among the gasses most commonly mentioned as having been used. Many among the mainly

[51] David Mcdowall, op. cit., p. 357.
[52] Ibid., p. 357.
[53] Ibid., p. 358.
[54] Ibid.

civilian population living in the town succumbed to asphyxiation and died. Against clear evidence and overwhelming international public opinion, the Iraqi government kept denying that it had had recourse to chemical weapons against the Kurdish population.[55] The leniency of major powers towards the Iraqi government and its war against Iran left little chance for facts and figures to reach western reporters and researchers. "The actual death toll was never independently verified." report John Bulloch and Harvey Morris.[56] It varies between 4,000 and double that figure. Chemical "shelling"[57] and "bombing by warplanes"[58] on the population went on for several hours as Iraqi forces showered civilian Kurds with sarin, tabun and mustard gas. The panic of the local civilian population knew no bounds, and survivors wasted no time in fleeing into Iran or Turkey.

One eye witness account gave this description of the sufferings underwent: "Dead bodies – human and animal – littered the streets, huddled in doorways, slumped over the steering wheels of their cars. Survivors stumbled around, laughing hysterically, before collapsing. . . . Those who had been directly exposed to the gas found that their symptoms worsened as the night wore on. Many children died along the way and were abandoned where they fell."[59]

Pictures of the dead and dying were disseminated to all international news agencies. A week later, Anfal II set out to eliminate Kurds from the mountain range of Dara Dagh, south of Sulaymania. Chemical attacks on the villages were followed by ground action. Once again punitive measures completed the take over. During the spring of 1988 a total of 8 Anfal atttacks was carried out.

Between 28 August and 5 September, realising that the fight against Iraqi forces was too unequal to be won, Kurdish leaders decided to cut their losses and "beat an orderly retreat",[60] thereby saving the cause of the nationalist movement and lessening the suffering the people were undergoing. As ever, the Kurds, 50,000 strong according to some accounts, more according to others, fled to the mountains. The flight later came to be known as the exodus

[55] Khalid Saleh, Genocide in Iraq: The Anfal Campaigns against the Kurds, in: Middle East Watch, New York, 1993.
[56] J. Bulloch & H. Morris, op. cit., p. 142.
[57] D. McDowall, op. cit., p. 357.
[58] Andrew and Patrick Cockburn, op. cit., p. 97.
[59] Middle East Watch, Iraq's Crime of Genocide, Yale University Press, May 1994, p. 106.
[60] J. Bulloch and H. Morris, op. cit., p. 163.

forced on the Kurdish people by the Iraqi government. Many who left said they did so because of their fear of chemical weapons.

The Anfal operation, it is claimed, took the lives of some 150,000–200,000 persons. It also gave Kurds the feeling that henceforth they were entitled to speak of genocide in connection with the treatment their people had been subjected to. As for the Iraqis, they gained a renewed sense of security, for, by the end of August 1988, all armed resistance in Kurdistan had been overcome and their armed forces were once again in complete control.

According to Bulloch and Morris, 150,000 Kurds undertook the long trek into Turkey where "they met cold and hunger, and the ill-disguised hostility of the Turks".[61] D. McDowall talks of 60,000.[62] Other groups, still within Iraq, were housed in a camp near Arbil, thus constituting a typical IDP population. For obvious reasons, many authors simply omit to mention the fact that even while Turkey was reluctantly letting people into their country, Iranian authorities would be coping with a Kurdish influx, substantially higher in numbers, which was winding its way towards the Iranian border. About 100,000 Kurds entered Iran, adding to the approximately 150,000 refugees of the same origin that the Iranians were already hosting. "By the autumn of 1989", writes Con Coughlin "the number of Kurdish refugees in Iran and Turkey had reached 250,000."[63]

8.1. *UNHCR Operation*

Under point 4 in the annual report of the United Nations High Commissioner for Refugees for the year 1989, mention is made of the Kurdish crisis. "Outside Africa," says the report, "the largest single repatriation involved the return of about 45,000 Iraqi Kurds under the terms of an amnesty."[64] On page 25 of the same document, we learn that, in response to a request made by the Islamic Republic of Iran, the High Commissioner agreed to assist some 70,000 Kurdish refugees from Iraq "who arrived in that country between March and October 1988." The list of goods and services provided by UNHCR on this particular occasion included medicines, health kits, transportation, domestic utensils, containerised

[61] Ibid., p. 164.
[62] D. McDowall., op. cit., p. 360.
[63] Con Coughlin, Saddam, the Secret Life, Macmillan, 2002, p. 242.
[64] UNHCR Doc AL/44/12, 1 Sept. 1989, p. 1.

health posts, materials to construct shelters for refugees, water tanks and prefabricated warehouses in view of the harsh climatic conditions during the winter. UNHCR also distributed winter clothes and supplementary food and secured transportation of 11,000 refugees to and from areas of temporary shelter. The entire assistance to Kurdish refugees in 1988 amounted to $8.3 million.[65]

8.2. *Media Coverage and Attitude of the International Community*

The events of Halabja carried too many implications of violation of the 1925 Geneva Protocol and other relevant rules of customary international law[66] to be conveniently ignored. Yet, shortly after the Kurds began to draw the world's attention to what had happened, and while Iran raised vehement protest, the rest of the world community preferred to remain silent. The Western press was slow in reporting that the Kurds were under serious attack. The Daily Telegraph mentioned the attacks as early as 24 April 1987, The Guardian on 2 May 1987, and the International Herald Tribune on 12 May 1987. As journalists forged ahead with their charges against the Iraqi government, accusing Baghdad of slaughtering the Kurds, Iraqi Foreign Minister, Tariq Aziz, on a trip to Geneva to attend the first round of Iran-Iraq peace talks, replied that nothing untoward had happened apart from the fact that the Kurdish insurgency had now been curbed and the rebels been forced to run for their lives. According to him, Kurdish leaders Barzani and Talabani were the real culprits, eager to gain publicity for themselves and their parties by urging women and children to flee Iraq. As for chemical weapons, Aziz insisted: "There is no use of chemical weapons and no necessity of using them".[67]

Later, a British documentary film-maker Gwynne Roberts slipped into Iraqi Kurdistan, interviewed various people and smuggled out samples of soil for analysis by a British firm on her return. The firm in question confirmed the contaminated nature of the soil and media uproar redoubled in intensity.

In the aftermath of the events of Halabja, a Canadian doctor, managed to introduce a note of interrogation of a different quality.

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[65] UNHCR Doc. AL/44/12, p. 25.
[66] Resolution 620 (1988) of the UNSC.
[67] J. Bulloch & H. Morris, op. cit., p. 163.

". . . My views are coloured by my work with a medical humanitarian organization in Halabja, northern Iraq, a city whose Kurdish civilians were bombed by the Iraqi government with a mixture of nerve, mustard and VX gases. This attack in 1988 killed more than 5000 civilians, and while the horror of the attack is not in doubt, the likelihood that medical preparations could have altered its outcome certainly is. Ironically, during the Kurdish refugee crisis that followed, far more Kurds died from easily preventable diseases like diarrhea and pneumonia."[68]

David McDowall takes on an accusatory tone when writing about international response to the news that chemical attacks had taken place. He points out that "Within a week of Iraq's first use of gas against the Kurds, the PUK issued press statements and formally appealed to the United Nations. Some victims came to Europe for treatment. The evidence was incontestable."[69] Yet no response was forthcoming because perhaps the timing was inconvenient.

Western governments finally began responding to media outcry, even as Arab states expressed support for Iraq and denounced pro-Zionist, anti-Arab elements at work, and the Soviet block did not depart from their indifference.[70]

United States Secretary of State George Shultz, with the backing of the British Foreign Office, informed Baghdad that enough evidence had been produced to prove without a doubt that chemical weapons had been put to use against the Kurds. French President François Mitterrand, for his part, expressed to his Iraqi interlocutors the extent of his concern over the questionable methods used against the Kurds.

But Iraq was far from convinced that something questionable might have taken place on its territory and refused to let a UN fact-finding mission come in and investigate, arguing that the issue was a wholly internal matter. Turkey, for its part, also refused to cooperate with any UN inquiry team so the standing Security Council resolution 620 was not adequately applied and the matter was quietly allowed to drop.

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[68] Michael Schull, Canadian Journal of Preventive Medicine, vol. 1, No. 3, October 1999 – Bioterrorism: When Politics Make the Best Prevention.

[69] D. McDowall, op. cit., p. 361.

[70] Dilip Hiro, When US turned a blind eye to poison gas, The Observer, Sept. 1, 2002; J. Bulloch & H. Morris, op. cit., p. 165.

9. The Refugee Crisis of 1991 – Detailed Account

The 1991 war in Kuwait – and the refugee crisis it generated – differs in more ways than one from past military conflicts and can be considered a turning point in the management of refugees in mass influx. The 1991 refugee crisis was unlike anything that had ever gone before in that region.

As news of the defeat of Iraqi land forces at the hands of the coalition on February 28, 1991 spread through the region, southern Iraq, home to the Shiites of that country, "rose in revolt, encouraged by mass desertions from the army."[71] Not to be left behind, Iraqi Kurdistan, eager to respond to US President George Bush senior's call to topple Saddam Hussein and secure in the knowledge that the remaining Iraqi forces would be occupied elsewhere, threw itself into the fray in the small mountain town of Rania on March 5, although Kurdish leaders had apparently scheduled the uprising for the middle of the month. Most of the local Kurdish militia joined the cause of the rebels, in such a way that within a very short time, Kurdish forces grew from an initial 15,000 to well over 100,000 men.

Encouraged by Shiite successes to the south and the warning issued by the Americans to the Iraqi government that no chemical weapons should be used, the Kurdistan Front attacked the town of Kirkuk and captured it on 19 March, 1991. The victory was only of short duration, however, as Iraqi Republican guards moved northwards and began a counter-offensive on 28 March, driving the rebels out of Kirkuk and the foothill towns of Arbil, Dohuk and Zakhu.

"Mass panic and flight gripped all Kurdistan," writes D. McDowall. Over 1.5 million Kurds abandoned their homes in a mad stampede to reach safety either in Turkey or Iran. All the roads and tracks to the border rapidly became clogged."[72] Andrew and Patrick Cockburn describe the situation in these terms: "Iraqi helicopters threw flour on the retreating Kurds, giving the impression that they were using chemical weapons. The object was to induce panic on a population with bitter memories of Saddam's lavish use of chemicals on them only three years before: it succeeded all too well. A million Kurds fled into Iran and Turkey."[73] The Kurdish rebel-

[71] D. McDowall, op. cit., p. 371.
[72] Ibid., p. 373.
[73] Andrew & Patrick Cockburn, op. cit., p. 29.

lion might have reached the end of the road; the Kurdish exodus had begun.

A crisis in the sense already defined above was inevitably to follow. As it gathered momentum, this refugee crisis sensitized attention to several aspects of both international law and politics. In the space of a few days, almost two million people climbed towards the mountainous regions separating Iraq from Turkey and Iran. The sheer size of the population on the move made it what one commentator calls "a unique occurrence".[74] Hardly had the crisis begun, than it was resolved, for less than a month later most of these refugees and displaced persons had returned to their point of departure. In between, a political process had been set off, culminating "in the first post-Cold War 'forcible humanitarian intervention".[75]

On 1 April, Kurdish leaders approached the Turkish border and began begging the authorities to let their people pass freely. Alarmed at the estimated number of refugees mentioned in the first reports, the Turkish National Security Council met in an emergency session. For Turkey a threat to its national security was seen in the arrival of the Kurds. The Turkish authorities decided to keep their borders sealed. Although the Turks did not refuse to provide humanitarian assistance to the refugees, it was preferred to keep them out of national territory and on the Iraqi side of the border.

In doing so, Turkey, according to its own lights, was in no way acting in violation of its obligations under the 1951 Convention relating to the State of Refugees which it had ratified in 1961. The definition of a refugee contained therein was interpreted by Turkey to mean that refugee status could only be granted to "those who can convince the local authorities or the representatives of the UNHCR that they face a threat to their lives as a result of persecution in their home countries."[76] Unless and until the Turkish authorities recognised that a particular individual could be taken in as a refugee, he or she remained in legal terms no more than an asylum seeker outside the border.

Turkey was so determined in its refusal to channel the refugee flood on its own territory, that it even "turned down international offers of 14 million dollars to improve conditions for the refugees in the border region."[77]

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[74] Kemal Kirisci, Provide Comfort and Turkey. Decision Making for Humanitarian Intervention, The Kent Papers in Politics and International Relations, 1993, p. 1.
[75] Ibid., p. 2.
[76] Kemal Kirisci, op. cit., p. 5.
[77] Astri Suhrke, From one Crisis to Another, EGDI, August 2000, p. 6.

What Turkey did proceed to do, however, was to alert the UN Security Council and the international community to the perils of the situation. On April 5, the hastily drafted Security Council Resolution 688 was submitted to Council members. It was adopted by a vote of 10 for, 3 against (Cuba, Yemen and Zimbabwe) and two abstentions (China and India). According to this Resolution, not only did this particular refugee crisis constitute a threat to international peace and security, it demanded that Iraq must "allow immediate access to humanitarian assistance to those in need".[78] Thus the Turkish government obtained Security Council backing to deny entry to the refugees and, at the same time, a soft law legal ground had been found to infringe Iraqi territorial integrity and set up a safe haven for the protection of a minority group with adequate military force to prevent any incursions from the central government.

On April 8, 1991, US planes began dropping food packages to the refugees still in the mountains and, after a visit to the Turkish border by the then Secretary of State James Baker, a flurry of diplomatic activity took place both in the US and the European Community, paving the way for the creation of the no-fly zone above the 36th parallel in favour of the Kurdish population, which was henceforth forbidden to any Iraqi "fixed-wing airplanes or helicopters"[79] and reserved exclusively for patrols carried out by Coalition planes, taking off from a NATO base located in southern Turkey. Iraq was further warned not to impede relief work anywhere on its territory. As The Economist pointed out at the time: "The US exclusion zone and the Turkish incursions look suspiciously like the first steps in a policy to remove some parts of Iraq from the jurisdiction of Baghdad".[80] From May 1991 onwards, operation Provide Comfort I was in full swing, with over 20,000 troops from 11 countries guarding the zone just north of the Iraqi oil fields. A similar no-fly zone was also later established in southern Iraq, for the protection of the Shiite population in that region.

Iraq protested vehemently at this "forcible intervention" on the part of the US-led coalition and the resulting violation of its state sovereignty. The Iraqi Foreign Minister denounced the USA, saying the action they had taken was one which "constitutes a flagrant interference in the internal affairs of Iraq, an independent coun-

[78] Kemal Kirisci, op. cit., p. 9.
[79] M.M. Gunther, op. cit., p. 56.
[80] The Economist, 13 April 1991.

try and member of the United Nations". The spokesman of the Baathist Party Al-Thawrah, described the creation of a safe haven as a "precedent the likes of which never existed in the history or relations among countries."[81] but Iraq was far too weak to undertake anything substantial to overturn the situation. Therefore, making a virtue of necessity, it no longer opposed the signing of a Memorandum of Understanding with the UN on 18 April 1991 which, though expressing non-acceptance of the Provisions of Resolution 688, agreed the terms allowing humanitarian assistance to be provided both to Kurdish returnees in their masses as well as to the rest of Iraq.

Even though, between the months of April and May 1991, approximately 1.5 million Kurdish refugees had fled to Iran and another 450,000 to Turkey, by the end of August, all but 124,300 of them had returned on a voluntary basis, whilst allied forces had been withdrawn from the area a month before. The Secretary General of the United Nations used glowing words of praise to describe the whole operation: "Given the traditional plight of refugees throughout the world, who may spend years – even decades – in refugee camps far from their homes, this early voluntary return was a major achievement."[82]

9.1. *UNHCR Operation*

The UNHCR, in its Report on Northern Iraq: April 1991–May 1992[83] comments on the lightning return of the Kurdish refugees to the newly set up safe-haven, brought about through a combination of preventive diplomacy and forcible intervention, as follows: "The first wave of voluntary repatriation to Iraq from Turkey started in the last week of April 1991 – Within five weeks, 95 per cent of Dohuk's more than 400,000 former residents had returned as had another 60,000 persons who lived beyond its borders in government controlled territory, but who were unwilling to proceed there."

Early June saw all the border camps closed down. Only 13,000 refugees still remained and these were relocated to another camp in Silopi. By the end of 1991, only some 4,000 Kurdish refugees were still to be found in Turkey and the whole operation was termed

[81] M.M. Gunther, Ibid.
[82] M.M. Gunther, op. cit., p. 86.
[83] Report on Northern Iraq: April 1991–May 1992, UNHCR, Geneva, 1992, p. 5.

a huge success. Huge, too, was the cost of the repatriation programme. The first phase of international assistance alone, covering the period between March and September swallowed up over one billion dollars.[84] Turkey, for its part, spent some 300 million dollars on relief and assistance operations.[85] And the "winterisation programme" to rebuild Kurdish villages, etc. took up more resources.

While the attention of the entire world was directed towards the refugees to whom Turkey had denied access, Iran, with a minimum of fuss and bother, had thrown open its borders to the stream of Kurdish refugees. Iranian Kurds provided their brothers and sisters from across the border with shelter in their homes, schools and mosques. D. McDowall cites the example of the Iranian town of Piranshahr with a population of only 25,000 which offered accommodation and care to over 75,000 refugees.[86] By early May 1991, Ahmad Hosseini, the director general in charge of foreign nationals and immigrants in the Ministry of the Interior of Iran, announced "that the number of the Iraqi refugees arriving in Iran has surpassed 1.117 million."[87]

Emergency camps were set up in every conceivable place to house the massive influx of Kurds. But Iran, unlike Turkey, being neither a member of NATO nor of the US-led coalition, drew little or no international recognition for its massive humanitarian efforts. Furthermore, it received proportionately insubstantial financial help from the international community to provide the refugees with basics. The then Iranian president, Hashemi Rafsanjani, was quoted as saying: "The costs are astronomical, and what you gave is equal to what a single Iranian village has donated."[88] On-the-ground contingency planning in Iran had not been undertaken by UNHCR. So it turned out that in Iran "refugees were mostly supported by national authorities"[89] In its annual report for 1991, however, UNHCR insisted that "The rapid mobilization and transfer of UNHCR staff to the region were fundamental to UNHCR's speed of response and effectiveness in the Islamic Republic of Iran. Stocks of emergency relief items were procured and expedited to the affected

[84] European Community News, 28 September 1991.
[85] K. Kirisci, op. cit., p. 11.
[86] D. McDowall, op. cit., p. 375.
[87] M.M. Gunther, op. cit., p. 54.
[88] Ibid., p. 55.
[89] A. Suhrke, op. cit., p. 6.

countries."[90] Also, once the situation had returned to normal, UNHCR was instrumental in making voluntary repatriation of Iraqi Kurds from Iran go forward at a smart pace.

9.2. *Deficiencies in the Management of the Crisis*

"The management of the crisis revealed important weaknesses in the existing refugee structures and practices," writes Kemal Kirisci in his paper Provide Comfort and Turkey.[91] To which general consideration, A. Surkhe adds that "UNHCR's main role was in relation to the movement of Kurdish refugees. The emergency presented major protection and assistance challenges, and the agency's response was controversial. One point of criticism was that it reacted slowly – and had inadequate contingency planning."[92]

In her assessment on how UN agencies and UNHCR in particular performed during the 1991 Kurdish refugee crisis, A. Suhrke enumerates the various areas in which relief work was poor and badly coordinated. She points out that the 1990–91 war in Kuwait triggered three separate population outflows. The first, occurring very soon after Iraqi forces entered Kuwait in August 1990, was "a massive flight of foreign workers, mostly into neighbouring Jordan."[93] These were then repatriated with little delay by various international agencies. The second outflow, limited in number, followed the American-led offensive against Iraqi troops in January-February 1991. Lastly, after the capitulation of the Iraqi government became a fact, and unsuccessful rebellions shattered the south and the north of the country, 1.5 million Kurdish refugees fled from the north towards Iran and Turkey, whereas some tens of thousands of Shiites, about whom little was ever written, fled from the South to Iran.

The early warning system in place broke down at a crucial moment because UNHCR misinterpreted the course of events. Impressed by the first refugee influx of migrant workers, humanitarians in their worst-case scenario planning, reckoned with a flood of some 400,000 refugees, rushing mainly towards the borders of Syria and Jordan, with smaller groups breaking away in the direction of Iran or Turkey. Accordingly, relief items sufficient to assist 100,000

[90] UNHCR Annual Report 1991, A/46/12, para. 72.
[91] K. Kirisci, op. cit., p. 1.
[92] A. Suhrke, p. 4.
[93] Ibid.

persons for 90 days were pre-positioned in Iran, Jordan, Syria and Turkey.

"In the event, nowhere near the 400,000 came."[94] The Syrian and Turkish borders were kept closed and access to Jordan was cut off. "All in all, only some 65,000 were believed to have fled during Operation Desert Storm and its aftermath in the South",[95] their destination no doubt Iran. After which vigilance relaxed so that the massive Kurdish influx on the Turkish border caught everyone, including the UNHCR, by surprise. Pre-positioning of stockpiles and site planning for camps within Turkey was in any case out of the question, in view of the hostile attitude of that country.

Contingency planning being haphazard and coordination faulty, preparedness was, naturally, insufficient. When the crisis broke out, the UNHCR found itself wasting time "shifting small stockpiles from Jordan and Syria, negotiating with the Pakistani government for release of items stockpiled for Afghan refugees in that country, and engaging in lengthy procurement procedures to get new supplies."[96] Three weeks after the beginning of the Kurdish emergency, only about 10 per cent of the relief items necessary for the survival of over 1 million Iraqi refugees could be provided by UNHCR. Likewise, only small emergency teams could be deployed to the crisis zone since UNHCR maintained only a limited staff in the area.

In its own defence, the UNHCR offered the following arguments which, though halting in places, are not devoid of substance, especially as regards questions of principle: "The Persian Gulf crisis challenged the international protection capacity of the office in a number of important ways. As a result of the size and speed of the exodus and the return, UNHCR found significant operational obstacles in protection and assistance. The fact that the Iraqi situation included refugee movements and internal displacement further added to the complexity of the situation. While in some instances during the Persian Gulf crisis refugees were not accepted at borders, certain countries in the region that had not previously been confronted with major refugee influxes also confirmed a basic commitment to the principle of *non-refoulement*."[97]

Last but not least, the UNHCR also came in for criticism for vacillating when it came to accepting the solution of a safe haven in

[94] Ibid.
[95] Ibid., p. 5.
[96] Ibid., p. 6.
[97] UNHCR, 1992, Annual Report.

Iraq, since this was at variance with the principle of asylum on which its mandate was, and is, based and is, moreover, of only dubious legality. But however much the solution found to overcome the 1991 April refugee crisis is hailed as representing "the beginning of a new era in humanitarian assistance, intervention, and protection for victims of forced migrations",[98] it goes without saying that the principle of forcible intervention, whether here or in other places later, is far from being anchored in the main body of international law and the controversy surrounding it and other such innovations in the domain of what constitutes legality or legitimacy in respect to relations between states has yet to be resolved. In any case, in our present state of knowledge, the experiment carried out in Northern Iraq will probably remain unique and non-transferable to other refugee and humanitarian crisis situations, whether in the area itself or elsewhere in the world.

In a statement dated 18 May 1992, entitled On Humanitarian Intervention, Sovereignty and the Future of International Society, former UN High Commissioner for Refugees Mrs Sadako Ogata focused on how certain legal constraints impede the development of a more effective humanitarian strategy in view of the recurring humanitarian emergencies challenging the international community, and the changed nature of the refugee problem. She argued that refugee law as it stood tended to be an imperfect instrument when it came to apply modern crisis management techniques to situations of mass displacement and seemed to suggest that modifications were required; for instance, as regards the strict respect of the sovereignty of nations: "Traditionally, international protection and assistance of refugees have studiously respected the bounds of national sovereignty. A refugee did not become the object of international concern until after he had crossed his national boundaries, and the interest of the international community ceased as soon as he returned to his country of origin or became a naturalised citizen of his country of asylum."[99] Nowadays, however, in the High Commissioner's reading of the situation, most refugee crises occurred as a result of "vicious internal conflicts, rooted in nationalistic, ethnic and religious hatred."[100] The plight of internally displaced persons, according to Mrs. Ogata, was the silent emergency of our times and the most acute problems arose in the

[98] K. Kirisci, op. cit., p. 1.
[99] Ibid.
[100] Ibid.

area of protection of returning refugees as well as internally displaced persons.

Referring to the Kurdish crisis, Mrs. Ogata pointed out that: "The massive exodus of Kurdish refugees last spring had turned within weeks to large-scale spontaneous return, conditioned as much by the decision of the Coalition Forces to set up a safety zone inside Iraq as by the reluctance of Turkey to allow the people in. However, many of the returnees remained displaced inside Iraq for months in insecure and unsafe conditions."[101] Hence, she went on to say: "One of the first decisions which the UNHCR made in the Kurdish crisis last spring was to provide protection and assistance to anyone displaced by the insurrection, irrespective of whether or not he or she had crossed an international boundary", adding "Refugee law, which focuses on the protection of persons after they have crossed their national frontier, is, I am afraid, of limited use in this area."

According to her, provisions in humanitarian law dealing with the protection of persons, notably in the Second Additional Protocol to the Geneva Conventions, for the protection of civilians in internal armed conflicts, or the mandate of the International Committee of the Red Cross, do exist, but they too are of a restrictive nature inasmuch as they stipulate that "Protocol II comes fully into operation only when the party opposing the Government consists of an organised armed force, uses armed action and controls a significant part of the territory.[102] Since more and more refugee-producing conflicts tend to fall outside this category, the need to address this lacuna in the law becomes urgent if the problem of displacement is to be adequately addressed.

Returning to the problem of national sovereignty, Mrs. Ogata asks whether in situations of gross violation of human rights within a country, there should be the right of humanitarian intervention. Honesty compels her to say: "Some argue that national sovereignty should not be allowed to block humanitarian action, others say that the right to intervene is a euphemism for the right to wage war and, using northern Iraq as an example, have pointed out that intervention often creates more problems than it solves."[103]

[101] Ibid., p. 2.
[102] K. Kirisci, op. cit., p. 2.
[103] Ibid., p. 3.

9.3. *NGO Activities*

Non-governmental organisations did not on the whole come out well from the 1991 Kurdish refugee crisis.[104] They carried out no prior consultation among themselves so that assistance was often duplicated and inefficiency was the end result. This remark could also be extended to include intergovernmental organisations and donor governments, or as one senior Turkish diplomat put it at the time: ". . . non-governmental organisations and intergovernmental, and these organisations and donor governments, failed to coordinate effectively from the beginning. Thus in the case of bilateral aid, it was not clear who was giving what to whom through which agency."[105] Many NGOs arrived in Turkey without bothering to inform their own diplomatic representations there, creating a raft of administrative problems as regards visas and the like. But their contribution all in all was negligible. On the Iranian side too, the presence and assistance offered by the NGOs were late and minimal. And since the setting up of the "safe haven" for the Kurdish people, international organisations such as the Dutch Consortium of NGOs or the Norwegian People's Aid organisation, to name only two, had established a massive presence in Northern Iraq and had helped to run the area each according to the field best suited to its competence.

10. The Refugee Crisis of 1996 – Detailed Account

Once they were safely back in Northern Iraq, thanks to allied military intervention on their behalf, the Kurds once again divided into their traditional two groups, the KDP and its followers exercising power in the north, the PUK entrenched in its bastions round Sulaimaniya.

On 19 May 1992, a general election took place in Northern Iraq in keeping with the agreement the Kurds had entered into at the time of their return. It was a triumph for the two leading parties

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[104] L. Minear, U. Chelliah, J. Crisp, J. Mackinlay and T. Weiss, United Nations Coordination of the International Humanitarian Response to the Persian Gulf Crisis, 1990–1992 (Occasional Paper Number 13, Watson Institute, Providence, 1992).

[105] Asylum under Attack, A Report of the Lawyers Committee for Human Rights, April 1992, p. 27.

which split the vote almost evenly. Masoud Barzani's KDP's campaign slogan had been: Autonomy for Kurdistan, Democracy for Iraq. Not to be outdone, Jalal Talebani's PUK had come up with: Self-determination for Kurdistan within a federal Iraq. The problem was that in spite of the similarity of their platforms, the two parties remained at loggerheads.

In June 1992 the Kurdish Assembly with a 105 seats convened in Arbil. In July, the Kurdish Regional Government (KRG) had been sworn in. Barzani and Talebani, however, refused to be part of the government, though they continued to make their wishes known through various substitutes. "This allowed them to maintain and to extend their party networks and encouraged the development of two parallel administrations in the Kurdish region, one dealing largely with the north, the other with the south."[106] A two-party democratic system with power-sharing as its basis seemed a difficult thing to demand from the Iraqi Kurdish people who had just taken their first few steps in the direction of modernising their political structures.

Insoluble economic problems also loomed ahead. First and foremost, the Kurds were submitted to a double economic blockade, one on the part of the international community which concerned Iraq as a whole, the other on the part of Baghdad with a complete ban on fuel and other relief goods.[107] Then the Kurds suffered from "the decline in international commitment."[108] Not only did UN agencies under-fund their rehabilitation efforts, including de-mining operations, they often got bogged down in inefficiency, much to the disgust of both the Kurds and the NGOs involved in rebuilding the area.[109] The UNDP, for instance, at the start of the crisis, had promised to supply Kurdistan with fertilizers, seed livestock and farming equipment. None of this materialised owing to lack of funds.

The political parties did not make things easier for the KRG. Efforts to raise money by taxing trade entering Northern Iraq were swiftly undermined by middlemen all down the line taking their cut as well. The old patronage system again came to the fore, weakening the government considerably.

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[106] Charles Tripp, op. cit., p. 272.
[107] Borhanedin A. Yassin, The Kurdish Mass Emigration, Lecture in front of Danish Parliament, 23.10.2001, p. 3.
[108] David McDowall, op. cit., p. 382.
[109] Michel Leezenberg, Humanitarian Aid in Iraqi Kurdistan, In: Cahier d'tudes sur la Méditerranée orientale, No. 29, Jan.–Jun. 2000, p. 7.

Meanwhile, the KDP and PUK continued to battle for power, seeking allies abroad, the former in Iran, the latter in Turkey; both tirelessly courted the government in Washington and neither was unwilling to keep up their relations with Baghdad. In 1994, the Kurds began fighting again, the immediate cause being money.[110]

Smuggling diesel-fuel products out of Iraq and into Turkey had become a lucrative business in Kurdistan. Tolls worth hundreds of million dollars per year were collected at the crossing points. And much of this trade was controlled by Massoud Barzani's KDP. Talebani's PUK, on the other hand, though in charge of several major cities, had no reliable sources of income in border areas. Fighting began over a land dispute pretext and spread to various parts of Northern Iraq. A cease-fire was imposed through American intervention. By December 1995, this had failed and fresh fighting broke out in which PUK forces seemed to be gaining the upper hand. In these civil-war conditions, KDP's Barzani appealed to the United States for help, without much result. So Barzani asked Baghdad for help, claiming that Iran was aiding the PUK militarily. On August 31, 1996, Iraqi artillery opened fire, Iraqi helicopters took to the air over Northern Iraq and their tanks entered the Arbil area and, later, the city as well. The Iraqis, however, left soon afterwards, PUK partisans having been driven away and replaced by KDP partisans.

American Defence Secretary William Perry made it clear that, since no American vital interests were at stake, the US should not intervene: "My judgement is that we should not be involved in the civil war in the north,"[111] was how Perry put it at the time. But Bill Clinton's administration in a face-saving gesture fired forty-four unmanned cruise missiles at Iraqi command posts south of the fighting zones and extended its control over Iraqi air space from the 32nd to the 33rd parallel.

The brief Iraqi incursion into Northern Iraq had sent ripples of fear through the region. In anticipation of renewed Iraqi pressure on the north, the USA began the evacuation of its nationals and members of the Iraqi opposition who had worked closely with the Americans.

At the same time, a new stream of Kurdish refugees took to the road, seeking sanctuary in Iran. They were in a specially demoralised state not only because of the battles lost to the KDP. Jalal

[110] A. & P. Cockburn, Saddam Hussein, op. cit., p. 178.
[111] International Herald Tribune, 9.9.96.

Talabani had made "foolish claims that the Iraqis were aiding the attackers with chemical weapons (he hoped thereby to provoke U.S. intervention).[112]

The American press closely followed events and widely reported them. Thus, the International Herald Tribune of 11th September, 1996, carried an article entitled: "Kurds Flee Baghdad-Backed Force" and another on the following day: "Averting a Kurdish Refugee Crisis." The former reported that tens of thousands of Kurds were in flight and quoted a UN official in Arbil as saying: "The number is between 70,000 and 75,000, we believe."[113] Other officials estimated that the total could quickly approach 300,000. In Tehran, a UN refugee official said he had reports that an unspecified number of people were crossing the Iranian border in the Azerbaijan province, more precisely in the area near Marivan. The Iranian government put forward the figure of 200,000 refugees. Variable though the figures were, one thing was clear: the spectre of the 1991 Kurdish exodus with its two million people on the move could be laid to rest.

One important factor in helping to avert another grave Kurdish refugee crisis this time was the amnesty announced by the Iraqi government for all those who had not committed rape or stolen state property during the fighting. A second measure of pacification was Baghdad's unilateral lifting of the blockade it had imposed on the Kurds in 1991.[114]

On October 13, 1991, a regrouping of PUK forces occurred. Refreshed and reequipped, they swarmed down their mountain slopes and attacked KDP soldiers. These fled as precipitously as the PUK troops had done a month before and so balance was restored, with Saddam Hussein, in his new role as arbiter in disputes between the Kurds, emerging "as the clear winner from the Kurdish civil war."[115]

10.1. *UNHCR Operation*

In its annual report 1996 addressed to the General Assembly, UNHCR writes: "The main development in the Islamic Republic of Iran in 1996 was the influx of some 65,000 Iraqi refugees who

[112] Andrew and Patrick Cockburn, op. cit., p. 245.
[113] International Herald Tribune, 11.9.96.
[114] Ibid., 12.9.96.
[115] Andrew and Patrick Cockburn, op. cit., p. 248.

arrived in the western part of the Islamic Republic of Iran after fighting broke out in the Sulemaniya area of Iraq in September and October 1996. By January 1997, practically all of the refugees had returned to their places of origin. During their stay in the Islamic Republic of Iran, the basic shelter, food and health needs of these refugees were covered by the Government of the Islamic Republic of Iran, with a UNHCR contribution over US$ 4.2 million from its Emergency Fund."[116]

10.2. *Media Coverage and Attitude of the International Community*

This was swift, widespread and sustained. But interest shifted rather rapidly from the Kurdish faction fight and other problems to concentrate thereafter on Baghdad's daring to come to the aid of the KDP in spite of the bans set in place by the US government and its allies. Much speculation as to the form American retaliatory measures might take, dried up after the bombing of the South of Iraq took place. As the US ambassador to the UN Madeleine Albright put it: "We have choked Saddam Hussein in the south. We really whacked him."[117] The media next proceeded to analyse how neighbouring countries might come out as the winner of the conflict. Iran was one clear candidate as articles such as "Tehran is the winner in U.S. Attack on Iraq"[118] multiplied. The other likely winner seemed to be Turkey, which could now seize the pretext to create a buffer zone within northern Iraq to ward off Kurdish guerrilla attacks. The arguments about how the Iraqis had defied the Clinton administration and got away with it finally disappeared. Media interest waned and other matters began to capture the headlines.

The United States was not happy about the loss of credibility it felt it had suffered after the KDP allied itself to Baghdad and used Iraqi military forces to chase away its rival Kurdish faction the PUK. But support from American allies was slow in coming. France categorically refused to have anything to do with new air-strikes against Iraq. Britain's Premier John Major did not hold back, but the British did point out that the US needed better legal justification for carrying out a new raid against Iraq. An attempt to get the UN

[116] UNHCR Annual Report, 1996, p. 37, para. 190.
[117] International Herald Tribune, 9/9/96.
[118] Internatoinal Herald Tribune, 7–8/9/96.

to pass a resolution condemning Iraq failed when the Russians voiced opposition. So America had no alternative left but to carry out cruise missile strikes, for which they got support only from Great Britain, the other coalition partners, among them most of the Arab countries and Turkey, showing strong signs of Iraq war fatigue.[119]

Having secured his chances of re-election, Bill Clinton next turned to cutting his losses in Northern Iraq. The American reaction consisted of drastically cutting financial contributions in favour of the Kurdish population in that area, and leaving all relief work to specialised groups and international organisations like the UN. ". . . the United States has gradually reduced its contributions to relief efforts – from nearly $600 million in 1991 to $71 million the next year, to $22 million so far this year (1996)."[120]

The 1996 Kurdish refugee flow did not take on the large-scale proportions which had been feared on all sides. It was resolved with a minimum of suffering for the people concerned, although Iran once again found itself funding the displaced almost single-handed. What it did do was to dismember Iraq still further, and delay the implementation of the food-for-oil programme Baghdad had negotiated with the UN, which, nonetheless, seemed to represent a partial lifting of the post-war economic sanctions. Moreover, none of the problems besetting the region came even close to finding a durable or fair solution. So that the determination displayed by the new Bush administration to attack Iraq once military operations, in response to the September 11, 2001 events in the USA, had been completed in Afghanistan came as no surprise to most observers.

11. The Potential Refugee Crisis 2003

Operation Enduring Freedom, begun on October 7, 2001 with the first bombs falling over Afghanistan,, was declared ended a few short months later after the fall of Kabul and the major Taliban-controlled city of Kandahar. Thereafter the Bush administration began increasingly to direct its anti-terrorism rhetoric against the government in Baghdad, although until today no serious evidence

[119] Newsweek, Sept. 16, 1996, p. 12.
[120] International Herald Tribune, 13.9.96.

of a link between the al Qaeda organisation and the authorities in Iraq has been established. Yet preparations to attack that country went on quickly, gaining momentum as the rhetoric gained in intensity until there were some 200,000 American soldiers in the Persian Gulf area awaiting a White House command to start the invasion of Iraq, once the American air force had properly bombarded the country with the prescribed amount of bombs.

The UN Security Council fought hard to avert the crisis. World public opinion, usually difficult to move, was galvanised into action. Anti-war demonstrations on a scale never seen were organised and continued to take place in practically every country in the world over a period of several months. Even so, for reasons of their own, the USA and Great Britain were not to be held back. In the early hours of 20th March, 2003, the allied forces started the new war by air raids against positions in Baghdad and other cities. Simultaneously, Anglo-US ground troops entered Iraqi territory.

However, the expected flood of refugees in the wake of US military action failed to materialise. UN projections had spoken of some 500,000 injured and over a million people rendered homeless and on the move. A pre-war humanitarian conference, convened on February 15, 2003 in Geneva by Swiss Foreign Minister Micheline Calmy-Rey, attempted to analyse these figures and suggested ways and means to work out appropriate emergency plans to tackle the expected refugee crisis once it got underway.[121] But in fact with the war on Iraq over, no significant movement of refugees was recorded.

Contrary to all speculations in the region and by the international community, the expected refugee crisis did not take place. For less than a year when the US administration was trying unsuccessfully to secure the support of the UN Security Council for its predetermined war against Iraq, neighbouring countries – and in particular Iran – were anxiously in search of ways and means to get prepared for a new wave of refugees. The bitter experience of the past had left them no possibility of feeling the slightest optimism. The new war was characterized by the notion of "regime change" which could further exacerbate the likelihood of a refugee exodus out of fear of the massive use of chemical and biological weapons by a regime desperate enough to defend its very existence, or by certain elements of the regime who would have nothing to

[121] Humanitarian Meeting Iraq, Geneva, 15–16 Feb. 2003, Press Release Swiss Federal Department of Foreign Affairs of 13.02.2003.

lose at the end of the war and therefore show no mercy to the Shiite and Kurd populations labelled as traitors.

In the meantime two factors prevented the UN system and other international relief agencies embarking upon high profile contingency planning. First was the fact that the Iraqi government was a member of the United Nations and the organization was not willing to be dragged into a prejudging position on the possibility of the use of weapons of mass-destruction by one of its members, in particular amidst the anti war emotions of the world public opinion. The second reason was the hesitation of the UN Secretary General to signal a green light to the UN humanitarian agencies because of the fear that the US administration could view such a move as an exaggeration and over estimation of the consequences of war with a pre-emptive goal.

Although contingency planning by the international community was slow and certainly not adequate, neighbouring countries managed to be relatively prepared for the worst-case scenario in reaction to a mass influx of hundreds of thousands of refugees motivated by a possible use of chemical and biological weapons. Kuwait took advantage of American expertise, in addition to the recruitment of several chemical weapons defence experts from the Czech Republic, and an official request of help to the OPCW in the Hague. Bordering the most populated areas in Iraq and being a natural place of refuge for Kurds and Shiites, Iran depended mostly on its national resources to put up camps and to arrange for chemical protection, decontamination and treatment based on its past experience. In a wider networking of international assistance, the UNHCR, the ICRC and the OCHAA intensified their efforts including through their new offices and coordination centres in Turkey, Kuwait and particularly Iran alongside the Iraqi borders.

To the surprise of the region and the entire world, war did not last more than three weeks, no weapon of mass destruction was used, the Iraqi government mysteriously gave up any resistance, and civilian casualties were minimal compared to other experiences in the region in the past. Potential refugees were not prompted to leave their houses and therefore another humanitarian tragedy was averted for the good of the Iraqi population and neighbouring countries.

But other problems may be looming, having in mind the tribal demographic configuration of Iraq, and possible future attempts by certain groupings to gain a political upper hand in the Iraqi political scenery. The armed attempts now being made by the Kurdish population to deport Arabs, Turkomans and others from northern

Iraq, among other events may be alarming[122] since these may constitute acts of ethnic cleansing which will also carry a price tag in terms of refugees or internally displaced persons.

All in all, then, it is still too early to say what the final outcome of the war will be. If it happens to be benign, then Iraq will restore its sovereignty and concentrate on rebuilding all that was taken away from it during the years of hardship. Otherwise, massive outflows of refugees might still occur in the future, keeping Iraq in the priority lists of those organisations specialised in alleviating mass human sufferings and presenting a continuous challenge to the recipient neighbouring countries.

[122] Jason Burke: Arabs flee revenge of the Kurds, The Observer, April 20, 2003.

B. Role of Neighbouring Countries

Since contemporary Iraq is home to two especially volatile population groups, the Kurds and the Shiites, who, after failed attempts at insurrection, often needed to flee the Sunni-led central government in Baghdad the role of the neighbouring countries in this area in dealing with successive waves of refugees has become of the utmost importance and urgency.

A look at the map of the region reveals why this role is important. Iraq is almost a landlocked country (its only access to the Persian Gulf being confined to the port of Umm Qasr) with no fewer than six neighbours with which it shares common borders. To the north of Iraq lie Turkey and Syria, to the west is Jordan. The southern neighbours of Iraq are Saudi Arabia and Kuwait, whereas to the east the 1,458-km long border of Iran meets that of the territorial state of Iraq. The demographic situation of Iraq, where most of the population lives in the eastern part of the country, makes it inevitable that, in any upheaval of a political nature on Iraqi soil leading to an extended refugee crisis, the countries neighbouring Iraq, especially in the east and north, will find themselves forced to devise ways to contain the impact of human influxes, each in keeping with the means at its disposal and the refugee law and procedure regulating its role as an eventual host country.

In the following pages, after taking a brief look at the historical background of each neighbouring country, we shall examine in some detail how the six states surrounding Iraq have coped with the problem of refugees in general and with those coming out of Iraq in particular. This study is legally relevant since it indicates state practice in the refugee context. Our study is in no sense exhaustive and it does not claim to examine the refugee phenomenon in its entirety. Its focus is rather country by country, in the context of the day-to-day occurrences which make up the refugee reality- emergency assistance, protection, *refoulement*, integration problems, resettlement or repatriation- bearing in mind that more often than not, in the receiving countries under discussion, with their significant economic problems, the sudden, repeated arrival of refugees is likely to constitute a burden rather than an asset.

The repetitive story of refugees in mass influx from Iraq has taught the neighbours an important shared lesson: preparedness while resisting new arrivals. The build up to the 2003 war of the Allied Forces against Saddam Hussein's government is illustrative in this regard. In the run up to the attack, Iraq's neighbouring countries

had already informed international humanitarian organisations how they intended to proceed.[1] Syria and Iran said they would allow Iraqi refugees to cross their borders at specified points and some preparation to receive them was underway. Turkey made provision for refugees – but only inside Iraq itself. Jordan did not wish to allow refugees to enter Jordanian territory – though this attitude underwent a change after UN agencies and NGOs had exerted pressure on the authorities. Saudi Arabia and Kuwait were unwilling to play a direct role in the handling of any refugee crisis, although they did seem to imply they would be willing, if the need arose, to offer some financial assistance. At the time, all these countries were aware of what was at stake: extreme human suffering if displaced persons were denied basic help. Nevertheless, questions of internal stability, political calculations, and the costs of providing for refugees generally tended to dominate the thinking of local governments rather than mere moral considerations.[2]

This said, the following broad generalisations might help to summarise the differences apparent in the approach to refugee questions adopted by the neighbours of Iraq. Of the six countries involved, only the two biggest in size and population, Iran and Turkey, are signatories to the United Nations Convention on Refugees. In crisis situations, Turkey is usually assailed by Kurdish refugees from Northern Iraq while Iran receives both Iraqi Arab Shiites and part of the Kurdish population. Besides which, Iran has its own long-standing masses of Afghan refugees, the first of whom entered Iran in the 1980s following the Soviet invasion of Afghanistan. Jordan and Syria, smaller in every respect, tend to serve more as a transit area for people in flight. Both countries have substantial permanent Palestinian populations to contend with and so feel less able to deal with other types of refugee crisis. As for Saudi Arabia and Kuwait, the best off economically of the six, their unique way of solving the problem of asylum-seekers has often been to simply assimilate them into the expatriate labour force both countries maintain for the running of their economies.[3]

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[1] Iraq politics: The coming dash for safety, The Economist Global Agenda, 6 Mar. 2003; Rhoda Margesson & Joanna Bockman, Potential Humanitarian Issues in Post-War Iraq: An Overview for Congress, March 18, 2003, pp. 11–12; Ambiguity over Turkey's refugee crisis preparations, Turkish Probe, 19.1.2003.

[2] Oxfam tour Report. Iraq Borders Assessment Visit. 11–17 December 2002, p. 1.

[3] World Refugee Survey 2003, Middle East, US Committee for Refugees, p. 1.

Iraq and its neighbours

In the following paragraphs, a brief historical outline for each individual country will be followed by description of the legal and political behaviour of Iraq's neighbours vis-à-vis refugees.

1. Kuwait

The modern history of Kuwait dates back to 1710 when immigrants from the Arabian Peninsula took over the area and proceeded to establish the city of Kuwait. By 1756, rulers of the Sabah dynasty had seized the reigns of power. The sheikhdom of Kuwait remained nominally attached to the Ottoman Empire, but enjoyed something akin to *de facto* independence. In 1899, the Ottomans, with German help, attempted to regain control over the sheikhdom, whereupon Kuwait turned to Britain for assistance and protection. The British granted Kuwait independence as early as 1914, but kept a wary eye on events in the region, intervening each time it was felt Kuwait was in danger. It was the British, too, who helped to draw up the borders between Kuwait and Arabia, on the one hand, and Kuwait and Iraq, on the other. Petroleum was discovered in Kuwait in 1938 and by 1946, the British and US-owned Gulf Oil Corporation had begun oil extraction activities. A Kuwaiti constitution was promulgated in January 1963, under which executive power was concentrated in the hands of the emir, while legislative authority was assigned to an elected national assembly. The latter, however, was dissolved on several occasions and its role in governing the country has proved to be less decisive than it should have been. In 1975, Kuwait nationalised its oil industry which was henceforth run by the Kuwait Oil company. During the Iran-Iraq war years, Kuwait's intervention on the side of Iraq was little appreciated by the other side. But this was nothing compared to the moment of real crisis it endured when Iraqi forces occupied Kuwaiti territory in August 1990, forcing Emir Sheikh Jabir al-Ahmad al-Sabah to flee. By February 26, 1991, a US-led international coalition had chased Iraqi troops out of Kuwait, paving the way for Sheikh Jabir to be reinstated on the throne.[4]

Refugee law and procedures as such do not exist in this small Persian Gulf state. Kuwait is neither a signatory to the UN Refugee

[4] Tore Kjeilen. Encyclopaedia of the Orient. Kuwait: History.

Convention, nor has it promulgated any domestic law relative to refugees or their claims. To make up for this lack, however, the Kuwaiti national assembly ratified an agreement with the UN High Commissioner for Refugees, signed by the Kuwaiti government and recognising UNHCR's mandate to protect refugees and adjudicate their claims.[5]

Thanks to this legal basis, UNHCR was in a position to issue protection letters, signed and stamped by the Kuwaiti Ministry of the Interior, protecting refugees registered with them, from deportation or detention.

Most refugees in Kuwait are actually long-term residents. In 2001, according to The United States Refugee Committee (USCR), over 50,000 refugees were living in Kuwait, a country with a population of some 1,811,000 people. These included an estimated 35,000 Palestinians, 15,000 Iraqis, and small numbers from Afghanistan, Somalia and other countries. Kuwait also hosted a special group of some 120,000 stateless Arabs, going under the name of Bidoon, many of whom had lived their entire life in Kuwait without being able to apply for citizenship. Since Kuwaiti law does not recognize refugees, part of the foreign presence in the country was assimilated with Kuwait's expatriate labour force. Also Kuwait was praised by USCR for generally showing tolerance towards the foreigners on its soil, the exception to the rule being Iraqi citizens, often regarded with suspicion especially after the 1990 invasion of Kuwait by Iraq.

Since Kuwait actively discourages asylum seekers, very few Iraqis choose to approach this country in times of need. In past years, the few Iraqis who did manage to enter Kuwait, after crossing the demilitarised zone between Kuwait and Iraq, were branded as "infiltrators" and simply held by Kuwaiti authorities, for "security reasons" in detention centres.[6]

In the 2003 war, Kuwait happened to be the staging area from which some 200,000 Anglo-American forces launched their military attack on Iraq. Yet the country was reluctant to establish any camps in the event that an influx of refugees got underway. In fact, the Kuwaiti government repeatedly made it clear it would not permit the setting up of refugee camps on its side of the Iraqi border,

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[5] Worldwide Refugee Information, Country Report: Kuwait, 2002, page 1.

[6] Charles Recknagel. Iraq: Neighbors Mostly Close Borders to Refugees, Complicating assistance plan, Radio Free Europe, 11 March 2003, p. 1.

despite pleas from the UNHCR to do so.[7] General Ali al-Mumim, the chairman of Kuwait's Humanitarian Operations Centre (HOC), declared to journalists: "Our plan is to have any refugee camps within the Iraqi border, mainly the DMZ (i.e. the demilitarised zone). What we can promise is that we will be very helpful and supportive of their requirements. That is the best solution because if you look on our side of the border, it is mainly desert, but on the Iraqi side, there [are] a lot of facilities available, which a lot of agencies are already aware of. And there [are] a lot of activities already in Iraq. So this is the best solution to this problem, we feel."[8]

Whether it was or not, UNHCR was never able to ascertain how much the Kuwaiti government would provide in funds and aid supplies of its own to assist the refugees inside Iraq since the danger of a refugee crisis remained in the air. The result was that, unlike in Turkey, Iran or Jordan, UNHCR never managed to pre-position supplies in Kuwait.

UN officials offered the notion of "host country fatigue" worldwide as an explanation for the refusal of most of Iraq's neighbouring states to open their borders. They pointed out that so many conflicts had shattered the region already, provoking huge displacements of people who sometimes spent decades, if not lifetimes, in host countries because no solution to the initial problems precipitating war had ever been found, that it was but natural that many governments no longer wished to get involved, however awful the situation of civilians in Iraq threatened to turn.

And the Iraqi situation was particularly frightening because 60 percent of the population of that country were already dependent on the UN-approved oil-for-food programme for their daily sustenance. UN planners estimated that, in the case of a prolonged war, as many as 2 million Iraqis could be displaced and up to 1.5 million more might have been driven to seek asylum in neighbouring countries.[9]

Of course, if the worst-case scenario had taken place, even Kuwait would no longer have been in a position to turn away a stream of refugees and neither would it have wanted to do so. The legal framework might have been inexistent, but the humanitarian grounds wouldn't have gone away. It remains unclear as to whether the

[7] Charles Recknagel, Ibid.
[8] Ibid., p. 1.
[9] Ibid., pp. 2–3.

Persian Gulf State will in the future decide to sign the UN Refugee Convention, thus perhaps lessening the burden of other potential host countries.

What is clear, however, is that in matters to do with international protection for refugees and asylum-seekers, Kuwaiti policies – like those of several other countries- are mainly of a restrictive sort and subordinated to economic considerations, i.e. to what extent Kuwaiti living standards will be affected by the absence or presence of refugees in the country. In principle, Kuwait would be ideally located to take in people forced to flee from the southernmost parts of Iraq, as the distances to be covered to reach the nearest population centres are not beyond the strength or capability of a refugee overflow. In practice, though, sealed borders, and the lack of legal instruments which could serve to open them, make Kuwait a more hospitable place for the migrant worker than for the refugee in fear of his life.

2. The Hashemite Kingdom of Jordan

The Hashemite Kingdom of Jordan is an independent Arab state of Southwest Asia**,** occupying an ancient land long associated with the civilizations of antiquity. Jordan was established as a British mandate under the name of Transjordan in 1920. A year later, one of the members of the Hashemite royal family, Abdullah, was appointed king by the British. In 1946, Transjordan gained its independence and became an international entity. 1950 brought with it both the occupation and annexation of the West Bank and a name change for the kingdom to Jordan. The years that followed were full of strife. First King Abdullah was assassinated by a Palestinian nationalist, leaving his grand-son Hussein to ascend the throne. In the early 60s, Jordan was caught up in warfare with the Palestinian PLO for control over the country. 1967 brought the Six-Day War with Israel during the course of which Jordan lost its West Bank territory and agreed to take in many of the Palestinians who had been turned into refugees by Israel's military conquest. In 1971, Jordan expelled the PLO from its territory. But later it changed course and in 1974 it recognized the organisation as the sole representative of the Palestinians. This was followed in 1988 by Jordan giving up all claims to the West Bank which it henceforward regarded as territory belonging exclusively to the Palestinians. In 1993, Jordan held its first parliamentary elections since 1956. The following

year it signed a peace treaty with Israel. King Hussein of Jordan died in 1999 and was succeeded by his eldest son Abdullah II.[10]

At the end of the year 2001, Jordan, a country with a population of some 6 million, hosted over 1.64 million people in need of protection or refugees. The bulk of the refugees was composed of Palestinians registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). According to the Jordanian government, a further 800,000 Palestinian "displaced persons", forced to flee from their homes after the 1967 war, were also residing in the country. Palestinians constitute more than half of Jordan's total population.[11] Their legal status is better than in other countries giving shelter to Palestinian refugees since many of them enjoy full citizenship, including the right to vote. And those who are not entitled to claim nationality nonetheless enjoy freedom of choice as regards their place of residence. Although the Jordanian government has set up some 10 camps to shelter refugees, 82% of the registered refugees in Jordan live outside these, alongside the local population. An estimated 250,000 Iraqis also live in Jordan, but it is unclear how many of them are actually refugees[12] as distinct from normal migrants or temporary workers.

That Jordan is often numbered among the countries with the largest refugee population in the world[13] has something to do with how the UNRWA mandate defines Palestinian refugees. These, according to UNRWA, are "persons who resided in Palestine two years prior to the outbreak of hostilities in 1948 and lost their homes and livelihoods as a result of the conflict, as well as persons descended from the original refugees."[14] Since UNGA Resolution 194 of 1948 foresees repatriation or compensation as the only permanent solution to the Palestinian refugee problem, citizenship in another country does not terminate refugee status as required by the UN Refugee Convention and Protocol and applied to all other refugee groups. Hence, persons of Palestinian origin in Jordan have the legal possibility of being counted both among the citizens and the refugees at one and the same time. Palestinians in Jordan are virtually considered to be an integral and important part of the

[10] Tore Kjeilen. Encyclopaedia of the Orient. Jordan: History.
[11] USCR, Worldwide Refugee Information. Country Report: Jordan, 2002. p. 1.
[12] USCR, op. cit., p. 1.
[13] Géraldine Chatelard, Jordan as a transit country: semi-protectionist immigration policies and their effects on Iraqi forced migrants, UNHCR Working Paper No. 61, August 2002, p. 2.
[14] USCR op. cit., p. 2.

country's population. However, having in mind the above explanation, distinctions tend to get blurred as to who exactly is a citizen and who a refugee.

Jordan, like Kuwait but for reasons of its own, is not a signatory to the UN Refugee Convention. As one expert points out: "One effect of the Palestinian issue is that none of the Arab countries, (Jordan, Lebanon, Syria) hosting a significant number of Palestinian refugees under the mandate of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (NRWA), has adopted international standards on refugees, such as the 1951 Convention, and none has devised a national legal framework to deal with new mass influxes of refugees, even if they may have a domestic legal definition of asylum. Apart from the Palestinians, forced migrants in the Arab Middle East have been left in a legal abyss."[15]

However, in April 1998, the Jordanian government made some effort to remedy the situation by signing a memorandum of understanding with UNHCR concerning the treatment of asylum seekers and refugees.[16] This particular document supplemented an earlier Cooperation Agreement concluded in July 1997,[17] under the terms of which the process of assessing refugee needs and providing appropriate financial assistance was streamlined. According to the memorandum, Jordan is legally bound to admit asylum seekers, including undocumented entrants, and to respect UNHCR's refugee status determinations. It also agrees not to practise any form of "*refoulement*" of refugees and asylum seekers from its territory, a principle that is sometimes overlooked when it comes to the deportation of Iraqi nationals living illegally in Jordan.

The number of Iraqis living in Jordan is estimated to be between 200,000 and 350,000. Not all of them are recognised refugees. Jordan allows Iraqis to remain in the country for a period of six months, after which they must go abroad to get their visas renewed. "Many Iraqis are among the poorest in Jordanian society," writes USCR, "eking out meagre existences while living in overcrowded and sometimes unsanitary conditions."[18]

In the 1991 Kuwait war, Jordan was faced with the challenge of taking in more than one million people of various nationalities,

[15] Géraldine Chatelard, op. cit., p. 2.
[16] UNHCR, ministry sign memorandum on refugee issues, Jordan Times, April 12, 1998.
[17] UNHCR, Update on Regional Developments, doc: EC/48/SC/CRP.3, p. 26, para. 126.
[18] Ibid., p. 4.

among them some 360,000 permanent returnees, i.e. citizens of the Hashemite Kingdom.[19] The duration of stay of many of the transit refugees was never lengthy since these were people belonging to the expatriate labour force active in Kuwait who were soon transferred to their country of origin. But many among those streaming into Jordan at the time were actually Iraqi citizens seeking refuge after the 1991 uprising of the Shiites in the south of Iraq had been crushed.[20]

The Kuwait war crisis had the effect of bringing to the fore the need for Jordan to develop mechanisms to accommodate mass movements of population resulting from emergency situations. Jordan's social, economic, health, educational and financial system was strained to breaking point by the influx; hence it embarked upon close cooperation with the United Nations High Commissioner for Refugees, the International Red Cross, NGOs, and the international community as a whole to find a quick and appropriate solution to the problem.

Later, during the sanction years, Iraqi "forced or involuntary migrants", as they tend to be called,[21] began entering Jordan in a steady stream, not so much with the intention of settling down in that country, but more in the hope of using Jordan as a transit point for resettlement in one of the countries in the West. Since the embargo made it impossible for Iraqis to travel anywhere by boat or by plane, they could only reach a neighbouring country by road. Jordan proved accessible because of its open borders, fairly good treatment at the hands of the authorities and a well-travelled route towards further emigration. As G. Chatelard argues, Jordan allowed in Iraqi migrants, but deprived them of any valid legal status, encouraging them to move on to some other country of their choice.[22]

As the latest crisis in the region took shape, Jordan began by taking the same line as Kuwait, making it abundantly clear that it would rather not open its borders to any large influx of Iraqis. However, in the opening days of the war, it did set up a few rudimentary camps, once again to receive foreign workers fleeing Iraq.

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[19] N. Van Hear, The impact of the involuntary mass "return" to Jordan in the wake of the Gulf crisis, International Migration Review, vol. 29, no. 2, Summer, 1995, pp. 352–374.
[20] Géraldine Chatelard, op. cit., p. 3.
[21] Ibid., p. 3.
[22] Géraldine Chatelard, op. cit., p. 6.

Later Jordan finalized an agreement with the UN to establish two camps near the borders with Iraq, despite its firm rejection of any mass influx of refugees into the country. The two camps were set up to shelter "under strong security control thousands of Iraqis" who would then have been in the care of UNHCR for everything else required to meet their basic needs.[23]

Jordan's attitude towards Iraqis in need as the outbreak of hostilities approached was in marked contrast to the "semi-protectionist immigration policies"[24] it had pursued in the years preceding the conflict. Involuntary group migration from Iraq involving a steady flow of refugees and asylum-seekers began shortly after the 1991 Kuwait war came to an end. Although the bulk of Iraqis, writes Chatelard, have found refuge in Iran – which was unconditionally liberal in its granting of asylum to both Afghans and Iraqis[25] – Iraq continues to be the second most important country of origin for asylum-seekers in the main industrialised countries (41,000 applications in 2000).[26] It was this latter group which found temporary refuge in Jordan before moving on to a final destination often located somewhere in the richer areas.

Thus, for over a decade, Jordan has tended to serve as Iraq's external border with the rest of the world. Refugees have neither been welcomed in nor turned away – no doubt partly in keeping with what G.M. Arnaout, in a study on the Islamic meaning of asylum, defines as Arab-Islamic traditions of hospitality and assistance to others arising out of the tribal ethos of the desert Arab and the duties enjoined upon the faithful by Islam.[27] But since no legal tools for the protection of the said refugees has been devised by the Jordanian authorities-no status, no family reintegration, no access to work- survival has dictated that they move on to other lands with less rudimentary systems of asylum and assistance in place.

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[23] Arabic News Daily, Jordan agrees to establish two camps for the Iraqi refugees, 2.14.2003.
[24] Géraldine Chatelard, op. cit. p. 1.
[25] B. Rajaee, The politics of refugee policy in post-revolutionary Iran, The Middle East Journal, vol. 54, no. 1, 2000.
[26] Géraldine Chatelard, op. cit., p. 1.
[27] G.M. Arnaout, Asylum in the Arab-Islamic Tradition. International Institute of Humanitarian Law, UNHCR, Geneva, 1987.

3. The Syrian Arab Republic

Syria as we know it today emerged from four centuries of Ottoman government to become a Western mandate under French rule in keeping with the 1916 Sykes-Picot agreement.[28] World War Two gave it the impetus to step up its struggle for independence, and at the end of the war Syria became one of the charter members of the United Nations. In 1948, Syria participated in the war of the Arab nations against the establishment of Israel and shared in the defeat inflicted on the Arabs. One military coup after the other, interspersed with several new constitutions, followed. In 1958, Syria took part in the short-lived experiment of the foundation of a United Arab Republic under the leadership of Egyptian president Gamal Abul Nasser. In 1963, a semblance of stability entered Syrian politics with the coming to power of the left-leaning Baath party headed by Major General Amin el-Hafez. Attempts to unite with Iraq at the time failed. After the Six-Day War against Israel in June 1967, Syria lost control over the Golan Heights in the south-west of the country near the border with Israel. The defeat led to much soul-searching within the Baath party, and a change in leadership. In 1971, a popular referendum voted Defence Minister Hafez al-Assad into power. Syrian politics since then, secular and socialist, have concentrated as much on recovering the lost Golan Heights as keeping control over Lebanon and striking an independent line in its dealings with the West. President Hafez al-Assad died in 2000 and was replaced by his son Bashar al-Assad as head of government.

Syria, a medium-sized Arab country with a population of some 15 million, is not a signatory to the UN Refugees Convention or the 1967 Protocol. Yet, when it comes to Arab refugees or asylum seekers in need of protection, it has in some instances opened its doors in the past, letting in people who had no other place to go. According to USCR, at the end of 2001, Syria hosted more than 397,600 Palestinian refugees and asylum-seekers, representing some 10 percent of all UNRWA-registered displaced persons. About 28 percent of this population was confined to camp life, whereas the others were free to work and settle where they liked and gain access to government services.

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[28] Secret convention (1916), with Russian assent, between Great Britain and France for the dismemberment of the Ottoman Turkish Empire, whereby France acquired, among other things, Syria and Great Britian, Mesopotamia and the Palestinian mandate as their share of the spoils. In: Encyclopaedia Britannica, Ready Reference, Vol. IX, p. 728.

Certain journalists specialised in the question have made a comparison between the fate of Palestinian refugees living in Syria and those in Lebanon, for instance, pointing out that because Beirut "refuses to accept the de facto resettlement of Palestinian refugees in Lebanon, the refugees have never been granted citizenship or residency rights by the Lebanese government."[29] In Syria, on the other hand, says Angela Williams, director of UNRWA in that country, "Palestinians have the same access as Syrians to government services, education, government hospitals and employment. Here they can even purchase one parcel of domestic property for their own use."[30] Although Palestinian refugees in Syria are barred from acquiring citizenship, voting, or acquiring farmland, their integration into Syrian society is remarkably advanced, in keeping with the government's philosophy that "rather than standing in the way of political aspirations, improved living conditions help to build up Palestinians' ability to achieve a final settlement and return home when they are able."[31]

In addition, Syria shelters an estimated half-million long-term internally displaced persons, many of them of Druze origin, expelled from the Golan Heights after Israel captured that area in the 1967 war. 200,000 stateless Kurds, many of them of Turkish origin according to Syrian authorities, and some 40,000 Iraqi nationals complete the present refugee population in the country.

Until then, Syria had refused to submit nationals of Arab countries to any visa requirements. They were allowed to enter and reside on its soil indefinitely without any administrative need to apply for a residence permit. Over the past two years, however, Syrian authorities have tightened their regulations, making residence permits mandatory, although Arab citizens can still travel into the country without obtaining a visa beforehand.[32]

In the latest military crisis in the region in 2003, Syrian authorities, anticipating a mass refugee influx, concentrated on setting up refugee camps in strategic areas such as the border town of Al-Bukamal, with the help of the Syrian Arab Red Crescent (SARC), UN agencies and NGOs such as Oxfam. As things turned out, the preparations proved to be superfluous, since finally only a few foreign workers, many of them Sudanese nationals, fled Iraq during the conflict.

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[29] J. Fecci. Washington Report on Middle East Affairs, Dec. 2002, p. 1.
[30] Ibid., p. 3.
[31] Ibid., p. 3.
[32] USCR: Country Reports: Syria. 2002, pp. 1–3.

Following the outbreak of war in Iraq on 20 March, 2003, Syria responded favourably to a letter sent out by High Commissioner Lubbers to all governments in the countries neighbouring Iraq requesting them to keep their borders open to Iraqi refugees in the event of war. The Syrian government declared it would practice an open-door policy towards all Iraqi nationals and that the latter would receive any temporary protection required.[33] The end of the war, however, found Syria trapped in a dilemma between either living up to its humanitarian promises or giving in to international political pressure. Choosing the latter alternative, Syrian officials replaced their original welcoming stance towards Iraqis by the restrictive one of expulsion pure and simple. The media freely recounted stories of Iraqi refugees being expelled from Syrian camps and being sent back home. The Syrians cited "security concerns" to explain their behaviour. And UNHCR, although expressing understanding for the pressure Syria was facing, still urged the government to carry on giving safe haven to asylum seekers.[34] The UN refugee agency has been working hard towards the finalisation of a Memorandum of Understanding with Syria which will formalise and strengthen cooperation between the UNHCR and the Syrian government. The document has yet to be finalized and signed.[35]

If Jordan can be said to be a semi-protectionist or a semi-restrictive state as regards refugee movements, Syria, by the same token, might be described as being no different, preoccupied as it is to such an extent with its own internal long-standing refugee populations that it has not so far really managed to set up a legal framework for the protection of needy nationals in flight from other countries. Moreover, as the massive displacements following the 1991 Kuwait war demonstrated, Syria's geographical location at some distance from the main routes, and its limited border with Iraq have spared it a heavy burden of masses of needy refugees. But, in the near future, security-related considerations might well prompt the Syrian government to work in closer cooperation with international bodies so that, the next time round, legal instruments will be at hand allowing for a minimum of protection to be extended to needy persons whatever their origin.

[33] UNHCR briefing notes: Liberia, Iraq region, 4.4.2003, p. 2.
[34] Syria expels Iraqi refugees, Ananova, 22 April 2003.
[35] UNHCR, The Middle East, Global Appeal 2005, p. 210.

4. The Kingdom of Saudi Arabia

It has generally been held that Arabia is the original homeland of the Semite peoples, the race to which both Jews and Arabs belong. It was here that in the year 570 AD the Prophet of Islam was born. The religion he established, spurred on by the fervour of its belief, soon conquered the whole of the Arab peninsula and beyond. Some 600 years later in 1269, Arabia was seized by the Mamlukes of Egypt. The House of Saud was founded in the vicinity of today's city of Riyadh in the 15th century. But control over Arabia passed into Ottoman hands in 1517 through the conquest of Egypt. The 18th century saw the rise of the Wahhabi doctrine which soon permeated the House of Saud and their local kingdom of Najd in central Arabia. The years that followed were marked by civil war among various clans and a show of independence towards the Ottoman rulers. Thanks to British support, the Saudi prince Abdul Aziz finally emerged victorious from the struggle and by 1932 the state of Saudi Arabia was proclaimed.

Oil was discovered in 1939 and exploitation of the black gold began almost immediately. During the Second World War, Saudi Arabia sided with the allies and offered a site for a US air base in Dahrain. Saudi Arabia's wealth dates from 1951 when the Arabian American Oil Company (ARAMCO) agreed to concede to the Saudi government 50% of all its earnings from the sale of oil. In 1958, a form of constitutional monarchy, reducing the absolute powers of the king, was introduced. In 1964, Prince Faisal replaced his brother Saud on the throne. He was one of the architects of the oil boycott against Western countries in reprisal for their wholehearted support of Israel during the Yom Kippur war. In 1974, Saudi Arabia took over greater control over Aramco and its revenues. The following year King Faisal was assassinated and replaced first by his brother Khalid, then his half-brother Fahd who devised the policies under which Saudi Arabia still lives today. In 1980, Saudi oil was finally nationalised. The Kuwait war was a blow to the economy of the country, as Saudi Arabia was called upon to finance the presence of hundreds of thousands of foreign troops, mainly American, on Saudi soil. In 1992, further constitutional changes were brought about and a consultative council or shura was set up, along with a bill of rights and clear rules for succession to the throne. Before his death in July 2005, ailing King Fahd was unable to carry out his duties and the country was therefore run by his brother Crown Prince Abdullah who later became the king.

At the end of 2001, the Kingdom of Saudi Arabia was host to about 128,500 refugees and asylum seekers in need of protection. The largest single community was made up of Palestinians – some 123,000 in number – who enjoyed legal status even if they were not formally recognised as refugees by the government of Saudi Arabia. As in the case of many other countries in the region, Saudi Arabia is not a party to the UN Refugee Convention and lacks a procedure or legal framework within the country to determine refugee status. Since September 1998, however, negotiations with UNHCR have led to the establishment of a system enabling the latter to carry out refugee status determinations in the case of individual asylum seekers.[36] Saudi Arabia's most dramatic encounter with a mass refugee influx occurred during the 1991 Kuwait War when over 90,000 Iraqis "sought refuge with coalition forces in the occupied zone of southern Iraq."[37] Of these finally about 33,000 were placed in two camps in Saudi Arabia, Artewiya (for single men) and Rafha (for families and women), both camps finally merging into only one, the Rafha camp, towards the end of 1992. Most of the Iraqi nationals remaining in Saudi Arabia by the end of 2001 were Arab Shiites from the cities and marshes of southern Iraq. Saudi Arabia's attitude towards its refugee population has been tinged with suspicion. Thus, though the government does provide health care and schooling to Rafha inmates, the camp remains a closed, prison-like construction in the midst of a highly militarised zone. Refugees are prohibited from moving about freely. A curfew is enforced night after night and Saudi soldiers patrol the camp in armed vehicles. Prospects of resettlement in some more convenient area have so far come to nothing, so much so that Rafah refugees have often had to resort to demonstrations and hunger strikes to draw attention to their plight.[38]

As regards other foreign nationals on Saudi soil, Saudi Arabia's Basic Law recognises the right to apply for political asylum. The law in question states that "the State will grant political asylum, if the public interest mitigates" in favour of such asylum. No established procedures to adjudicate refugee claims exist and no special agreement on the subject has been reached with the UNHCR.

But the situation of foreigners, among whom must be included the some 123,000 to 290,000 Palestinians resident in the country,

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[36] Ibid., p. 1.
[37] USCR: Country Reports: Saudi Arabia, 2002, p. 1.
[38] Amnesty International, International Law, Saudi Arabia: The forgotten Iraqi refugees in Rafha, 24 February 2003.

is often solved here, as in Kuwait, by having recourse to the notion of an expatriate workforce. People who might be in some danger in their home country, often live and work in Saudi Arabia without gaining recognition as refugees. They enter the country through Saudi sponsors. Saudi employers impound the passports of their foreign workers, thus keeping a check on their movements within the country and their eventual departure from the Kingdom.

In 2003, as the conflict in Iraq could no longer be prevented and concern kept growing about an eventual refugee crisis, UNHCR began looking for places in which to house presumed Iraqi refugees. Most refugees were expected to flee to Iran. As for Saudi Arabia, it came to an agreement with neighbouring Jordan whereby it would provide funds to help that country take in refugees fleeing out of Iraq.[39] Opening its own borders was apparently not an option for Saudi Arabia.

As for achieving fundamental change in the defining institutions governing treatment of refugees and asylum seekers, little headway seems to have been made so far. In its 2001 Global Report, UNHCR reported optimistically: "efforts to promote the Government of Saudi Arabia's accession to the 1951 Refugee Convention yielded results. The newly created Saudi Committee on Accession to the 1951 Convention held several meetings throughout the year and a high profile delegation was sent by the Government to participate in the Ministerial Meetings of State Parties to the 1951 Convention . . . held in Geneva."[40] However, no further mention of the process appeared in the 2002 Report in which UNHCR seemed more inclined to give vent to its frustration over the ongoing Rafah camp conflict between Saudi officials, refugees and the UN agency than to expressing satisfaction over progress made.

5. The Islamic Republic of Iran

The Persian people have occupied the area of the vast Iranian Plateau at least since the early 1st millennium BC. Arab conquest of Iran took place between 630–640 AD after which, Iran became one of the chief centres of Islamic civilization, and extended its

[39] Carrie Abner, Concerns Rise over Potential Displacement in Iraq, Interaction, 24 Mar. 2003.
[40] UNHCR, Global Report 2001, p. 268.

cultural influence into. Various dynasties presided over the destinies of the country, among them the Safavids (1502–1736) who not only established the Iranian national state, but also proclaimed Shiite Islam as the religion of the state. By 1722, however, Iran found itself facing three separate dangers: an occupation originating from Afghanistan, an invasion by the Ottomans and Russian interference. Nadir Shah ascended the throne in 1736 and proceeded to conquer Afghanistan and Delhi. In time, however, Nadir Shah seemed to show signs of growing mental derangement and he was assassinated in 1747. Three more dynasties were to rule Iran thereafter, the Zand in the south (1750–1779), the Qajars (1794–1925) and the Pahlavis (1925–1979).[41]

The history of Iran in modern times was marked in a first phase by skilful manoeuvring between Great Britain and Russia, both desirous of keeping Iran in their own sphere of influence. Oil was another important element in Iran's policies. The oil concession granted to a British company as early as 1901 was finally revoked in 1951 when Iran nationalised its oil industry. In 1979, the revolution took place and the Islamic Republic of Iran was established under the leadership of Imam Khomeini. But the country found itself straightway plunged into war as Iraq mounted its first attacks against its neighbour in a military conflict which was to last for 8 whole years. Since the 1988 cease-fire with Iraq, Iran has concentrated mainly on rebuilding the country economically, although, till today, it has been subjected to a far-reaching US sanctions regime.

Unlike the other countries discussed so far, Iran acceded to the UN Refugee Convention as well as the Protocol as far back as July 1976, although with some reservations. Article 17 of the Convention, in particular, relative to the right to work was not accepted as such by Iran. Thus, recognised refugees with residence permits need to apply for a further work permit before they can be gainfully employed. This practice has often led to abuses. Refugees are often refused a work permit. Or if granted one, their permit is restricted to manual work. The result has been a proliferation of black market activity. To counter this, the government of Iran set up a legal framework, article 48 of the current five-year development plan which was passed in April 2000, empowering the Ministry of the Interior to expel foreigners without work permits whose lives would not be threatened if they were to be returned to their country of origin.

[41] Tore Kjeilen. Encyclopaedia of the Orient. Iran: History.

Furthermore, Iranian authorities decided to apply sanctions to businesses which hired undocumented workers or even went so far as to revoke permits which had already been issued. This crackdown on illegal employment, writes USCR, might have been one of the main reasons why so many Afghans have agreed to voluntary repatriation in recent times,[42] a tendency which was accentuated after the US-led coalition war in Afghanistan.

Notwithstanding Iran's unconcealed desire to see fewer refugees arrive or remain on its territory, it continues to hold the distinction of being the country hosting the largest refugee population in the world. The latest reckoning revealed as many as 2.55 million refugees in Iran for an indigenous population of 65,758,000 persons. The refugees included about 2,355,000 Afghans and 203,000 Iraqis. The ratio of refugees to the population is 1 to 26.[43] Iran has often complained bitterly of the negligible economic assistance it has so far received from the international community to address the needs of the refugees it hosts, but it has not made much headway in bringing about a change of attitude in the richer donor countries.

Yet Iran's attitude towards its many successive waves of refugees has often been one of openness and cooperation. After the upheavals in Afghanistan in 1978–79, for instance, the newly established Islamic republic readily provided asylum to the first wave of refugees from that country, and other later arrivals. The living conditions of all these uprooted people were in no way precarious since, to quote from one of the volumes dealing with refugee plight in the developing world: "In Iran the refugees were located in local residential areas, with the costs largely absorbed by the government."[44] It was only at a much later point in time, in 1983 to be exact, that Tehran turned to the outside world for some financial assistance in maintaining its refugee population. With the help of UNHCR, a modest international programme was then set up. Finally, in 1986 UNHCR opened offices in the Islamic Republic run by a small resident staff.

Stimulating international funding for Iran's refugee commitments has often proved a Herculean task, in spite of the fact that everyone agrees that "Iran continues to host the world's largest refugee

[42] USCR: Country Reports: Iran, 2002, p. 3.
[43] New Internationalist 350, Oct. 2002.
[44] Aristide R. Zolberg, Astri Suhrke, Sergio Aguayo. Escape from Violence. Conflict and the Refugee Crisis in the Developing World. Oxford University Press, 1989, p. 153.

population."[45] The absence of sufficient funding was perhaps also one of the reasons why no legal framework was devised by Iranian authorities to allow full-scale operations by international and national NGOs within the country. As the Iranian Ministry of the Interior's Bureau for Aliens and Foreign Immigrant Affairs (BAFIA) constantly pointed out: any self-financed activities on the part of NGO's were more than welcome. But money was too short for Iran to encourage UNHCR funding to be channelled in part through various NGOs.[46]

But however pressing the need to discover new financial sources to cover the needs of all, until the mid-90s the government of Iran made no distinction between Iranian citizens and foreign refugees. The services they provided such as education, health- care and food rations were open to all, including refugees, both registered and unregistered.[47] This may prove to be all the more remarkable when we note that Iranians themselves have suffered enormously, especially during the war with Iraq when shortage of food and other elementary basic goods took its toll on society. Although, officially, Iranian authorities spoke out against local integration as a lasting solution for refugees, leaning instead towards promoting large-scale voluntary repatriation whenever feasible, allowing refugees to live in close contact with the population of the country rather than isolating them seemed to be the cornerstone of Iran's refugee policy. In keeping with this policy fewer than 5 percent of Iran's 2.55 million refugees lived in 29 camps. Afghans and Iraqis were spread throughout the country, but in largest numbers in the provinces bordering their respective countries and in the capital city of Tehran.

No sooner had the flow of Afghan refugees fleeing the conflict with the forces of the Soviet Union begun to lessen, than thousands of Afghans sought shelter in Iran again, this time running away from the civil war that raged in Afghanistan for years on end. By the time the Americans decided to attack Afghanistan following the events of September 11, 2001, Iran made it clear it would not tolerate a further refugee wave into Iran. Nonetheless, many Afghans did make it across the border to the Iranian towns of Zahedan and Zabol where they were taken in by relatives living in Iran since earlier Soviet times.[48] Medical teams visiting families discovered

[45] UNHCR 2001 Global Appeal. Islamic Republic of Iran in short, p. 151.
[46] Ibid., p. 151.
[47] USCR: Country Reports: Iran, 2002, p. 2.
[48] Jonathan Steele, Refugees: Iran battles invisible crisis alone, The Guardian, 11.8.2001.

many of these illegal entrants who were not registered with any of the health clinics. But in view of the gravity of the situation, Iranians turned a blind eye to this flouting of the law and gave people in need treatment anyway.

For others, trapped in Afghanistan with no way out, Iranian authorities, remembering how they had come to the assistance of Tajiks and Azeris in flight from life-threatening situations in their own countries, concluded an agreement with the then-ruling Taliban, thereby allowing the Iranian Red Crescent to set up tents in the inhospitable desert on the Afghan side of the border. The Makaki camp, one of the two Iranian camps in the area, therefore got underway. Iranian officials provided shelter and food for the desperate refugees; water was also piped in from Iranian territory and electricity generated from machines brought over from Iran.[49] In addition, a small clinic started work screening refugees for tuberculosis, cholera and malaria. Though the number of refugees increased rapidly to reach approximately 50,000, UNHCR, evoking technicalities of various kinds, gave "no help to the flood of new Afghan arrivals."[50] This and similar bitter experiences made it even harder for the Islamic Republic of Iran to carry on undeterred with the generous policy of acceptance towards refugees it had displayed in the beginning.

The way Iran served as a safe haven for Iraqi refugees, whether in the north for the Kurds or in the south for Shiites, has already been discussed in detail in part A of this chapter. In 1991, at the height of the Iraqi refugee crisis following the war in Kuwait, Iran offered shelter to about 5 million refugees. These numbers diminished as over 2.5 million, among them 1.2 million Iraqi Kurds, returned to their countries of origin. As for the crisis in Azerbaijan, Iranian authorities chose to help Azeris inside their homeland rather than let them into Iran. In the words of Ahmad Hosseini, director general for expatriate and refugee affairs at the Interior Ministry of Iran: "We settled a total of 50,000 Azeri refugees in 8 camps erected by the Red Crescent Society in areas such as Imishi, Saatlou and Saberlou inside the Republic of Azerbaijan, 5 km from the joint border. Thus, we prevented the rush of refugees to our country."[51]

The creeping changes occurring in the initial goodwill shown towards refugees has something to do with Iran's economic situation,

[49] Jonathan Steele, Ibid.
[50] Ibid.
[51] International Relations, Social, Cultural, Economic Monthly, May–June, 1995, vol. 1. no. 1, p. 69.

weakened as it is by years of sanctions, with oil prices held at the lowest levels, and a downturn in 1998. Iran has also noted time and time again that the international community, often co-responsible for starting refugee crises in the area, promised a great deal and delivered but little. In fact, as Iranian Director for Refugee Affairs neatly pointed out in one interview, although the West greatly fears that Third World refugees might migrate to their own countries, they still have not begun doing enough to share the cost of keeping such refugees alive and well and on the way to achieving some form of financial autonomy through, for example, education or vocational training.[52]

Iran's constant involvement in large-scale refugee movements is, of course, very much linked to its geographical location, since it serves as a natural zone of shelter for two very troubled countries, namely Afghanistan and Iraq, not to mention the Central Asian Republics. At periodic intervals it has thus been forced to cope with wave upon wave of refugees from one or the other of these places, a state of affairs which has no doubt resulted in a sense of "host country fatigue". After the first euphoria of coming to the help of thousands of starving, homeless people, a more sober assessment revealed that taking in refugees also means sharing basic amenities, often in short supply, such as water and electricity. Or, as neighbouring Pakistan discovered to its cost, refugees can also turn into a destabilising factor for the population in general. Petty crime, smuggling, drugs, all these and more are part and parcel of the refugee problem.

For all these reasons, coupled with little response to the idea of international burden-sharing, Iran gradually began tightening its laws relative to asylum-seeking, and implementing a series of measures aimed at lessening the refugee burden.

In 2001, the Iranian Bureau for Aliens and Foreign Immigrants Affairs (BAFIA) began registering all foreigners, documented or undocumented, living in the country. The registration was carried out in two phases, the first in February, the second in April–May in 250 centres throughout the country. On the basis of this, all registered foreigners were issued with certificates, redefining their legal status and, for a given period of time, allowing them protection from any attempt at arbitrary deportation.

Voluntary repatriation is the cornerstone on which Iran, with a population of its own of about 66 million, has sought to base its

[52] Ibid., p. 70.

present policy towards its refugee population. The Iranian BAFIA, working in close cooperation with the UNHCR, launched a joint repatriation programme, particularly for the Afghan refugees. In the years 2000 and 2001 this led to a considerable number of voluntary returns to their country of origin. After the changes in Kabul, repatriation was accelerated and by the spring of 2002 some 400,000 Afghans had begun to return home.

Iranian authorities accorded the same easy-going treatment to Iraqi refugees in Iran as they did to the Afghans. No restrictions were put on their place of residence, although most Iraqi Shiite Arabs tended to settle along the south-western border of Iran, whereas Iraqi Kurds congregated more readily in the northwest part of the country. The majority of Iraqi refugees in Iran have been living there since the 1980s.

In 1999, the Iraqi Government had already issued a decree exempting from prosecution Iraqi nationals who had left the country illegally. Then, in 2001, the governments of Iran and Iraq were able directly to sign an agreement facilitating the voluntary repatriation of refugees in both countries. The UNHCR, on the other hand, did not express great enthusiasm for the scheme, warning repatriation candidates that it could neither monitor nor guarantee their safety after their return, one of the reasons which perhaps explains the low number of people, whether Kurds or Shiites, who took advantage of this opportunity to return to Iraq.

In spite of the various changes Iranian refugee policy has undergone over the years, it continues to provide an interesting model of what a country with limited resources can nonetheless do for suffering humanity if driven by moral considerations. Even Americans, who have little time for the Islamic Republic otherwise, have been struck by the fairness with which Iran has so far managed to treat its refugee population. Thus William F. Schulz, writing in the magazine "The American Prospect" has these words of praise for Iranian treatment of Afghans, as compared to the treatment Pakistani authorities meted out to them: "In Iran, by contrast, the refugees have been permitted to live among the Iranian population and even find employment or pursue education."[53] And journalist John Daniszewski in a Los Angeles Times article paid this tribute to the efforts made by Iran to stand by its many refugees: "Which country is the most magnanimous toward refugees? Not

[53] William F. Schulz, Justice for Refugees, The American Prospect vol. 13 no. 1, January 1–14, 2002.

Sweden, Canada or Switzerland. Although not generally regarded in the West as a charitable country, Iran for most of the last two decades has provided haven to more refugees than any other nation. Afghans, Tajiks, Azeris and Iraqi Arabs and Kurds have sought shelter here, escaping civil war, insecurity and oppression in their homelands. In most cases, the refugees are not sequestered in camps but are allowed to live and work alongside Iranians. Many attend schools, and a few even attend universities."[54]

As regards the 2003 war on Iraq, preparations for a possible influx of refugees into Iran began as early as March 2002.[55] Tens of thousands of tents and blankets were moved to western Iran to meet the challenge of a huge wave of Iraqi refugees. Contingency plans were carefully laid. UN stocks, meant for refugees from Afghanistan, were removed from south-eastern Iran and transported to areas near the Iraqi border. Iran, reluctant at first to let in refugees at all, finally changed its mind and agreed to open the door.

In fact, it began actively to prepare for incoming refugees, setting up 10 camps along the border with a capacity for taking in some 20,000 people per camp. One official described Iranian policy in this conflict in the following terms: "Our policy is the complete closure of borders with Iraq . . . but if the lives of Iraqis are really in danger, we have plans to set up camps" for them on the border between the two countries. Iran, he added, had not allocated any particular budget to help potential refugees, but "was ready to facilitate the work of humanitarian organizations and transit international aid across the Iranian border to displaced Iraqis and refugees."[56]

The British relief agency Oxfam went even further and claimed that Iran would have to host anything up to 90,000 refugees from the war on Iraq. Oxfam also pointed out that, since two million refugees from Afghanistan and 450,000 Iraqis were already living in the Iran, to add to that heavy refugee burden "the Iranian government will need full international assistance to cope with a further humanitarian crisis."[57]

Into the third week of the invasion of Iraq, however, UNHCR confirmed that no Iraqi refugees had begun entering Iran, though

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[54] John Daniszewski, Refugees find new home in "outlaw" Iran, Los Angeles Time, 13 Dec. 1998.
[55] UN Helps Iran Plan for Flood of Refugees. The Guardian, March 16, 2002.
[56] Iran prepares for 200,000 refugees from Iraq in 10 camps, Relief Web, AFO, 26.1.03.
[57] Ibid.

a small population movement within Kurdish-controlled northern Iraq had been seen round the town of Penjwin.[58] After the fall of Basra and Baghdad, however, with looting and plundering going on unchecked, Iraqi refugees began to be sighted near border areas. UNHCR spoke of some 30,000 refugees near the Iraqi town of Badrah who had fled from the unrest in Baghdad and Nassiriyah. Iranian authorities, fearing the possibility of up to 100,000 gathering in that area, sent over food, water and medicine from their own stocks. The Iranian refugee bureau BAFIA set up 10 tent camps in the area to receive any flood of displaced people that might roll in.[59]

For Iran, struggling hard to meet its international commitments regarding refugee protection, the lack of coordination and legal safeguards on the part of its various neighbours can only prove a frustrating experience. Added to this is the fact that any cost/benefit calculations involving assistance from the international humanitarian community usually finds Iran ending up on the losing side.

Nonetheless, over the years, its long borders with Iraq and the existence of the main Iraqi population centres in close proximity have turned Iran into a natural safety zone for all population outflows out of trouble-prone Iraq. For whatever the disadvantages involved in hosting large number of refugees, Iran has been consistent. Culturally, it has remained true to its tradition of hospitality which one UN report aptly describes as "de facto asylum"[60] for the refugees, affording them basic social services and a high degree of tolerance from the surrounding population. Legally, it is bound by the provisions of the Refugee Convention and the protocol which Iran has adhered to.

6. Republic of Turkey

The Ottoman Empire was a major Muslim power that, from the 13th and 14th centuries onward, slowly brought under its control south-eastern Europe, the Middle East and North Africa. The disintegration of the Empire and the Sunni Caliphate had set in by the time World War I was being fought in Europe. Decline was

[58] Irannews.Org, Iran: No Iraqi refugees reported, says UNHCR, 7 April 2003
[59] APA, 11.4.2003: 30,000 Iraqi Refugees at the Iranian border.
[60] Summary of UNHCR's operations in CASAWANAME, 5–7 March 2002, p. 2.

gradual as, with the assistance of the colonial powers, one after the other Ottoman possessions broke away, forming separate States. The Young Turk Revolution (1908) tried to revitalize the remaining parts of the Empire, but to no avail, as military and territorial losses continued to grow.

In 1923, a new Turkish republic was proclaimed and Mustafa Kemal became its first president. Kemal defined the new state as a secular republic, based on the indirect expression of the will of the people. His stated aims were to build up a new feeling of Turkish nationalism and to run an economy under government supervision. Under Kemal's moderate political leadership, based on European ideals, Turkey made significant economic progress, achieving impressive growth figures. Moreover, it took giant strides towards being considered a European state. In the Second World War, Turkey was careful to remain neutral, but it did join the Allies in 1945, establishing the special US-Turkey relationship which is still in existence today.

In 1952, Turkey became a member of NATO. The 50s were marked by conflict with Greece over the Cyprus question. In 1964, Turkey became an associate member of the EEC (now EU). In 1974, Turkey occupied the northern part of Cyprus. Between 1980 and 1989, Turkey was under direct control of the military, although general elections brought civilian prime ministers to power, first Turgut Ozal and then Tansu Ciller. Turkey's Islamic Welfare Party under Necmettin Erbekan won the 1995 elections, but the military soon found ways of forcing Erbekan to resign. After a series of short-lived governments, Turkey has now a new Islamic party leader, Tayop Erdogan of whom the people have high hopes that he will manage to find a solution to the long-lasting economic problems of the country and lead Turkey into the EU. Turkey's recent past has been marred by long violent military clashes between the Turkish army and the militant separatist Kurdish PKK party, clashes which slowly began to die out after the capture and trial of PKK chief Abdullah Ocalan.[61]

Turkey is another big Western Asian country with a population size similar to that of Iran. But as far as refugee hosting goes, it lags far behind. Its asylum policy is extremely restrictive, and notwithstanding its location in a crisis-prone area of the world, Turkey's refugee intake is comparable with that of Western countries rather than with any of its Asian neighbours.

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[61] Tore Tjeilan. Encyclopaedia of the Orient, Turkey: History. 1996–2003.

Thus, in 2001 the USCR reported that, Turkey hosted about 12,600 refugees and asylum seekers, of these, 3,400 persons had been granted the status of recognized refugees (2,650 Iranians, 565 Iraqis and 185 others); 3,400 cases were still pending. Added to this were some 5,500 Macedonians out of a total of 8,000, most of them ethnic Albanians, who had reached Turkey in safety from the ongoing fighting in their country during the year, the others having decided to return home as the year came to an end. About 300 Bosnian and Kosovar refugees completed the estimated refugee population in Turkey for the period in question.

Apart from this official group, there were no doubt other foreigners residing in Turkey in 2001 on grounds of political persecution in their countries of origin without invoking such a cause. As USCR writes: "Either because they did not meet procedural requirements or because they feared rejection of their claims and subsequent deportation, many would-be asylum seekers preferred to remain in hiding, to renew non-immigrant visas, or to move on to third countries, rather than come forward with refugee claims."[62]

In Turkey, the UNHCR works under a special mandate which includes status-determination procedures and automatic resettlement to third countries for any candidates who manage to get themselves recognised as *bona fide* refugees.

If Turkey as a rule has refused to have much to do with refugee crises generated by the outside world, within the country itself it faces a large-scale problem of internal displacement. Armed conflict between the Turkish military and the Kurdish Workers party (PKK) not only took countless lives. Up to as many as one million Turkish citizens, Kurds for the most part, moved from one area to another of the country over the past few years, either out of choice or necessity.

Apologists for Turkey's treatment of its Kurdish citizens tend to insist on the complexity of Kurdish demography, pointing out that a large number of Kurds live outside their traditional Kurdish areas because of migration to western parts of the country and that the degree of assimilation into the Turkish society through intermarriages, for instance, makes it difficult to determine who is a Kurd and who not.[63] It is believed that the number of Kurds in Turkey is around 13 million; that is to say Kurds constitute some 19 per cent of the population in Turkey given that its present total is

[62] Ibid., p. 1.
[63] K. Kirisci: Humanitarian Intervention, p. 6.

around 64,000,000. The areas traditionally inhabited by Kurds are at times indistinguishable from those populated by Turkish, Turkomen, Assyrian and other ethnic communities. Former Turkish president Turgut Ozal once even went so far as to say that over 60 to 65% of Kurds lived outside south-eastern Anatolia and 20 to 25% were to be found in Istanbul.[64]

Turkish nationals also continued to apply for asylum in European countries. In 2001, their numbers were estimated at 30,100. Moreover 13.100 Turkish refugees, again no doubt of Kurdish origin, were also to be found in Iraq during this period.[65]

Turkey's problem with internal displacement following years of civil strife has been interpreted differently by Turkish authorities and local NGOs. Whereas the former deny that any such problem exists, arguing that departures from the south-eastern province of the country are based on economic motives, the latter insist that as many as 3 million Kurds have been forcibly relocated, and efforts to return have not exactly been encouraged by the government. What seems to be certain is that "urban populations have grown dramatically throughout the country in recent years."[66] Kurds are not the only people to charge the Turkish government with practising measures of ethnic cleansing. Turkey has also attracted international blame for its handling of the Cyprus situation which it invaded in 1974, claiming that the lives of Turkish Cypriots were at a risk. Greek Cypriots have often accused Turkey of displacing some 200,000 of their people (over 1/3 of the total population of Cyprus) and turning them into refugees within their own country, a charge that Turkish authorities have usually dismissed as without foundation.[67]

Turkey is a signatory to the 1951 UN Refugee Convention. But as we have already had occasion to point out in connection with the 1991 flight of Kurdish refugees out of Iraq, Turkey's adherence is based on the qualifying clause contained in that document linking refugee recognition to events occurring in Europe. In other words, in the eyes of the law, the Turkish government recognises only Europeans as refugees, non-Europeans wishing to acquire refugee status, being non-starters from the outset. In July 1968, Turkey ratified the 1967 Protocol Relating to the Status of Refugees,

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[64] Assembly of the Western European Union, 38th ordinary session, Doc. 1341, Turkey (6 Nov. 1992).
[65] USCR, Country information: Turkey 2002, p. 2.
[66] Ibid., p. 2.
[67] Cyprus action, 2001/2002 HEC and Argyros Argyrou, p. 1.

but if it agreed to lift the time limitation, it insisted on maintaining the geographical clause, the only country to continue doing so, apart from Monaco.[68]

In 1994, Turkish refugee regulations were nonetheless modified to include a new category, that of asylum seeker. The problem is the special distinction between a "refugee" and an "asylum seeker" which is in Turkey based wholly on whether the candidate for refugee status is European in origin or not, that is to say on racial considerations. We will discuss later how consistent this categorization is with the modern requirements of public international law. In fact, "regarding non-Europeans, Turkey is under international law tied only to the *non-refoulement* principle"[69] which seems already to be an integral part of Customary International Law.[70]

Non-European asylum seekers are submitted to a protracted and complicated process of registration at the UNHCR offices in Ankara, or in border areas, followed by a visit to the local police station which then sends on the case to the Ministry of the Interior, whence the claim is forwarded to the Ministry of Foreign Affairs which finally makes a decision. All claimants seeking asylum in Turkey are submitted to a 10–day deadline to file their case with the appropriate authorities. If granted "temporary asylum seeker status" a non-European asylum candidate is then given a six-month residence permit and turned over to UNHCR offices for third-country resettlement. In the light of this unique status-determination procedure, based on racial grounds and individual examination, it is obvious that in times of mass influx or staggering refugee movements – the Kurdish exodus of 1991 when some 450,000 Iraqi Kurds came to the Turkish border to be met with non-admittance is a case in point – Turkey has been unable to prove a reliable partner when it comes to handling and overcoming crisis situations. However, during the Bosnian and Kosovo war it did make a commendable effort to forego bureaucracy at the height of the crisis and take in refugees from the Balkans, without waste of time or reference to national laws which tend to paralyse rather than facilitate action.[71]

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[68] Kemal Kirisci, UNHCR and Turkey: Nudging Turkey towards a better implementation of the 1951 Convention, 8–11 January 2001, p. 4.

[69] Flüchtingsrat. Zeitschrift für Flüchtlingspolitik in Nierdersachsen, Heft 77, June 2001, p. 6.

[70] San Remo Declaration on the Principle of Non-Refoulement (Finding of the Council of the International Institute of Humanitarian Law), San Remo, 8 Sept. 2001.

[71] CISNEWS: Turkey 1st Muslim country to accept Kosovo Refugees, 8.4.1999.

The restrictive measures applied by Turkish authorities to asylum-seekers, including some annually documented cases of *refoulement*, also serve the purpose of keeping out would-be migrants from the EU and other European countries. Thus, in 2001, for instance, the government reported that Turkish officials had apprehended and turned away some 94,000 people coming from countries like Iraq, Iran, Pakistan, Afghanistan and Bangladesh on the grounds that they were not in a position to produce proper documentation.[72]

Turkey's deportation policy is based on the return of unacceptable foreigners, whatever their country of origin might be, to bordering countries. No guarantee of asylum by these third countries is part of the deal so that they too can continue the deportation process by sending back foreigners from wherever they were fleeing. Turkey has also signed readmission or multilateral agreements with various countries allowing it to carry out deportations with the maximum of facility.[73] Under the terms of such agreements, Turkish authorities have the possibility to return so-called illegal migrants to Greece or Syria. Or, as in the case of Iraqi asylum seekers whose case have been rejected in countries such as Switzerland, the Netherlands or Sweden, Turkey provides safe passage for repatriation of these Iraqis to northern Iraq, repatriation which takes place in close cooperation with the International Organisation of Migration. Similar border-control and repatriation measures are under discussion with the European Union as a whole.

Restrictive policies as regards citizenship have also plagued modern Turkey as it emerged from the ruins of the Ottoman Empire to become a state, with only a fraction of the territory it originally possessed at its disposal. The Turkish Law of Settlement no. 2510 going back to the year 1934 – which has sometimes been taxed as being politically motivated with the aim of turning Anatolia into a purely Turkish entity – stipulates that only people of ethnic Turkish descent and culture are entitled to immigrate and settle in Turkey and receive citizenship. Critics claim it is this Law of Settlement which provides the legal basis for the forced migrations which have come to play such a central role in connection with the Kurdish question. Those benefiting from this law in the first place happen to be the Turks of the Caucasus, the Balkans and Asia. Moreover, Muslim Albanians, Bosnians and Bulgarians are also entitled to special treatment under the law, followed by Central Asian nation-

[72] USCR: Country Report: Turkey, 2002, p. 5.
[73] Ibid., p. 6.

alities such as Kazakhs, Khirghizes, Uzbeks, Turkmen, Uigurs, Azeri Iranians and Turkomens from Northern Iraq. Of the aforementioned, only the Bulgarian Muslims of Turkish origin settled down in Turkey in two large migratory waves, one occurring in 1950, the other in 1989.

In 2001, with a view to turning its legislation into something more visibly EU-compatible, the Turkish government undertook some modification of its existing refugee laws. This latest effort at modernisation, known as the National Proposal states that Turkey will be willing to lift its geographical reservation on refugees, provided that EU countries show the "necessary sensitivity in burden sharing and required legislation and infrastructural changes are performed in a manner that this situation shall not encourage a mass influx".[74]

On the ground, the hospitality Turkish authorities have extended to persons in need of protection has not been of a very high standard. Most non-European refugees and asylum seekers are concentrated in two areas – Ankara and its satellite towns, and in Van and Agri close to the Iranian border. Some material help is forthcoming from a Turkish NGO ASAM but, as a rule, neither the UNHCR nor the Turkish government provide for the upkeep of this highly distressed section of the population. According to USCR "the overwhelming majority of asylum seekers and refugees did not receive accommodation or assistance . . . Most were destitute, living on the margins of Turkish society."[75] Those who find accommodation in and around Ankara usually live in slums along with many internally displaced persons. Refugees and asylum seekers are not permitted to work, but their children are allowed to attend primary school.

As preparations for the allied invasion of Iraq got underway, Turkey, too, began laying contingency plans for a possible refugee crisis. Before the bombing of Iraq began the president of the Turkish Red Crescent said: "We cannot estimate the size of the crisis. But we proposed our plans to the government and announced that we can meet the needs of almost 100,000 people as the Turkish Red Crescent. We also said we need $50 million for 80,000 people per month."[76] A similar demand for money and supplies was addressed

[74] Flüchtlingsrat. Zeitschrift für Flüchtlingspolitik in Niedersachsen. Heft 77, June 2001, p. 12.
[75] USCR: Country information: Turkey, 2002, p. 7.
[76] UNHCR. Ambiguity over Turkey's refugee crisis preparations, 19 Jan. 2003, p. 1.

by Turkish authorities to UNHCR officials so that no repeat performance of the 1991 Kurdish crisis took place. As Gonen put it: "We are not able to define the cost of the 1991 crisis. But the main lesson that we derived from the 1991 crisis is that we will not give this service free this time, even though this is humanitarian aid. We want our cooperation with the U.N. to be realistic."[77]

Throughout its pre-war preparations, Turkey, like the other neighbouring countries of Iraq, concentrated on organising relief inside northern Iraq so that refugees did not feel impelled to enter Turkey territory. This included the setting up of 12 camps on Iraqi territory and a further 6, two kilometres inside the Turkish border in case of any overflow from the Iraqi camps. It was expected that the UNHCR would ship food, tents and heating equipment to Turkey along with other countries bordering Iraq. The UN World Food Programme was reportedly stockpiling enough food in the area to feed 900,000 refugees for a month.

Turkey did not hide the fact that it was concerned that Turkish Kurdish rebels who waged a 15-year war for autonomy in south-eastern Turkey might try and hide among the refugees to slip into Turkey. In order to prevent such a thing from occurring, Turkish officials said that all refugees would be searched, registered and given temporary identification papers.[78] Thousands of Turkish Kurdish rebels are believed to be living in northern Iraq.

As the war on Iraq quickly came to an end, the expected refugee influx failed to materialise, thus relieving Turkey of the economic and security-related concerns it had felt at the start of the war.

Turkey's policies towards refugees and asylum-seekers have often been identified with inflexibility, something which can be traced back as much to its initial geographical reservation to the 1951 Convention as to its overriding national security considerations regarding any influx on the part of the Kurds of Iraq or other undesirable elements. However, in the context of its candidacy for EU membership, Turkey has begun to show signs of relenting, going so far as to express a conditional commitment to lifting the geographical clause in its adherence to the 1951 Convention,[79] seem-

[77] Ibid., p. 2.
[78] UNHCR, Turkey prepares for possible Iraqi refugee flight, 5.2.2003, p. 1.
[79] UNHCR Mid-Year Progress Report 2001, p. 223.

ing finally to come to terms with the realisation that "international law does bring restrictions to state freedom."[80]

The root of the problem, however, lies in Turkey's European ambitions, which might succeed at the cost of its neighbours elsewhere in Asia. If Turkey does become an ideal implementer of the 1951 Convention and, at the same time, a full EU member, it will be expected to intensify its role as a buffer state between EU countries and the rest of Asia. Over recent years, through such instruments as the Schengen Treaty or the Dublin Convention, EU asylum policy has begun to concentrate more and more on border control and deterring unwanted asylum claimants from entering European territory. Turkey, situated at the outer edge of Europe, will come under increasing pressure to tighten its control procedures and legislation, creating such a situation that, ironically enough, Turkey's asylum and refugee policies of today, however exclusionary, might well appear liberal and permissive compared to the "fortress Europe"[81] methods it might be forced to adopt some time in the not so distant future.

7. Overall Assessment

As we wind up our review of the role played by Iraq's neighbouring states in coping with refugee problems, the most striking feature to emerge is the diversity of responses we have been able to trace in the six countries exposed to an influx of Iraqis in flight. The following comparative table may give some idea of how the neighbouring countries of Iraq approach the refugee question under international or domestic law.

[80] Kemal Kirisci, UNHCR and Turkey: Nudging Turkey towards a better implementation of the 1951 Convention on the Status of refugees, Working paper, 8–11 January 1921, p. 27.

[81] N.A. Abell, The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees, International Journal of Refugee Law, Vol. 11, No. 1, 1999.

LEGAL OBLIGATIONS ASSUMED BY THE SIX COUNTRIES NEIGHBOURING IRAQ

Country	1951 Convention	1967 Protocol	1949 Geneva Conventions	Additional Protocols I & II	National Laws
Iran	28 Jul. 1976	28 Jul. 1976	20 Feb. 1957	–	Local. Legislation
Jordan	–	–	29 May 1951	I & II	1998 MOU
Kuwait	–	–	2 Sept. 1967	I & II	1996 MOU
Saudi Arabia	–	–	18 May 1963	I & II	Case-by-case
Syria	–	–	2 Nov. 1953	I only	Case-by-case
Turkey	30 Mar. 1962	31 Jul. 1968*	10 Feb. 1954	Neither	Local. Legislation

* With geographic limitation

Six countries, six responses and more often uncoordinated action each time a crisis occurs lead to an overall picture which inspires little confidence for the successful handling of future crises. This conspicuous absence of any unified pattern of behaviour on the part of the main regional players adds to the urgency of imposing some degree of uniformity in guaranteeing the elementary rights of refugees, individually or in their masses. The need to respect a set of basic principles and laws in the treatment of refugees therefore stands out as one of the major tasks facing the neighbours of Iraq and the larger humanitarian community.

It is incumbent on the countries located in this highly troubled region to coordinate their divergent policies when it comes to applying the international protection regime for refugees. Governments displaying evasiveness vis-à-vis refugee movements as much in their political will as in their legal undertakings, responsiveness to the world, and their sense of responsibility towards the UNHCR and relief agencies need to be relied upon in times of crisis to deal with the myriad problems and untold suffering that a situation of mass influx brings in its wake. It is a fact that lack of solidarity and burden-sharing on the part of the receiving countries is detrimental to the international cause of protection of refugees. It represents a challenge to the *raison d'être* of the entirety of refugee law.

If we turn now to the reasons why the countries of asylum in the region differ so much from one another in our evaluation, a variety of factors come to mind. Explanations must be sought as much in the geographical aspects involved as in the economic, cultural and legal areas.

To sum up, Kuwait and Saudi Arabia, the two economically strongest regional players in the group surrounding Iraq, practise the most restrictive policies towards refugees, preferring to take in nationals from other countries according to the needs of the labour market rather than as an uncontrolled influx. Their legal tools for dealing with refugee cases are of an elementary nature. They can be said to be adherents of the closed-door approach to people on the move while being flexible under certain circumstances for financial help outside their territory.

The Hashemite Kingdom of Jordan, geographically of vital importance to Iraq, especially during the years of embargo, hosts, like Syria, a massive Palestinian population of its own, although generally considered as an integral part of its own population. It has little inclination or resources to devote to the needs of other nationality groups, particularly as refugees. Few instruments for the protection of foreigners stranded in the country have been legislated so far. Jordan has been best served over the years by developing into a point of transit for refugees and forced migrants, towards whom it has adopted largely semi-protectionist policies.

The Syrian Arab Republic, somewhat remote from the usual route Iraqi refugee movements have taken, has little or no legislation to cover the needs of refugees, except in connection with the Palestinians and the internally displaced Druze population. Syria's refugee policies can be safely placed in the semi-restrictive category.

Iran is the country with the longest border with Iraq. It has the most complete set of legislation at its disposal for the protection of refugees, and there has been an openness in the attitude of the local community as well as the government to absorbing needy refugees driven to its borders. Iran's policies towards refugees fit the description of cooperative and liberally permissive.

Turkey, on the other hand, with a comparable border area in common with Iraq, has a highly restrictive approach to legal instruments devised to protect refugees. Anti-refugee sentiments often dominate public opinion, not a surprising development in a population which has been exposed to years of civil war. Turkey's policies towards Iraqi refugees can best be described as tending to exclusionism.

Demographically speaking, among the neighbouring countries of Iraq, Iran with an indigenous population of nearly 66 million people leads the way, with Turkey coming a close second. Nonetheless, whereas the former offers shelter to over two million refugees by the latest reckoning,[82] the latter accounts for fewer than 13,000

[82] UNHCR. Global Report 2002, p. 301.

recognised refugees and asylum seekers. The following table gives some idea of differences between the various regional countries in the ratio of their local population to their refugee figures:

Country	Population	Total of Persons of Concern
Kuwait	1,811,000	50,000
Saudi Arabia	20,181,000	128,500
Jordan	6,304,000	1,640,000
Syria	15,333,000	397,600
Iran	65,758,000	2,550,000
Turkey	64,479,000	12,600[83]

The supposition one might have formulated that the bigger the local population, the more generous the response to those involuntarily in trouble and forced to flee, is not borne out by the above breakdown. Rather, it would appear that the size of the local population and the refugee population size are not linked in any conclusive manner. Furthermore, it must once again be pointed out that both Jordan and Syria include long-term Palestinian residents or citizens with Palestinian origin in the figures they provide for the number of refugees they are currently housing.

If we now look at the funding that the international community provides to the regional parties, then their contribution to sharing the burden of meeting refugee needs allows one to draw more interesting conclusions on the functionality of the existing international mechanisms for assisting countries exposed to refugees.

Country	Total Refugees	Total Funding in US$
Iran	2,550,000	29,401,040
Jordan	1,640,000	1,539,623
Kuwait	50,000	nil
Saudi Arabia	128,500	1,964,217
Syria	397,600	2,073,649[84]
Turkey	12,600	6,106,541[85]

As regards Jordan and Syria, whose refugee population contains an overwhelmingly Palestinian component, to the figures indicated above must be added annual payments by UNRWA to the tune of

[83] USCR: Country Reports 2002: Syria, Kuwait, Jordan, Turkey, Iran, Saudi Arabia.
[84] UNHCR Global Report 2002, pp. 285 & 301
[85] UNHCR Mid-Year Progress Report 2002, p. 213.

US$ 143,831,000 for Jordan and US$ 53,026,000 for Syria[86] as well other sums supplied by various NGOs like the ICRC, for instance. If oil-rich Kuwait appears to be self-funding at times, all the other states receive some form of aid from the international community. In a few cases, there seems to be an inexplicable gap between the amount of funding allocated and the total of the refugee population in need of assistance. Thus, though Saudi Arabia, Syria and Turkey seem to be treated with a certain degree of generosity, a rough calculation brings to light an incredibly paltry US$ 15 per year per refugee for Iran. Yet it is Iran that takes in more refugees than any of its neighbours each time the need arises. The government in place in that country, recognizes it is duty-bound to come to the assistance of people in flight as a full signatory to the refugee conventions – the only one among the regional states.

To conclude it should be reemphasized that there is noticeably no unified pattern of behaviour, or even perceived obligation, on the part of the regional players that are so implicated in the process of international protection of refugees in one of the most troubled regions. They are divergent and some even evasive vis-à-vis refugees, through their political will, legal undertakings, responsiveness to the world, and the sense of liability to the UNHCR. On the other hand, the international community's treatment of these regional players is viewed as being discriminatory, inconsistent and non-rewarding. It essentially comes short of continued burden-sharing and a shared sense of obligation. This represents a challenge to the protection regime that the international community needs for refugees.

[86] UNWRA PROGRAMME BUDGET FOR 2002–2003, p. 13.

C. Existing Humanitarian Challenges in the Region

Between October 2001 and May 2003, the United States and Britain, along with several of their allies, invaded two separate countries, Afghanistan first, then Iraq on the grounds that the former was harbouring and encouraging terrorism and the latter was doing not only that, it was also stockpiling weapons of mass destruction. Regime change was effected in both, leaving the future of the one and the other in an uncertain and challenging state. It goes without saying that empowerment or nation-building is a fragile process at best, fraught with dangers and difficulties. If the present fate of Afghanistan is anything to go by, Iraq, too, will take an unconscionable amount of time to settle and become a full-fledged member of the international community.

This being so, it is obvious that humanitarian challenges, far from diminishing in Iraq and the entire region, still exist. To describe them adequately, a before and after approach seems the most advisable, allowing us to grasp the many changes that have occurred in the status of Iraq.

1. Pre-Occupation Iraq

As we pointed out in the foregoing pages, historically, but with even greater frequency in modern times, Iraq has proved itself to be crisis-prone and a generator of refugee movements. In fact endogenous factors including interactions between tribes and racial groups, instability, lack of democracy and people's participation in their political affairs, worked hand in hand with other factors such as the aggressive attitude of Saddam Hussein's regime and its wars against its neighbours, to turn Iraq into one of the most refugee producing countries in recent history.

Added instability came to Iraq as part of its colonial legacy. The most striking structural defect in the formation of the state of Iraq was the arbitrary bundling together of three ethno-religious groups each one wary of the other, under an imported monarch and without making any attempt from the start to achieve a federal framework within which a pluralistic government could have been set up. Efforts to build up a national Iraqi identity based on an equitable distribution of political power never really achieved their goal. When the Kurds were not up in arms against the central Sunni-

dominated authority in Baghdad, the Shiites were. When the Shiites quietened down, the Kurds were vocal again. Only once, in 1991, did the two dissatisfied groups manage a generalised revolt simultaneously, but since no advance planning or coordination guided their struggle for power, government forces finally came out victorious from that particular battle, though not unharmed, since the north of the country was lost to the separatist Kurds.

The government of ex-President Saddam Hussein and the one-party system of governance adopted by the Iraqi Baath party brought stability and a functioning infrastructure to the country, modernisation, including a relatively high standard of living, an excellent health care and education system, and a land reform policy that aimed at boosting the incomes of small landholders and farm workers at the expense of rich landlords.[1] The wars against Iran and later Kuwait destroyed those achievements. Damage from the Iran-Iraq war, massive coalition bombing of Iraq's infrastructure over several years, and a severe economic embargo coupled with the intransigent and oppressive policies of the government turned the whole of Iraq into a humanitarian catastrophe of the very worst type.

With an entire nation at risk, one would have thought no single group could be singled out for special treatment. Yet, discrimination in aid distribution in pre-occupation Iraq was so obvious that it is deserving of special comment. Humanitarian agencies, reflecting the preference of the donors, concentrated their activities primarily on one side. The Kurdish safe haven to the north was open-handedly provided with goods from all parts of the world, and stood in need of little extra assistance. Its economy had surged thanks to its receipt of 13 per cent of Iraq's oil revenues, earmarked by the U.N. Oil-for-Food Programme for the Kurdish Safe Haven.[2] Yet it acted as a magnet for humanitarian efforts at the time. The South, however, with its exhausted Shiite population, or the Centre, knew poverty on a daily basis and would have greatly benefited from help, but this either never materialised or was slow in coming.

It is instructive to note the remarks of the British Secretary of State for International Development at the time, Claire Short, talking about the heavy British funding of humanitarian operations in Iraq through UN agencies and appropriate NGOs: "Much of this [funding] supports the work of NGOs operating in Northern Iraq.

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[1] Dilip Hiro, Iraq, Granta Books, 2002/2003, p. 3.
[2] Robert Collier, Kurdish region to lose billions, San Francisco Chronicle, 26.5.2003.

Humanitarian work in the North, where the Oil For Food programme is run by the UN and the Kurdish authorities are keen to collaborate with a range of international organisations, is much easier than in the Centre/South. Despite sanctions, humanitarian indicators such as maternal mortality and child mortality have improved much faster in the North under the Oil for Food Programme."[3] The reference to the easier task in the north is due to the fact that following the adoption of the Security Council resolution, a safe haven was set up in the north but not in the south.[4] Therefore the North flourished, whereas the rest of the country went into a gradual decline.

A primary humanitarian challenge for the international community in general and various specific agencies involved in the area would have been to correct the imbalance that they themselves had managed to create in dealing with the two halves of Iraq. It can be plausibly argued that the fault was primarily of a political nature and, therefore, by definition, outside the scope of humanitarian actors' responsibilities. Scrutinizing now the purely technical aspects of an effective and coordinated international response to a situation of crisis, it would appear that humanitarian agencies tended to perform better. However, it is fair to say that the quality of their contingency planning on the whole was finally never put to the test during the 2003 war.

In order for the humanitarian agencies to get prepared for this crisis, and learn from past mistakes, especially those made in 1991 during the Kurdish crisis and then again during the 1998 Kosovo exodus, due attention was paid to the six crucial aspects of disaster relief work, as defined by R.C. Kent. According to these criteria the strengths and weaknesses, success or failure of any given relief operation can be judged. Kent listed the following six elements which he claimed were essential to any proper humanitarian contingency planning: 1. preparedness, 2. prediction, 3. assessment, 4. appropriate intervention, 5. timely intervention, 6. coordination.[5]

As soon as the rhetoric of war had reached a certain level, humanitarian actors and neighbouring countries in and around Iraq, prepared without much publicity for any mass influx that might get underway. At the operational level as much as on the strategic pol-

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[3] Claire Short, Humanitarian Contingency Planning for Iraq, Written Ministerial Statement, 13.3.2002, p. 2.
[4] UNSC resolution 688, 1991.
[5] R.C. Kent, Anatomy of Disaster Relief, Pinter, 1987, pp. 21–28.

icy and planning level, efforts were made to avoid yet another humanitarian tragedy. The needs of potential victims were carefully assessed in order to avert what Yves Beigbeder describes as "the negative effects of unplanned, hasty, uncoordinated, ill-adjusted ad hoc relief efforts".[6] A coordinating mechanism or strategic framework had begun functioning to ensure maximum efficiency in emergency response. And all the agencies worked from the premise that the worst – rather than the best-case scenario might occur. The fact that no refugee movement of note did take place does not detract from the seriousness with which planning for a range of events was carried out.

Relatively sufficient funding – or at least pledges – for the operation was also provided as donors expressed their willingness to make substantial contributions. The European Commissioner for Development and Humanitarian Aid, Poul Nielson, committed himself to making a sum of 21 million Euros available to relief agencies as an immediate response to the humanitarian situation in Iraq, if events so justified, adding that the amount could go up to as much as a 100 million euros if required.[7]

2. Iraq under Occupation

2.1. *Return of Refugees*

If pre-occupation Iraq was already full of insoluble problems, there is no guarantee that the post-conflict era will see them diminish or not take on new forms. Massive refugee outflows seem unlikely to take place, at least in the immediate future. But another dimension of refugee crisis, has began to loom in the shape of internally displaced people, eager to return to their former homes and regain part or all of the possessions they were forced to leave behind; and there is the even more pressing problem of returnees, who fled to other countries as refugees during Saddam Hussein's rule and now want to come back home and start a new life within Iraq.

These refugees and displaced persons constitute a highly vulnerable group of Iraqis. Their homes and living environment were destroyed,

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[6] Yves Beigbeder, The Role and Status of International Humanitarian Volunteers and Organizations, Martinus Nijhoff Publishers, p. 7.

[7] Poul Nielson, EU humanitarian response to war in Iraq, Speech/03/146, Brussels, 20 March 2003.

their families uprooted, forced into migration or dispersed, as attested, among others, by the example of the Marsh Arabs who could only look on helplessly while their habitat was totally destroyed.

Iraqis forced to flee from their country are numbered at some four million[8] people throughout the world, potential returnees from among them at something like 500,000 according to a recent estimate provided by UNHCR.[9] About 200,000 Iraqis, the single largest group of refugees, are to be found in Iran. When it was declared that major hostilities in Iraq were over, the Iranian government, desirous of restoring normalcy to the Iraqi refugee situation in the shortest period of time, urged UNHCR to arrange for their return home, especially since many of the refugees were themselves desperate to go back. But U.S. authority in Iraq impeded the move, arguing that a flood of refugees, many of them of the Shiite faith, entering Iraq at this point in time would only add to the precariousness of the situation.

Iran's director general for refugee issues, Ahmad Hosseini, in a press conference at the Geneva offices of the U.N. High Commissioner for Refugees explained the situation in the following terms: "We're facing problems created by the occupying powers that prevent us from returning these refugees. The occupying powers believe it's not the proper time for all Iraqis who reside abroad to go back."[10]

Iraqi refugees may be the most numerous in neighbouring Iran, but the consequences of a delayed return to their homeland extend far beyond the region. Apart from invoking the destabilization factor that might result from a quick repatriation of refugees, American officials have also pointed out that the forces at their disposal are limited and not in a position to carry out adequate security checks on people returning in large numbers. Last, but not least, according to Paul Bremer the head of the Coalition Provisional Authority, returning refugees "must be well looked after once they get here."[11] This is, of course, an irrefutable argument in view of the lasting chaos which has prevailed in post-war Iraq. So Iraqi refugees, whether in Iran, Syria, Jordan or elsewhere, were asked to hold off and not to move until they were told to do so. In the meantime the UNHCR was planning an organized return of refugees mainly

[8] UNHCR, Iraq Emergency, 7.7.03.
[9] UNHCR special envoy cautions on quick return of Iraqi exiles, UNHCR, Relief Web, July 9 2003.
[10] Betsy Pisik, U.S. grapples with refugee challenge in Iraq, Washington Times, 30.6.2003.
[11] Ibid.

from Iran with priority given to those with less contentious status. What remained was the legality of obstacles placed by an occupying authority in the way of refugees who wished to return to their country since they believed they were no more in danger of persecution.

The UNHCR released a statement, clarifying its position.[12] since it has responsibility for the protection and safety of refugees and was meanwhile desirous to accommodate their longstanding aspiration to return home, It argued that since the return of the refugees must be carried out in an orderly manner, it would require more time and the setting up of adequate infrastructure facilities before refugees could be allowed to come home and enjoy a durable solution.

The UNHCR added that it was preparing to help thousands of Iraqi refugees in Iran to return home, but would refrain from carrying out any immediate large-scale voluntary repatriation programmes owing to security concerns in Iraq. Instead, UNHCR would opt for a plan of phased repatriation. The manifest desire of Iraqi refugees to go back at all costs, added to the mortal danger of spontaneous returns-some refugees had begun undertaking the journey on their own through one of the most heavily mined border areas in the world- made it impossible for UNHCR to do otherwise.[13]

At the same time, the UNHCR special envoy to Iraq, Dennis McNamara recommended restraint on the part of European governments in their treatment of rejected Iraqi asylum-seekers, urging them to delay sending them back to Iraq at present.[14] This was a reaction to some European governments who had indicated a willingness to speed up the process of return of their Iraqi refugees in an apparent effort to address their internal political needs vis-à-vis local constituencies.

The dilemma is how to choose between the two compelling arguments (and in fact existing international law leaves considerable room for argument between the two): the one which emphasises the security aspect of the return and its consequences on the stability of society, or the one that suggests that returning refugees constitute a vital force for change and can play an indispensable role in the reconstruction process in their homeland. The earlier their return, the greater the chance that they will manage to successfully

[12] UNHCR special envoy cautions on quick return of Iraqi exiles, UNHCR News Stories, 9 July.
[13] IRNA News, UNHCR to help Iraqi refugees return home, 14.7.2003.
[14] Ibid.

reintegrate into the socio-economic life of the country and the more widespread acceptance will they encounter among the Iraqis who stayed at home all along and did not suffer displacement. But as long as this resistance to letting in refugees persists, it is felt that the authorities in Iraq will be unable to achieve the much-needed normalisation the situation so urgently calls for. If the far-reaching challenges, both legal and humanitarian, are not met head on, existing tensions might trigger new outflows and, in any case, add considerably to the continuing sufferings of uprooted people.

2.2. *UNHCR and the Challenge of Refugees vs. IDPs*

The 2003 war in Iraq took place without a UN mandate being duly handed out by the Security Council to authorise military operations. But the UN presence in Iraq has been far from negligible. The late UN special representative to Iraq, Sergio Vieira de Mello, tried to intensify the UN's involvement in Iraq. And the UNHCR returned to Iraq in force thus signalling that the refugee problem in Iraq that has gained momentum over several years was still far from diminishing.

Whereas some other humanitarian agencies have chosen to reduce their activities and presence in the region, either due to irritation at being monitored or disturbed by the authorities,[15] or because of their diminishing role at the end of a turbulent chapter in the region, the UNHCR's large-scale deployment to Iraq after years of absence from that country points to the need which may still arise not only to find a permanent solution for returnees but also to avert possible new outflows. UNHCR offices have been opened in Baghdad and Basra and additional staff redeployed to the north and the south.[16] A high-ranking UNHCR official, Denis McNamara has been appointed senior representative in charge of Iraq. The signs seem to point to the fact that the UNHCR is attaching increasing importance to the issue of Iraq's refugee situation.

UNHCR has already begun routine protection and assistance work among refugees of other nationalities who have sought shelter in Iraq down the years, foremost among them being Palestinian families. An alarming new development can be observed in Iraq whereby, in post-war chaos, people are determined to improve their

[15] Naomi Klein, Now Bush wants to buy the complicity of aid workers, The Guardian, 23.6.2003.
[16] UNHCR Fact Sheet, 16.5.2003.

living standards simply by expropriating property and goods, often at the expense of other weaker, less organised groups. Foreign refugees – Palestinians, Syrians, and Iranians – are among the latter. They find themselves being driven out of camps, deprived of land they were once allowed to use or being expelled from homes they used to occupy in the capital.

The first tents of a refugee camp, inhabited by Palestinians living in Iraq, have already been put up in a soccer field near eastern Baghdad. If the situation is not remedied soon, other such camps might be established. The UNHCR, aware of the dangers lurking in the situation, has set out to provide new housing for these urban refugees.[17] At the same time, it is working with a great deal of persuasiveness towards repatriating refugees from other neighbouring countries, still present in Iraq, back to their countries of origin.

But the main challenge for its future work in post-war Iraq – for which the UN agency has already solicited donations to the tune of 90.6 million dollars to fund its activities till the close of 2003[18] – will not be confined to the above or to ensuring the so-called "phased repatriation" of returnees once the situation in the country has returned to normal. The UNHCR will also be involved in seeking a solution to the problem of internally displaced persons (IDPs) who, unlike the refugees, are already in the country and impatient to use every opportunity to improve their living conditions and regain their homes and properties. Iraqi internally displaced persons may naturally form a pressure group of some importance in the future of Iraq and may pose a new challenge to the process of normalization.

"At least one million Iraqis have been displaced inside the country during the past two decades by hardship, conflict or forced relocation policies intended to favour groups friendly to Saddam's regime, according to human rights and relief agencies. Some estimate that the internally displaced number is as high as 3 million, although records are far from comprehensive. Technically, people are not considered refugees unless they flee to another country, but "internally displaced people" have needs similar to those of people returning from abroad."[19]

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[17] UNHCR appeals for $90.6 million for Iraq operations, UNHCR News Stories, 26 June 2003.
[18] Ibid.
[19] Betsy Pisik, op. cit.

The UNHCR in Iraq now finds itself in the position of having to balance the needs of returnees, the priority group in the mandate under which it operates, against those of IDPs. According to agency experts, the aim they are pursuing with all the resources at their command is to avoid superimposing one humanitarian crisis on another. To quote UNHCR special envoy to Iraq Dennis McNamara: "What do you do when refugees return from Iran and try to reclaim the land that had been the Marsh Arabs', who would also like to return home? Those people will need assistance, but you cannot help them without improving the lives of those who already live there."[20]

Concretely, in the IDP question, the UNHCR will be called upon to be active in the reconstruction of destroyed villages. It will have to settle compensation and ownership issues.[21] Refugee experts warn that conflicting claims to the same plot of land might be next to impossible to sort out. Dennis McNamara acknowledges the complexity of the matter: "This is an enormous, complex, time-consuming issue, but if you don't do it, and do it right, you'll continue to have a terrible struggle. People will continue to occupy and reoccupy the same disputed areas."[22] Land records have either been burned down in the recent unrest or are deemed unreliable. Finally, it is expected that Iraqi tribal leaders will be pressed into service to decide to whom disputed land or property should be attributed.

In a recent fact sheet on Iraq, the UNHCR states that "its overall priorities are to prepare for the future return of refugees from abroad, to facilitate the repatriation of Iraqi refugees from Iran to Iraq and to resume the UNHCR's work to provide protection and assistance to the refugees within Iraq, many among whom are facing serious problems."[23] The UNHCR is however not explicit in what it may be able to do for the internally displaced persons. In normal situations it is argued that international protection of the IDPs surmounts obstacles posed by the national sovereignty of independent states and non-interference in their internal affairs. The UNHCR may be expected to run into such arguments when dealing with the IDPs who are not covered by the Refugee Convention.[24]

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[20] Ibid.
[21] UNHCR, Fact Situation, The Iraq Situation, 16.5.2003, p. 1.
[22] Betsy Pisik, op. cit.
[23] UNHCR, Fact Sheet Iraq, op. cit., p. 1.
[24] UNHCR does not have a general mandate to provide protection and assistance to internally displaced persons under the Refugee Convention of 1951 or its Additional Protocol of 1967. It acts on a case by case basis with the consent of

It is however less difficult for it to extend its protection to this type of people in Iraq while there exists practically no national sovereign government in the country.

In another document the agency in some way refers to its activities in favour of the IDPs: "The money will allow the UNHCR to continue helping more than 110,000 refugees in the country, as well as displaced Iraqis choosing to return home on their own."[25] It is clear that the UNHCR is aware of the legal distinction between the refugees who return to Iraq and the internally displaced people who are in need of assistance. It remains for the agency and the other organizations involved (such as IOM) to strike a balance in their treatment of the two types of population in need. Otherwise, a perception of the existence of discrimination and favouritism on the part of people – who naturally disregard the legal definitions –, will prove a new challenge for the humanitarian operation in the country and the region. This is also true in dealing with IDPs in the north and the south. For example the Marsh Arabs should not be treated less or more favourably than the Kurds who were subjected to an "Arabisation policy"[26] by the regime of Saddam Hussein.

In this context at least one thing is clear: the return of displaced people or refugees, whether spontaneous or organised, will not take place with the same comparative ease as in the case of Afghanistan, for instance. It requires far more comprehensive arrangements and farsighted planning. Iraq has known many major demographic upheavals and manipulations on the part of the former government. It will be extremely difficult to reintegrate internally displaced persons or returnees without a good deal of struggle and forced compromises, since so many conflicting property claims have been left unresolved[27] over the years in northern Iraq and elsewhere.

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the country involved. The first reference by the General Assembly to UNHCR activities in favor of internally displaced persons appeared in General Assembly resolution A/Res/47/105 of 1992 which welcomed 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 favor of internally displaced persons, taking into account the complementarities of the mandates and expertise of other relevant organizations. The General Assembly confirmed this beginning of a mandate in its resolution A/Res/48/116 of 20 December 1993, Para. 12.

[25] UNHCR appeals for $90.6 million for Iraq operations, 26.6.2003.

[26] Ibid.

[27] UNHCR steps up efforts to help refugees and displaced people in Iraq, UNHCR News Stories, 24.6.03.

2.3. *Armed Resistance and Civil War*

Iraq is still full of potentials for humanitarian crises. If in the past the Iraqis suffered from malnutrition, lack of essential goods and the dictates of an authoritarian regime, today they face heightened insecurity, lack of basic services, medical supplies and an increasing antagonism with respect to foreign forces. This represents a volatile situation that should be alarming for humanitarian agencies.

The unrest in Iraq is not only an issue of individuals finding life intolerable under foreign rule. In organised militant groups such as the Shiite groups, for instance, we find considerable hostility being expressed and demonstrations taking place to protest against the occupation. Yet another group in danger of alienation is that of the hopeful exiles, who returned to Iraq in the wake of the occupation, believing they would take part in power-sharing, until the American governor of Iraq, Paul Bremer, announced a postponement in plans to hand over the reins of power to a civilian Iraqi government, and spoke of an unlimited extension of US presence, even though a 25-member political body called the Iraqi Governing Council was set up to conduct the day-to-day business of running the country.

Although the establishment of such an artificial governing organ was seen as a concession by the American authority in Iraq, it was not expected to be able to achieve ethnic reconciliation. From the day of its inception, the Council was subject not only to external criticism by democracy activists, but also internal criticism. An Iraqi protest group pointed out that the Governing Council had further split the people of Iraq along sectarian lines, arbitrarily declaring "a certain community to be the majority . . . without an accurate population census" to back such claims.[28]

As for the Kurdish areas in the North, a possible threat of ethnic cleansing should be taken into consideration, this time against Arabs or Turkmen from key areas that Kurds consider belong exclusively to their own people. Here, the chances of a classic displacement or refugee flow developing over time seem relatively high. The danger is all the greater since, according to a draft directive issued by the US military commander in Iraq, 100,000 Kurdish fighters would be allowed to keep their heavy weapons, whereas other militias would be required to surrender theirs,[29] a move strenuously opposed by most Shiite leaders.

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[28] Islam Online, Iraqis Challenge Governing Council, Occupation, 18.7.03.
[29] Patrick E. Tyler, U.S. to let Kurds keep weapons, International Herald Tribune, 24.5.03.

There are also the forces loyal to Saddam Hussein and the Baath Party who might be able to intensify their resistance to American and British forces. The prospect of a guerrilla war in Iraq and the instability it creates should not be underestimated. It may act as an impediment to the return of refugees from the safe places they live in, or trigger new outflows of refugees. In any case, even without the advent of well-defined guerrilla fighting, uncontrolled violence has exploded across the territory of Iraq. What began as "gun gangs" roaming the streets of the capital soon developed into, on the one hand, internal tribal disputes, with racketeers and others taking up arms and concentrating on score-settling for past injuries sustained during the Saddam Hussein period of power; on the other, there are the daily systematic attacks carried out against foreign soldiers and civilians.

A Canadian reporter, Scott Taylor predicts that all the present signs in Iraq point to a coming civil war or even two civil wars. According to him, the first would be between Shiite fundamentalists and non-fundamentalists in the south, the second would probably involve a three-way fight in the north between Kurds, Turkmen and Arabs.[30] Civil wars, if they do take place, belong to some future date when the foreign troops decide to leave Iraq in the middle of a chaotic situation and under political pressure from home. If that happens civil war will not confine itself to the two types mentioned above. It would also include a war of revenge against groups of people favoured by the old regime as well as inter-tribal conflicts. This would be another challenge that may *per se* produce new waves of refugees to the neighbouring and other countries.

In addition, the risk of the territorial disintegration of Iraq in ways nobody had wanted or planned for cannot be dismissed for some time to come. Already the Kurds have taken over Arbil and Mosul and Senjar provinces. They are eager to bring other parts of what they call Kurdistan under their control. And if in public they say they want to be part of Iraq, most Kurds actually aim at achieving "the country of Kurdistan".[31] If the Kurds were to break away, the rest of Iraq might disintegrate as well, splitting up into two further parts, with Basra and Baghdad as their centres. On the other hand, any independent Kurdish State, which would never stop at the borders of present-day Iraq, could arouse neighbouring

[30] Christopher Deliso, Interview with Scott Taylor, Antiwar.com, 27.5.2003.
[31] Sabrina Tavernise, Few Kurds want to be part of Iraq, International Herald Tribune, 26.5.03.

Turkey to take military action with all the fighting, suffering and refugee movement that might imply.

2.4. *Relief Agencies and the Challenges Facing Them*

Confronted with the unprecedented chain of events set in motion in Iraq, the challenge for humanitarian agencies lies in two directions. The first is their possible lack of coordination in reaction to the realities of Iraq under occupation or in transition; and the second is the the increasing danger of insecurity for international relief workers as a part of the general insecurity in the country. These two elements may work hand in hand to create an environment conducive to diminished humanitarian protection for the Iraqi victims of war or atrocities of the former regime.

Unlike Afghanistan, Iraq is a country rich in oil that can pay not only for its economic development but also for the humanitarian services it receives from the international community and the specialized agencies involved. The mechanism which was established by Security Council resolution 1483 of May 22, 2003 allows the authority in Iraq and the relevant agencies to finance such activities through a Development Fund for Iraq. Although this is good news for a sustainable humanitarian operation in Iraq – compared to Afghanistan where humanitarian agencies have already gone short of funds – it can trigger competition among agencies which primarily operate on donations.

The ultimate authority in charge of the allocation and distribution of money would remain the American authority in charge of Iraq.[32] Some agencies which have been able to secure agreements for specific projects may find an opportunity to achieve certain humanitarian goals, while others might feel under political pressure in an uncoordinated and unconstructive competition.

The danger that humanitarian action might in certain hands be turning into a political tool was forcibly argued at a UN meeting – in the context of Afghanistan – by one particular relief agency, the

[32] Paragraph 13 of the UNSC resolution 1483 notes that the funds in the Development Fund for Iraq shall be disbursed at the direction of the Authority, in consultation with the Iraqi interim administration, for the purposes set out in paragraph 14. Paragraph 14 stipulates that the Development Fund for Iraq shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration and for other purposes benefiting the people of Iraq.

outspoken NGO Médecins sans frontières (MSF). MSF Secretary General Rafa Vila San Juan made the point that "politically motivated military interventions have posed challenges to independent humanitarian action."[33] He pleaded for recognition of the fact that "the pressure to subordinate the humanitarian cause to some overarching goal is happening not only through UN operations, but in the strategies of the most powerful military actors, including in the war on terrorism."[34] In large-scale humanitarian operations, it is customary for UN agencies to set up a call for coordinated action. The MSF Secretary General made it clear that, although he was not questioning this practice, in his opinion a civilian humanitarian organisation could neither operate under the command of the military, nor could an integrated approach to a disaster situation merge the humanitarian with the political, military and economic agendas, something the United Nations has been urging its NGO partners to do in the context of Afghanistan, for instance.[35]

The challenge of insecurity in the operation field is of course not new to the international humanitarian organizations. What may be new is the characteristic of the problem in Iraq which makes it all the more difficult for them to act. For the reasons explained earlier, even if the process of the return of refugees comes to an end it does not mean that a final solution is reached. There would remain disputes and conflict within the population on the new adjustments or manipulations needed for reintegration of returnees that may augment antagonism against foreign forces and international relief workers. On the other hand, a prolonged presence of the foreign forces in Iraq increases the risk of threats to humanitarian workers by dissatisfied people and groups. Without a national independent and sovereign Iraqi authority in power, attacks against foreign troops and personnel – including humanitarian personnel – is likely to continue. That means that even though at some stage the American and British forces will be leaving Iraq, the humanitarian workers are less likely to feel secure due to socio-political complexities that exacerbate the anti-western feelings of the people.

This would be equally challenging to refugee treatment by the UNHCR and others, as well as to other organizations which provide

[33] Rafa Vila San Juan, Humanitarian action must not be a tool of political interests, Speech delivered to the UN, July 18, 2002 marking the tenth anniversary of resolution 46/182 that created the current mechanisms for the coordination of humanitarian action, p. 2.
[34] Ibid., pp. 2–3.
[35] Ibid., pp. 3–4.

basic material and services to the Iraqi people who have been for a long time dependent on their government for such provisions. In fact, ever since the war ended, different UN relief officials have referred to security as their main concern in reviving services and supplies that are essential to normalization of life in Iraq.[36]

3. Conclusion

An enormous wind of change has come to Iraq through the American-British war waged on the former Iraqi regime that caused hundreds of thousands of its people to flee out of fear of persecution and violence. The government of Saddam Hussein was responsible for uncountable crimes against nationals of Iraq as well as neighbouring countries. It is true that under the rule of the Baath party, the people of Iraq suffered immensely from the ruthless behaviour of their government and president which ended up in the creation of one of the biggest refugee populations in the world. But as we discussed earlier in the first part of this chapter there are also other historic, demographic, political and ethnic reasons to believe that the problem in Iraq is far from over.

In this part we have tried to examine some compelling underlying causes or potential threats that may again ignite situations conducive to population movement. We attempted here to concentrate on what we regard as essentials, that is to say such aspects of the present set up in and around Iraq which, if exacerbated or allowed to get out of hand, would inevitably lead to another round of humanitarian misery. Of necessity, undisputed facts went hand in hand with elements of speculation. Time alone will tell how these will be transformed into fact.

Bearing in mind what has already been evoked about the historical and political background of Iraq and the ethnic realities which make the country so hard to govern, it would be naive to suppose that the refugee-producing phase of Iraq is over, and that Iraq will no longer represent a humanitarian challenge for the international community simply because regime change has occurred and because Saddam Hussein and the Baathist regime have been

[36] The UN World Food Programme Executive Director, James T. Morris, warned that security was the key concern as the agency prepared to revive Iraq's food aid distribution system by the beginning of June. WFP, Iraq Crisis, Online Information Sheet, 12.5.2003.

removed from power. Therefore, the international community would do well to remain on the alert. Now more than ever, it should refuse to close its eyes to the threats that may still be posed to the stability of the country, threats which, if they finally translate into action, will lead to a new wave of refugees surging across the region into neighbouring lands and beyond.

As long as the occupying powers maintain their presence in Iraq, and the energy of certain segments of the Iraqi population is absorbed by survival tactics the sources of instability will probably be kept in check. Once the occupying powers depart, however, the possibilities for ethnic clashes and ethnic cleansing will multiply and be given free rein. One of the consequences of this might be the disintegration of Iraq along ethnic and religious lines.

The likelihood of a civil war would be very much on the cards. Not only can it be imagined that the three main groups – Shiite, Sunni and Kurds – will take up arms against one another; clashes within the groupings themselves, for instance among the different parties and tendencies of the Shiite or the two main Kurdish parties, could break out as well. Remnants of the now outlawed Baathist party could mount acts of terror and destruction against the locals in certain areas known to be Sunni-dominated. Finally, the experience of further foreign intervention or occupation – by Turkish forces in the north, for example – might await Iraq before it finally quietens down and achieves some degree of normalcy.

At this stage, these and other similar scenarios for the future have not really emerged from the realm of supposition. No mathematical certainties exist on the basis of present facts. Nonetheless, in the matter of most concern to us, one can predict with some degree of confidence that, far from beeing defused, the potential sources of refugee production in Iraq have temporarily gone underground.

Dangers such as disintegration, dormant so far, have taken on a more menacing aspect. Factors of destabilisation, enumerated in the foregoing pages make it more than likely that Iraq, eternally grappling with its sectarian differences and historical complexities, will not return to a state of peace for some time to come, and they lead us to predict that Iraqi population movement and refugee flow might once again appear in the agenda of the neighbouring states and the international organizations.

Chapter 3

Law and Humanitarian Actors

A. Role of the UN and Humanitarian Agencies Involved

Besides maintaining world peace and security, and promoting economic, social, and cultural cooperation among nations, the UN has, since its inception, also been entrusted by the international community with the task of carrying out humanitarian relief activities, the need for which has become a growing concern in an interdependent, globalised world, marked by disasters of all kinds, both natural and man-made, ranging from technological accidents and situations of serious political instability and war, to various natural disasters such as droughts, cyclones, earthquakes, floods and the like which, according to estimations, hit the world at the rate of about once a week, affecting the lives of millions of people.[1]

Under these circumstances, the humanitarian aspects of the mandate held by the United Nations and its relevant agencies have greatly enlarged in importance and complexity. Since the 1991 Iraqi refugee crisis, in particular, several far-reaching changes have occurred in the international relief system, both of an organisa-

[1] U.N. Doc. A/45/271,E/1990/78 of 1 June 1990.

tional nature aimed at improving the effectiveness of assistance provided to refugees, and of a political character seeking to promote the controversial notion of the "right to humanitarian intervention" thus challenging the principle of sovereignty of states.

The following section explores in greater detail the system of international refugee protection. It describes the funding of the organisations set up to offer refugees protection and assistance, and the behaviour of the central humanitarian UN agencies: UNHCR, UNICEF, WFP and DHA (today known as OCHA) and their inseparable partner IOM, along with their counterparts in the non-governmental sector. An examination of the years of sanctions and the deployment of aid agencies in Iraq comes next, with the remainder of this part outlining conditions in post-conflict Iraq with all the as yet unresolved humanitarian factors contained in the present situation and its potential for further refugee generation.

1. The International Relief System and Refugee Population

In parallel to the refugee crisis in Iraq, the international humanitarian system has undergone an upheaval. New trends were introduced and new concepts developed. Jurists of various persuasions set about modifying the legal framework of international standards to accommodate contemporary notions of limited sovereignty and unbounded powers of armed intervention granted to the world community on humanitarian grounds. But the events in Iraq in the 1990s failed to have a transforming impact on the fundamentals of the system which continued to function more or less as randomly as it had done in the past, with no fixed funding mechanisms, and humanitarian mandates seriously overlapping each other rather than being defined along strictly complementary lines.

Humanitarianism involves a network of actors, donor countries, UN agencies, inter-governmental agencies and non-governmental organisations (NGOs) which come together in a crisis situation to provide assistance to an affected population in a recipient country. The diagram below gives an overall view of the interdependence of the international relief system.

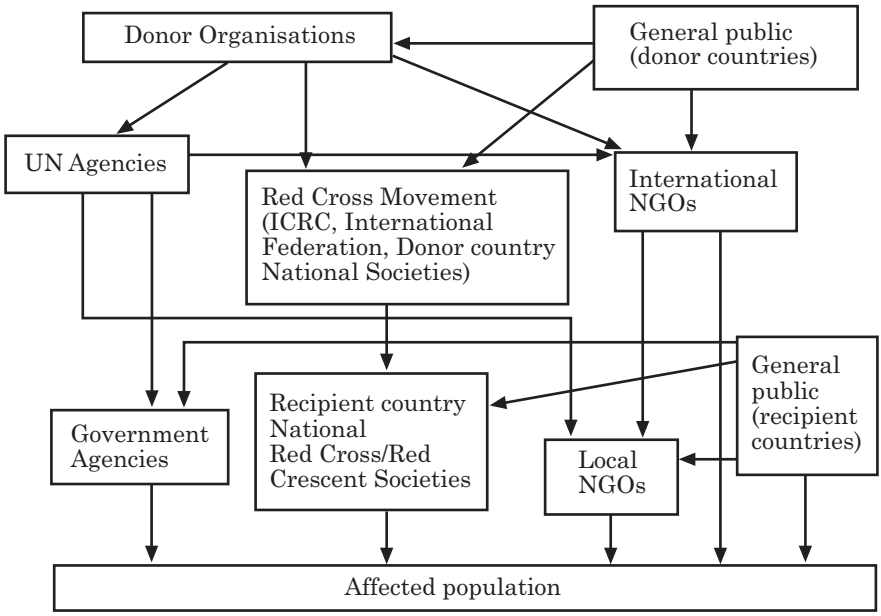

Fig. 1. The International Relief System

1.1. *Interactive Functioning of Emergency Response*[2]

The population for which the system catered has decreased from a peak of 27 million in 1995 and 21.8 million recorded in January 2000 to a total number of 19.8 million people in need according to the UNHCR; this is in addition to one million people worldwide with no nationality to their name. In its Global Appeal 2003, the breakdown given by UNHCR for this overall figure is as follows:

1. Refugees: 12 million;
2. Asylum-seekers: one million;
3. Returnees: 0.5 million;
4. Stateless Persons (or those with unresolved nationality): 1 million;
5. Internally Displaced Persons and Others of Concern: 5.3 million.[3]

The refugee caseload of Iraq itself is estimated at some 4 million,[4] whereas its internally displaced population is considered to total some one to two million people. As one example of how the interactive emergency response system functions in practice, we can

[2] John Borton, Recent Changes in the International Relief System, 1993.
[3] Ibid., p. 26.
[4] Iraq's refugees head home, BBC News, 30.7.2003.

turn to the way things are run in today's post-war Iraq. Volatile security conditions have greatly affected the smooth functioning of international relief activities. In fact, it would be no exaggeration to say the system has been reduced to working at only half capacity.

The basic framework of assistance to refugees and returnees is provided in principle by UNHCR and other international organizations. The lead role for refugee returns to Iraq devolves on UNHCR, whereas the International Organization for Migration has assumed a strong supporting role for the assistance and integration of Iraqi internally displaced persons (IDP). But UNHCR's ability to act has been severely constrained since the evacuation of about 650 international UN personnel from Iraq following the bombing of UN headquarters in Baghdad in August 2003.[5]

UNICEF, like the UNHCR, counting on local staff rather than the presence of its international workers, has continued to be active in delivering humanitarian assistance to women and children, and supporting the re-establishment of basic education and health services. As for the World Food Programme (WFP), this has been put in charge of the procurement of commodities required by the Iraqi Public Distribution System to ensure food supplies for large segments of the population.[6]

NGOs, for their part, are no longer available to take on their delegated activities, each in its own particular sphere as described in the pages that follow. Instead, many of them followed the example of the UN, cutting their numbers or simply closing down.[7] In 2004 Oxfam announced it was ceasing direct operations in Iraq for the foreseeable future.[8] Médecins sans frontières did the same.[9] And the ICRC made its decision to have only a "limited presence of international staff on the ground due to the prevailing insecurity."[10] So much so that, currently, only a handful of NGOs still feel safe enough to carry on their work, whether in southern or central Iraq or the relatively quieter north.

This blow to the humanitarian network must in no way be interpreted as an indication of fundamental weakness and failure. Less has been accomplished so far than what the humanitarian

[5] Assistance for Iraqi Refugees and Returnees, PRM Guidelines, March 17, 2004.
[6] WFP Emergency report No. 29, 16 July 2004.
[7] Beatriz Lecumberri, As UN pulls out of Iraq, NGOs lose heart, AFP, 26 Sep. 2003.
[8] Oxfam suspends all direct operations in Iraq, Oxfam Internet site, 19 April 2004.
[9] Evacuation des equipes de Médecins du Monde, Internet Site, 14.4.2004.
[10] ICRC, Operational update, 31.5.2004.

organisations had originally set out to do. Nonetheless, under more favourable circumstances and in other contexts, the international relief system will no doubt be up and running.

The UNHCR's latest assessment of the total population of concern worldwide confirms the startling decrease in refugee figures. To quote from the agency's 2003 Global Refugee Trends: "The total population of concern to UNHCR fell from 20.8 million persons at the end of 2002 to 17.1 million by the end of 2003 (–18%)."[11] The UNHCR's well thought-out explanation for the phenomenon also deserves to be quoted in full: "This is the second consecutive year in which the global refugee population has dropped sharply. Over the two-year period, the global refugee population has fallen by one-fifth. Decreases in the refugee population are often the result of refugees having access to durable solutions, in particular voluntary repatriation."[12]

2. Funding of UN Humanitarian Agencies

But if refugee numbers have shown a downward trend, the need for increased financial support has not. In fact, it is on the rise. For the funding of its numerous refugee programmes, the UNHCR's total expenditure shot up from $134.7 million in 1978 to $565 million in 1988 ($545 million coming from donor countries and $20 million from the regular budget of the United Nations).[13] As was only to be expected, by January 2003, the UNHCR had put forward a budget of more than US$ 1 billion for its annual programme of providing what it called "life saving protection and assistance to the world's refugees".[14] The UNHCR's Annual Programme Budget proposed for 2004 amounts to US$ 954,890,100.[15]

One easy-to-grasp reason for the UNHCR's constant need for increased funding is simply a workforce which has never known economy measures. One analyst puts it in a nutshell when he says:

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[11] UNHCR, 2003 Global Refugee Trends, 15 June 2004, p. 2, para. 4.
[12] Ibid., p. 2, para. 6.
[13] Yves Beigbeder, The Role and Status of International Humanitarian Volunteers and Organizations, Martinus Nijhoff Publishers, The Netherlands, 1991, p. 31.
[14] UNHCR Global Appeal 2003, Resourcing UNHCR's Work for the World's Refugees, p. 28.
[15] UNHCR, Annual Budget Programme 2004 presented at UNGA's 54th Session, 25 Aug 2003, p. 11, para. 23.

"Throughout its history, the number of UNHCR staff has continued to grow dramatically."[16] In 1959, the UNHCR employed 242 persons. By July 2003, there were some 6,200 staff working for the agency, without counting the roughly 700-strong additional workforce engaged on a temporary basis.[17]

With a total projected budget requirement of US$ 1,157,500,000 for 2003, the UNHCR ran its 277 offices in 120 countries with a staff of over 5,000 people in the service of a reported 20 million persons of concern round the world. 26% of the UNHCR's budget was absorbed by programme support and management staff, of which 19 percent went for workers in the field and 7 per cent for those retained at Headquarters.[18] As one example of the UNHCR's fieldwork, the case of Iraq's neighbours, Turkey, comes to mind. Here, for a total population of concern to the UNHCR estimated at 7.687, the agency deploys a staff of 67 people – dealing mostly with registration and awareness programmes – whose salaries absorb over 5.5 million dollars per year.[19]

Time alone will tell how cost-effective such practices will finally be considered in the corporate management-style thinking which has come to permeate the running of the UN humanitarian sector. In fact, two problems lie in wait for the UNHCR and others over time: failures of general accountability in the use and channelling of funds, and the tendency shown by donors to earmark more and more of their contributions for assignments in some particular country or region.

Another giant UN agency, UNICEF, which has been one of the leading organizations in humanitarian emergencies and often shares the same donors as the UNHCR, provided the following income figures for a similar period of time:

UNICEF INCOME 2000–2002[20]
(in millions of US dollars)

2000	Total	1,139
2001	"	1,225
2002	"	1,454

[16] John Telford, UNHCR and emergencies: a new role or back to basics? In: Forced Migration Review 10, April 2001, p. 42.
[17] UNHCR Annual Budget Programme 2004, op. cit., p. 18, para. 54–55.
[18] UNHCR Annual Budget Programme 2003, p. 53.
[19] Ibid., p. 50, p. 91.
[20] UNICEF Annual Report 2002, p. 36.

The 2002 increase in income over the previous year is an impressive 19%. From the above sums, UNICEF's regular country programmes of cooperation in Iraq and its neighbouring countries were funded as follows:

Iraq (2002–2004)	$5,233,000
Iran (2000–2004)	$3,902,000
Syria (2002–2006)	$4,823,000
Turkey (2001–2005)	$4,500,000

According to the agency, "Management and administration has remained stable at 6 per cent of total expenditure."[21] In 2002, UNICEF employed 7,100 people, of whom four out of five were active in the field.[22]

Over time, The World Food Programme (WFP), originally an FAO affiliate, became an independent agency, serving as the food and logistical spearhead of any humanitarian operation mounted by the United Nations. In the 1991 Persian Gulf crisis, the WFP, alongside the UNHCR and UNICEF, struggled to bring closure to a massive refugee influx situation which some sources claim took the lives of about 1000 persons a day during its acute, if short-lived phase. The agency published the following statistics for its activities in 2002:

- Food distributed to 72 million people in the world
- Operations in 82 countries around the world
- Total food distributed: 3.7 million tons
- Total expenditure: US$ 1.59 billion
- Staffing: Total number of employees: 2,684 of whom 2,063 in the field, 621 at Rome headquarters

WFP claims that it had the lowest overheads of any UN agency totalling an average of 9% a year.[23]

Finally a look must be taken at the Office for Coordination of Humanitarian Affairs (OCHA), a part of the United Nations

[21] Ibid., p. 44.
[22] UNICEF AT A GLANCE, Homepage indication.
[23] WFP in 2002: A quick glance, World Food Programme Annual Report 2003.

Secretariat, which is responsible for developing coherent approaches to dealing with emergency relief crises. OCHA's stated mission, as derived from UN General Assembly Resolution 46/182 of 19 December 1991 is to: ". . . mobilise and coordinate the collective efforts of the international community, in particular those of the UN system, to meet in a coherent and timely manner the needs of those exposed to human suffering and material destruction in disasters and emergencies. This involves reducing vulnerability, promoting solutions to root causes and facilitating the smooth transition from relief to rehabilitation and development."[24] The name of the agency dates back to 1997.[25]

OCHA's predecessor was the Department for Humanitarian Affairs (DHA) which itself absorbed the then existing UNDRO (UN Department of Relief Operations), in charge of coordination activities and which directed operations as an emergency unfolded on Iraq's borders in 1991. Its performance was deemed imperfect by many donor countries who insisted it be replaced by a more efficient coordinating unit.

OCHA's coordination mechanisms and tools include not only the processing of information and analyses found in situation reports, it is also in charge of handling the consolidated appeals process and the subsequent mobilisation and tracking of resources. With its hand on the purse strings, OCHA inevitably plays the role of final arbitrator, a position requiring "making judgements and choices which may create tensions between OCHA and collaborating agencies."[26]

OCHA, not unlike its predecessor DHA, has also encountered so-called relationship problems at the field level with representatives of other lead agencies or "humanitarian coordinators."[27]

OCHA's budget for 2002 amounted to US$ 42.8 million. It had a headquarters staff of 137 persons and 51 persons in the field. OCHA maintained field coordination arrangements in 16 countries and one region, oversaw the use of the Central Emergency Revolving Fund (CERF) and mobilized US$ 904 million in cash and in-kind contributions of which $37 million were channelled directly.

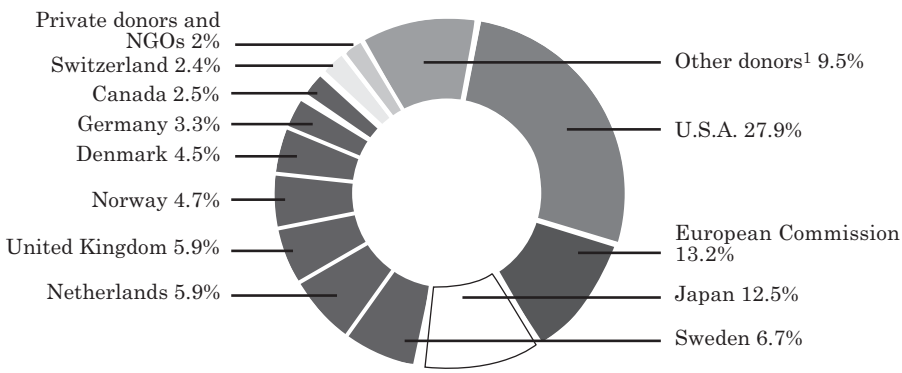
IOM or the International Organization for Migration, an independent inter-governmental body, but working in close partnership

[24] UNGA Resolution 46/182, 19 Dec. 1991.
[25] Susan F. Martin, Forced migration and the evolving humanitarian regime, Working paper 20, The Journal of Humanitarian Assistance, July 2000, p. 7.
[26] Department for International Development, Working with OCHA: Institutional Strategy Paper 1999–2002, Nov. 1999, p. 2.
[27] Ibid., p. 2.

with UN bodies, is another organisation involved in trying to bring the Iraqi refugee crisis to a sustainable solution. IOM's funding is partly derived from participation in the UN Consolidated Appeals Programme or through a so-called "migrations appeal". In the former category it set its grand total for 2003 at USD 238,012,335,[28] in the latter, its demands amounted to USD 42,246,822.[29] With such sums, which make up only part of IOM's income, the organisation has established 19 field offices worldwide and a global network of 150 Country Missions which implement projects largely financed by the projects themselves.[30]

The monies involved in the various funding figures mentioned above can usually be traced back to the same sources for all the agencies: the twelve leading donor instances, set out in the following UNHCR table:

Contributions: Top 12 donors (1992–2003)



[1] Includes governmental and inter-governmental donors and the UN.

But the table as it stands should not blind us to the fact that many countries not appearing in it also did more than their fair share of supporting UNHCR work in cases of mass displacement. As the Agency clearly states in its latest report: ". . . the UNHCR budget does not reflect the very significant contribution to the support of refugee communities made by hosting countries. This financial, social and political burden continues to be carried largely by those

[28] IOM Participation in the Consolidated Appeals for 2003.
[29] IOM Migrations Appeal 2003, Dec. 2002.
[30] IOM Internet Homepage.

nations which can least afford it. Many nations who themselves are struggling with their own economic development are at the same time striving to meet their commitments as signatories of the Refugee Conventions." It goes on to add: "Contributions to UNHCR's assistance programmes for refugees provide a burden-sharing mechanism to these generous nations."[31]

We have already had occasion to comment on the nature of the contributions that the principle of burden-sharing often seems to have been reduced to, and it will be further discussed in the next chapter. It must also be pointed out that countries hosting refugee influx had always felt secure in the belief that any action on the part of the international community was bound to contain respect for the core sovereign nature of their states. In addition, the role of the U.N. and its various agencies as defined in the U.N. Charter makes it incumbent on the international bodies, in the discharge of their duties, to safeguard above all the sovereignty, territorial integrity and national unity of states. As Yves Beigbeder writes "Governments are responsible for the governance, administration and welfare of their own people".[32] He goes on to say that, in keeping with the principle of national sovereignty under international law, even in cases of man-made or natural disaster, no state, intergovernmental organisation or NGO can impose aid on an afflicted country, however pressing its need. He also adds that this sacrosanct principle has now come in for large-scale modification as attempts to establish "a right and duty" of international humanitarian intervention in disaster cases begins to infringe on the prerogatives of states.

From the above discussion it is clear that funding for humanitarian operations has not been found to be adequate. It is also obvious that inadequate funding no doubt has its repercussions on the day to day conduct of humanitarian operations in the field as well as on headquarters activities. As the current lack of funds may well continue in the future, the international relief system needs to prioritize. Austerity measures should be envisaged as regards the operational costs at headquarters and regional offices of the UNHCR and other organizations in order to minimize budgets for overheads in favour of funds to be allocated for victims.

[31] UNHCR Global Report 2003.
[32] Yves Beigbeder, op. cit., p. 15.

3. Iraq, the Test Case

Conditions in Iraq, the 1990 war in Kuwait, and the subsequent refugee exodus, were the three factors which acted as a catalyst for the new interventionist doctrine in the handling of humanitarian crises which was applied not only in the Iraqi situation, but also in places as diverse as Somalia, Bosnia, and Kosovo.

When the Kurdish refugee crisis of April 1991 hit the headlines, and the world finally understood the full extent of Iraq's capacity for refugee-generation, the response by the international community came swiftly, if controversially. It contained three main elements:

- the passage of Security Council Resolution 688 on 5th April, 1991, which called for Iraq to "allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq";
- action by US, British, French and Dutch forces to establish safe havens within northern Iraq for the Kurds;
- the mounting of a massive relief operation in which military forces played a crucial role in delivering assistance, together with the UN agencies and international NGOs.

Resolution 688 and its repercussions created important precedents which are still provoking discussion today among members of the international community, as interventionists and national sovereignty advocates clash within that body. Case by case studies now determine whether or not, in any given situation, humanitarian intervention, sanctioned by the Security Council alone, is justified under international law.

In 1991, the novelty of what was taking place was profoundly unsettlingly and clearly impacted on the performance of UN agencies and other relief organisations who were involved in the provision and coordination of relief during the Kurdish operations. And the liberties taken with international legal standards then would continue to mark the future evolution of Iraq, struggling under a long and complete economic embargo.

3.1. *What Caused the Problem?*

The war in Kuwait, in many respects, was a watershed event for the humanitarian agencies and the international community at large. For one thing, it highlighted the lack of preparedness to deal with emergencies on the part of most of the organisations trained

for this particular task, whether they belonged to the United Nations "family" of actors or to the non-governmental sector. For another, it made clear that no one had anticipated the course that events would take, a sombre indication that early warning systems had failed to achieve what they were devised to do. What had been thought of as a well-oiled machine for crisis response, seemed at times to come almost to a standstill.

In the weeks following the Iraqi invasion of Kuwait on August 2, 1990, a humanitarian crisis unfolded as 850,000 third country nationals and 300,000 Palestinians fled from Kuwait and Iraq into Jordan and Syria, a first influx in August and then another smaller group in January–February 1991. The war itself, involving the most extensive military cooperation on the winning side since the Second World War, broke out on January 17, 1991. No panic-stricken movement of Iraqi civilians out of Iraq occurred, although many humanitarian instances had opted for this as the most likely thing to happen.

Once the fighting ended, however, rebellion broke out within Iraq. By late March 1991, an exodus began, numbering over a million Kurds to the north, and Iraqi Shiites in their thousands to the south, thus creating the second large-scale humanitarian crisis to overwhelm the region in a time span of less than a year. This set of events and their humanitarian repercussions, often described by analysts under the term "Persian Gulf crisis", will serve as a background for our examination into the workings of humanitarian agencies in their relation to the problem of Iraqi refugees.

As was expected, the United Nations played a pivotal role in coordinating the response of the international community to the drama of first the evacuee movement out of conflict areas, later the refugee movement out of Iraq. At the time the evacuee crisis occurred in August 1990, the UN already had at its disposal certain coordination mechanisms it felt it could depend on. Information sharing was the task of the Geneva-based UN Disaster Relief Office (UNDRO), whereas within the affected countries Resident Coordinators took charge of whatever the agenda demanded. To this standard practice, the UN Secretary General added a new device by appointing special emissaries, setting up a Senior United Nations Emergency Managers (SUNEMs) group, and launching an inter-agency consultations system through the UN Inter-Agency Working Group (IAWG) based in/working out of Geneva.

IAWAG met for the first time at UNHCR headquarters in Geneva on August 24, 1990[33] and its last meeting took place on June 16,

[33] Larry Minear et al., UN Coordination of the International Humanitarian Response to the Gulf Crisis, 1990–1992, Occasional Paper No. 13, 1991, p. 11.

1992. It grouped representatives from UNDRO, UNHCR, ICRC, IOM and the Federation of Red Cross and Red Crescent Societies. Its main function was to share information with UN organizations and a few select private relief agencies, on the basis of which humanitarian action plans for the region were formulated. IAWG also handled funding operations, coordinating appeals to donors and allocating resources to the various agencies, for which service UNDRO charged 3% to cover operating costs.

On the ground, United Nations agencies, programmes and offices with a mandate containing an emergency response component, UNHCR, WFP, UNICEF, UNDP, WHO and the Department of Humanitarian Affairs were all part of the effort to stem the successive crises.

In the field, UNICEF staff had no doubt the longest experience of the region and its various vulnerable groups. WFP offices in Baghdad were well placed to monitor the quantity and quality of food supplies required for Iraq. Among non-emergency agencies which continued to go about their routine business, regardless of war, were the International Labour Organization (ILO), The UN Environment Programme, the International Maritime Organization, the UN's Economic Commission for Western Asia (ECWA) and the UN Human Rights Commission which reviewed abuses in Iraq and occupied Kuwait.[34]

Parallel to the UN system, the European Union set up its own Humanitarian Aid Office, ECHO. Since 1992, ECHO has provided 157 million Euros for relief and emergency programmes in Iraq, making it the main source of external aid to that country. ECHO's projects in Iraq were implemented by its operational partners – United Nations agencies, the Red Cross/Red Crescent family and a limited number of experienced NGOs.[35]

Of the UN organizations which were called upon to handle the crisis, three leading agencies at least, namely UNHCR, UNICEF and WFP, developed problems of conflicting competence from the very start, since their basic mandates tended to conflict and overlap or to be insufficiently comprehensive. All this made effective division of labour hard to achieve.

In an assessment paper[36] Larry Minear describes how the conflict was solved, theoretically, if not in actual practice. In January 1991,

[34] Ibid., p. 12.
[35] Iraq – 20 years of deepening crisis, ECHO leaflet, EU's Humanitarian Aid Office, January 2003.
[36] Larry Minear et al., op. cit.

a Regional Humanitarian Action Plan was elaborated which tried to remedy the problem. The plan allotted the mandate for camp management to the UNHCR. Water and sanitation became the special province of UNICEF, and WHO was given responsibility for the health sector. But what appeared feasible in theory turned out otherwise in the field as all three sectors were seen to be interconnected and no one could decide who was to have the final say. The Action Plan as it stood proved impracticable as the influx of refugees became massive, and only a few months later it underwent serious modification.[37]

3.2. *The Reaction of Humanitarian Agencies*

The lead UN agency in the 1991 Kurdish refugee crisis was the UN High Commissioner for Refugees Office, then led by its 8th High Commissioner Sadako Ogata. Proceeding from UN Resolution 688 of 5 April 1991 which called upon the Secretary General to "address urgently the critical needs of the refugees and displaced Iraqi population . . .," the Secretary General requested UNHCR on April 10, 1991 to launch an emergency programme of assistance for the refugees fleeing Iraq.

But, in spite of the legal opportunities opened up by Resolution 688, the refugee agency was prey to some initial hesitation as to how best to proceed. The UNHCR's founding mandate expressly enjoined upon the agency respect for the Westphalian concept of sovereignty in regard to nation states, something which was clearly violated by the creation through military means, and against the will of the ruling government, of a safe haven for Kurds within the boundaries of Iraq. Then there was Turkey's non-cooperation with the basic demand of letting in the influx of refugees whose lives were in danger. The fact that Turkey was let off the hook as regards international need to respect refugee law tarnished the UNHCR's record of an unbiased approach to refugee protection. As one commentator put it "On a few occasions the Agency seems to have tilted toward the western donors, as when their ally Turkey closed its border to Iraqi Kurds fleeing persecution in 1991, and the Agency remained silent about this violation of refugee law."[38]

[37] Ibid., p. 8.
[38] David P. Forsythe, The Mandate of the UNHCR: The Politics of Being Non-Political, Human Rights Working Papers No. 11, February 2001, p. 25.

These primary legal difficulties were compounded by the fact that, if the definition of a refugee contained in the 1951 Convention and its 1967 Protocol applied to the Kurds massed around the Turkish border or in safety in Iran, this was no longer the case when these same Kurds returned to Iraq within the month following their precipitous departure. A blurring of categories was about to occur. A suggestion to extend the refugee definition to include internally displaced persons provided a solution which was willingly seized upon by UNHCR as a way out of its leadership dilemma. Within UNHCR itself, this shift from the essential, originally mandated, protection activities to assistance to the Kurds was not met without resistance, marking as it did, in the eyes of many, the end of the agency's era of asylum.[39]

A further step however, was required before UNHCR could become properly operational. An Executive Delegate for the UN Humanitarian Programme for Iraq, Kuwait and the Iraq-Turkey, Iraq-Iran Border areas had been appointed by the Secretary General. It was only when the latter had successfully signed a Memorandum of Understanding with the Government of Iraq on 18 April 1991 that the agency finally joined the fray.

The MoU "stipulated that the UN and the Government of Iraq would promote the voluntary return of Iraqi displaced persons and take humanitarian measures to avert new flows of refugees and displaced persons."[40] Furthermore, agreement was reached with the Government of Iraq legitimising a UN humanitarian presence in Iraq, wherever such a presence might be needed, and authorising the establishment of UN Sub-offices and Humanitarian centres (UNHUCs) in the country.

UNHCR's unwillingness to rush into action was dictated as much by reluctance to expose Kurdish refugees or humanitarian workers to armed reprisals, as respect for its own founding principles as evidenced by the scruples it felt about entering Iraqi territory without the prior consent of the government of Iraq.

An error of judgment also contributed to delaying its emergency response. UNHCR's interpretation of the coming refugee outflow had been mainly conditioned by events in Kuwait. Its on-the-ground contingency planning had focused more on refugee flows from that area to Jordan and Syria than on an exodus of Iraqis towards

[39] Gil Loescher, The UNHCR and World Politics, A Perilous Path, Oxford University Press, 2001, p. 431, p. 288.

[40] UNHCR's Operational Experience with Internally Displaced Persons, September 1994, p. 62.

Turkey and Iran. Proposals for stockpiling relief items and building up reserves had never been implemented.[41] This meant that supplies at hand were soon used up and a lot of time was wasted on lengthy procurement procedures to acquire new supplies.[42] About three weeks into the crisis, one commentator points out, UNHCR could provide only about 10% of the relief items needed by some 1 million Iraqi refugees.[43] Deployment of emergency teams to critical areas was also held up owing to insufficient staff.

This said, it was not necessarily UNHCR which failed to perform adequately to resolve the crisis. The UN system as a whole comes in for blame. The multiplicity of UN agencies and the competition among them made it impossible for effective coordination to be exercised. Then, at the highest levels, personal rivalry and tensions dogged relations between the UN Resident Coordinator, the SUNEMs, and other high-level emissaries sent to the region. In particular, the UN humanitarian coordinator in Baghdad's mandate of overseeing all UN activities clashed seriously with UNHCR's designated role of lead agency in charge of all the other humanitarian organizations.[44] Directing operations in the field from head offices situated in Geneva or New York was also hardly the best way to minimize humanitarian suffering.

Nonetheless, speed and flexibility were shown by some of the agencies in giving the Kurdish population access to essential goods. UNHCR brought in tents and other relief items, stockpiled in Pakistan in anticipation of a voluntary repatriation programme for Afghans.[45] UNICEF entered local markets to procure emergency material and hire local staff, whereas WFP, to avoid lengthy delays, purchased food in nearby countries and transferred it from regional pre-positioned stocks.[46]

But, as UNHCR acknowledged in its State of the World's Refugee overview, providing relief to so many refugees at one time presented an immense logistical problem. Notwithstanding the efforts of many international agencies, 30 bilateral donors and over 40 NGOs countries, UNHCR argued that only the intervention of the 13-nation coalition forces' combined craft allowing the use of more than 20,000

[41] Astri Suhrke, From one crisis to another: Organisational Learning in UNHCR, EGDI Seminar, Aug. 2000, p. 6.
[42] Astri Suhrke, op. cit. p. 6.
[43] Ibid., p. 6.
[44] Larry Minear et al., op. cit., p. 14.
[45] Ibid., p. 13.
[46] Ibid.

personnel and 200 aircraft made relief operations possible in all the mountain locations where refugees had sought shelter.[47]

In Iran where, one reads in the report, "the industrialised countries were considerably less forthcoming with assistance despite the much greater number of refugees, UNHCR mounted one of the most ambitious airlifts it had ever undertaken."[48] But by the end of April, only 12 per cent of the blankets, 9 per cent of the kitchen utensils and 11 per cent of the tents required had been delivered. In May, UNHCR was sending out 10 relief flights a day to Iran, thus delivering a total of 6.100 metric tons of relief supplies for April and May 1991.[49]

After the large-scale return to the "safe haven" in Iraq (by September 90% of the entire caseload of Iraqi Kurds had returned to Iraq),[50] UNHCR launched its "largest ever shelter programmes", offering around 30,000 metric tons of winter construction material to about half a million people.[51]

Having successfully completed the emergency relief phase of its operations in Iraq, UNHCR bowed out in favour of other UN agencies, most centrally UNICEF, better equipped to move the rehabilitation and reconstruction phase forward. UNHCR's effective departure from Iraq took place at the end of June 1992.

UNICEF's mandate, though couched in terms focusing on the needs of children ("UNICEF is mandated by the UN General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential"[52]) is also one which allows it to offer relief help even in countries where the government in power opposes such help or is not recognized by the UN General Assembly.[53] Hence its widespread work on behalf of displaced populations. In the mass exodus situation of 1991, it provided logistical support on several levels, among them supervision of water and electricity supplies, to ease the emergency situation.

The mission of the WFP, the World Food Programme, has been defined in the following terms: "to provide food aid: to save lives in refugee and other emergency situations; to improve the nutrition

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[47] UNHCR, The State of the World's Refugees, 1993: The Challenges of Protection, Chapter 5, Responding to Refugee Emergencies, 1 Jan. 1993, p. 8.
[48] UNHCR, The State of the World's Refugees, op. cit., p. 8.
[49] UNHCR, The State of the World's Refugees, op. cit., p. 9.
[50] UNHCR's Operational Experience, op. cit., p. 62.
[51] UNHCR, The State of the World's Refugees, op. cit., p. 9.
[52] UN GA Resolution.
[53] John Borton, Recent Changes in the International Relief System, 1993, p. 1.

and quality of life of the most vulnerable people at critical times in their lives; and to help build assets and promote the self-reliance of poor people and communities, particularly through labour-intensive works programmes."[54]

In order to ensure access to adequate food, WFP follows a threefold strategy. To quote the words of one scholar: "First, with respect to advance planning for potential emergencies, activities include vulnerability analysis and mapping, contingency planning, and assessment of logistical capacities and intervention options. Second, WFP has strengthened its efforts with respect to the inputs required for immediate response to large-scale population movements and other types of humanitarian emergencies. Third, to improve emergency management, WFP has taken steps to decentralise its operations through increased delegation of authority to the field."[55]

During the Persian Gulf crisis, little fault was found with the general preparedness of the WFP, and it earned praise for many of its initiatives by showing flexibility and common sense, such as purchasing food within the region and contracting locally for transport.[56] That WFP actually began life as a development agency and evolved only over the last decade into a disaster relief unit, working within the UN system in close cooperation and often in a subordinate capacity with UNHCR or UNICEF, is a fact that one tends to forget.[57] WFP seems to have taken this evolution in its stride, even though it was forced upon it in part by the reluctance shown by donors to continue funding food development projects, and it has met the challenges posed by complex emergency situations with expertise and skill.

If in the crisis, WFP had next to nothing to say at the coordination level by reason of its weak status among UN agencies, it made up for that by the quality of its performance, working in great harmony with the implementation of NGOs such as Save the Children which served as the direct manager for the distribution of food deliveries provided by WFP.[58] In the field of logistical capabilities, WFP's experience could not be matched by other UN agencies and NGOs, so much so that it transported not only food relief to refugees, but also medicine, shelter and other non-food items[59]

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[54] WFP, Website, Case Study.
[55] Susan F. Martin, op. cit., p. 11.
[56] Larry Minear, op. cit., p. 18.
[57] Raymond F. Hopkins, Complex Emergencies, Peacemaking and the World Food Programme, Macmillan Journal Publication, June 1998.
[58] Ibid., p. 14.
[59] Ibid., p. 15.

thus making logistical support "an important element that WFP brings to UN coordination in complex emergencies."[60]

Besides the three organisations already mentioned, the Geneva-based IOM (International Organization for Migration) was also at the forefront of events, using its transportation facilities to bring about the lightning return of the Iraqi Kurds to their newly created safe havens, and providing help in resettling them. Or as UNHCR puts it: ". . . almost one million people who fled from Iraq and Kuwait during the Gulf crisis were assisted to return home by the IOM."[61] In 1991, IOM's status as "the leading international organization working with migrants and governments to provide humane responses to migration challenges"[62] was taken at face value and hardly contested by anyone at all. This was to change in the decade that followed as some began to critique the policies of the organisation, accusing it of being both anti-migration and anti-humanitarian in its actions.[63]

The actual coordinator of the entire 1991 emergency relief programme for Iraq was an agency which hardly entered the field and which today no longer exists, having been swept aside in the tide of criticism and changes which followed the end of the crisis. The UN Disaster Relief Organisation (UNDRO) which should have mobilized, directed and coordinated the UN relief activities proved unequal to the task. Among its many problems were "an uncertain mandate, inadequate staffing and funding, lack of in-country capacity, lack of support from other UN agencies, a long-running dispute over whether or not it should be operational, and poor credibility within the donor community."[64] UNHCR, in particular, opposed any coordination attempts on the part of UNDRO and "fought fiercely to maintain absolute control over its operations."[65]

The performance of UN agencies involved in providing and coordinating relief during the Persian Gulf crisis drew a great deal of criticism from several western governments, both during and after the operation. The slow response of the principal UN organisations to the crisis was faulted. Likewise, the lack of inter-agency

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[60] Ibid., p. 16.
[61] UNHCR, The State of the World's Refugees, 1993: The Challenges of Protection, Chapter 5: Responding to Refugee Emergencies, 1 Jan. 1993, p. 4.
[62] International Office of Migration, Mission Statement, May 2000.
[63] Franck Düvell, Human rights watchdogs condemn IOM, Statewatch Bulletin, May 2003.
[64] John Borton, op. cit., p. 2.
[65] Gil Loescher, The UNHCR and World Politics, op. cit., p. 152.

coordination and the lack of leadership provided by the UN system to the numerous other actors involved (donor, NGO, intergovernmental) aroused the ire of these governments.

Reaction took the unprecedented form of a statement from a G7 summit in London in July 1991 in which reference was made to the failings of the UN system as an instrument the international community could use to respond to emergency humanitarian situations, and the suggestion put forward that the UN Secretary General should designate a high level official "who would be responsible for directing a prompt and well integrated international response to emergencies, and for coordinating the relevant UN appeals", and bring about "improvement in the arrangements whereby resources from within the UN system and support from donor countries and NGOs can be mobilised to meet humanitarian needs in time of crisis."[66]

The result was the passage of UNGA Resolution 46/182 in December 1991, creating a new emergency funding mechanism, the Central Emergency Revolving Fund (CERF) and setting up a new UN agency, the UN Department of Humanitarian Affairs (DHA) which absorbed the former UNDRO. In 1997, DHA underwent a further name change and became known henceforward as the Organisation for Coordination of Humanitarian Affairs (OCHA) At the same time, a back-up organization, the Inter-Agency Standing Committee (IASC) was established to facilitate inter-agency co-ordination in humanitarian emergencies.[67]

OCHA's creation was timely, following a period of underlying tensions among the international humanitarian agencies, and deep-seated resentments felt by giants such as WFP, UNICEF or IOM against the UNHCR. The latter had devised a secret plan whereby it would have been left in sole charge of the humanitarian assistance field, with a permanent coordinating role in any situation of complex emergency relief.[68]

Lastly, on the tricky subject of coordination, leading UN agencies set out to clarify their relationships, by signing written agreements defining the mandates and responsibilities of each organization, articulating parameters to build on the comparative advantages of each organization and divide responsibilities. The

[66] G7 Summit 1991: Political Declaration: Strengthening the International Order, 16 July 1991, University of Toronto Library.
[67] Gil Loescher, The UNHCR and World Politics, op. cit., p. 292.
[68] Gil Loescher, The UNHCR and World Politics, op. cit., p. 292.

goal here was, of course, "to maximize resource utilization and increase the speed of resource mobilization."[69] Thus inter-agency Memorandums of Understanding were signed between WFP and UNHCR in 1994 and between UNHCR and UNICEF in 1996, whereas the High Commissioner for Human Rights and UNESCO signed a Memorandum of Cooperation in 1995.[70]

3.3. *Evaluation of the Humanitarian Response to the Persian Gulf Crisis*

Another consequence of the Persian Gulf Crisis was the further development of a branch of humanitarian studies focusing on evaluation and assessment techniques. and extending the notion of accountability – which had just begun to become an integral part of popular thinking – to the field of relief operations. The United Nations commissioned leading figures in humanitarian thinking like Larry Minear, Jeff Crisp or Thomas G. Weiss to carry out the study.[71] UNHCR's most telling earliest evaluation report after the events was drafted by the Nordic specialist Astri Suhrke.[72]

The experts all agreed that miscalculations and mistaken responses had occurred. Coordination work (which critics could also interpret to mean no more than raging centralised bureaucracy) was qualified by all concerned as disastrous. In fact the whole UN system was described by some as giving "the impression of a system in disarray."[73]

Our comments below will be however restricted to four issues: the refusal to take local information seriously, the humanitarian costs of political preferences, the expatriate bias, and the lack of impartiality vis-à-vis populations in need in the 1991 Iraqi refugee crisis.

That the early warning system failed to function was as much to do with overconfidence and negligence as with the lack of a suitable mechanism in place. The UN system obviously disregarded regional knowledge and expectations about potential humanitarian challenges. The UN evaluation report, for instance, clearly

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[69] F.K. Bouayad and Boris P. Krasutin, Coordination at Headquarters and Field Level between United Nations Agencies Involved in Peace-Building: An Assessment of Possibilities, Joint Inspection Unit, Geneva, 1997, p. 6.
[70] Ibid., p. 7.
[71] Larry Minear et al., United Nations Coordination of the International Humanitarian Response to the Gulf Crisis 1990–1992, Occasional Paper 13.
[72] Astri Suhrke, op. cit.
[73] Larry Minear et al., op. cit., p. 9.

admits that ". . . the Government of Turkey in January 1991 forecast that as many as one million Kurds might be displaced from Iraq as a result of war, many of whom might seek refuge in Turkey. At about the same time, the Government of Iran foresaw a possible influx of as many as 1.3 million refugees into Iran, matching rather closely the number who eventually arrived."[74]

In addition, UN credibility suffered greatly as humanitarian action was perceived as being bound up with political/military strategies. Jordanian officials had this comment to make on the situation: "Had Turkey incurred the expenditures on evacuees for which Jordan is being denied reimbursement, the funds would have been provided with the stroke of the pen." And the Iranians were brief and to the point: "We got the refugees, but Turkey got the funds."[75]

The expatriate bias was also evident as much in ignoring local availability and importing into the region urgently needed resources ranging from food to medicine to other necessary relief items simply because aid in today's world has come to be intimately linked with purchases in the donor countries, as in bringing in imperfectly trained staff from the home countries instead of hiring highly qualified local workers.[76] The Iraqi crisis was a lesson for the UN in the importance of expanding its dependency on a wider network of assistance providers and suppliers than previously exercised.

Finally from the purely humanitarian point of view, the neglect of the Shiite Iraqi refugees and displaced persons in the south of the country by the international community and relief agencies, and their single-minded concentration on the Iraqi Kurds in the north was an instance of unforgivable partiality which, among all the failings enumerated, probably cost the most in terms of human lives.

Even today, denying protection and aid to the south of Iraq returns to haunt relief workers. In a roundtable on humanitarian action in Iraq held in Washington in February 2002, prominent among the lessons to be learnt from the Persian Gulf crisis was the fact that "internal strife and authoritarian massacres by the government in 1991, including violence against the Shiites, were not addressed by aid agencies or the military."[77] In an assessment paper

[74] Larry Minear et al., op. cit., p. 9.
[75] Larry Minear et al., op. cit., p. 15.
[76] Larry Minear et al., op. cit., p. 18.
[77] Summary of Roundtable on Humanitarian Action in Iraq, Institute for the Study of Migration, Feb. 3, 2002, p. 2.

put out by Médecins du Monde in April 1999, the French NGO went so far as to call the failure to respond to the plight of the Shiites "the principle deficiency" of the 1991 intervention, pointing out further that: "At no time did the United Nations adopt, for the southern region of Iraq, protective measures similar to those implemented for Kurdistan. And yet, in 1991, the Shiites were subject to particularly bloody acts of reprisal . . ."[78]

It would be unfair to bring this section to a close, without mentioning how aid agencies, UNHCR foremost among them, have made advocacy of the cause of Iraqi nationals seeking asylum beyond the region and particularly in Western countries, an integral part of their attempts to come to the assistance of the suffering population of Iraq. Such is the case today as UNHCR continues to urge concerned governments in the West to grant Iraqis temporary protection, and abstain from returning them either to their country in conflict or to the neighbouring states.[79]

4. Role of Non-Governmental Humanitarian Actors

Before the war began in 2003, some 72 non-governmental, non-UN aid and development organisations were registered in the north of Iraq, about 30 of whom had staff on the ground. Of the 32 registered in the centre/south, only seven had active programmes in operation.[80] These included CARE International, Caritas Iraq (and its partner agency Catholic Relief Services CRS), ICRC, Médecins du Monde, Germany's Architects for People in Need (APN), Enfants du Monde and Première Urgence.[81] Many of the larger aid agencies, such as OXFAM, which left Iraq in 1996,[82] Médecins sans frontiers or Save the Children, though extensively active in the region, were not operational in Iraq as a whole, being based either in Northern Iraq, Jordan or Iran. In other words, during the sanction years, only a handful of NGOs worked directly in Iraq, whereas

[78] A Case by Case Analysis of Recent Crises. Assessing 20 Years of Humanitarian Action, Working Paper, Médecins du Monde, April 1999, p. 47.
[79] UN Humanitarian Briefings, Temporary Protection for Iraqis, 28 Mar. 2003.
[80] R. Garfield & K. Dubatey, Relief and Reconstruction: How NGOs can fuel reform in Iraq, Humanitarian Affairs Review, 15 Jun. 2000.
[81] Ruth Gidley, Some NGOs open shop in Baghdad, others wait in Joran, AlertNet, 10 Feb. 2003.
[82] Nick Carter, Oxfam to refuse government Iraq aid, The Guardian, 4 March 2003.

locations in Eastern Turkey, Jordan and Lebanon attracted the greatest concentration of aid agencies.[83] As for emergency aid dispatched to Iraq, this was "primarily focused on the Kurdish populations, with Northern Iraq receiving one of the highest concentrations of emergency aid in the world between 1992 and 1996."[84]

In 1991, as soon as the first evacuees entered Jordan, NGOs mobilised and established a coordinating committee to share information and plan strategies. They were also the first to take in hand the looming refugee crisis. Undeterred by legal considerations and proceeding only from the humanitarian mandate forming the basis of their action, they rushed into action, often without prior consultation with one another.

Organisations such as OXFAM or Médecins sans frontiers, representatives of the refugee councils of Nordic countries, or CRS (Catholic Relief Services) were, on the whole, able to work effectively and well, the latter even obtaining consent from the Iraqi authorities to work in government-controlled areas.[85]

But, as has often proved the case in past emergencies, the major humanitarian role throughout the region in 1991was played by the ICRC. Based on the semi-official dual mandate of protection and assistance it shares with UNHCR,[86] connected to the UN system, but outside the coordination ambit of that body, ICRC was operational from the outset of the crisis. It set up the first camp near the Iraqi border, an example later followed by other NGOs. "Because of the ICRC's involvement in humanitarian and prisoner of war matters during the Iran-Iraq war and because of its studied efforts to nurture independent relationships with Iraqi government authorities," write the Minear team,[87] "its activities in northern and southern Iraq alike did not suffer from many of the problems encountered by UN organizations and NGOs."

ICRC's own standing was such that, during and after the refugee crisis, it refused to bow to the sanctions imposed on Iraq, notifying both the Sanctions Committee in New York and the Iraqi Government of its humanitarian shipments, but refusing to seek preliminary approval of the goods it was shipping in.[88]

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[83] InterAction member activity report: Iraq, its Neighbours and Lebanon, ReliefWeb, March 2003.
[84] Summary: Roundtable on Humanitarian Action in Iraq, op. cit., p. 3.
[85] Larry Minear et al., op. cit., p. 22.
[86] Susan F. Martin, op. cit., p. 2.
[87] Larry Minear et al., op. cit., p. 22.
[88] Ibid., p. 15.

The work of NGOs raised less international criticism compared to the work of international organizations. There were, however, reports of lack of coordination and irregularities among the NGOs, and in their relations with governments too. This was best illustrated by the case of Iran where the government had handed over all coordinating responsibilities to the Iranian Red Crescent. NGOs, however, refused to cooperate, inundating the country with relief goods, upsetting previous arrangements and travelling to refugee camps without prior consultation. The confusion that resulted forced Iranian authorities to ask for UN coordination to keep NGO unruliness in check.[89]

The *mea culpa* of private relief groups took the form of various agreements and codes of conduct which they promised to honour in any future complex emergency situations which might arise. NGO humanitarian ethic is stated in three key documents which have come to operate as "soft law" in the NGO community: the Code of Conduct, the Humanitarian Charter and the SPHERE Minimum Standards in Disaster Response.[90] The 10-point Code of Conduct was the joint work of the ICRC, the Red Crescent Movement and disaster relief NGOs. So far, 160 NGOs have signed up to the document which is ". . . increasingly used as a criterion in the planning and evaluation of NGO programming in and around war . . ."[91]

5. The 2003 War and the Occupation of Iraq

In the run up to the war in 2003, humanitarian agencies, from the United Nations as well as approximately 100 NGOs,[92] attempted to foresee events and show preparedness in the face of the mass refugee influx many had expected to develop. Even so, had events followed their expected course, the war on Iraq would have probably turned out to be yet another humanitarian disaster, with the humanitarian community inadequately prepared to respond to refugee flows, as in other crisis situations in the past.

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[89] Ibid., p. 21.
[90] Hugo Slim, Claiming a Humanitarian Imperative: NGOs and the Cultivation of Humanitarian Duty, Paper presented at the Seventh Annual Conference of Webster University on Humanitarian Values for the Twenty-First Century, Geneva 21–22 February, 2002, p. 2.
[91] Ibid., p. 4.
[92] Who's doing what where?, Humanitarian Centre for Iraq (HIC), 29.7.03.

As war loomed, Arthur C. Helton and Gil Loescher took note of the problem when they found that discussions on contingency planning which were taking place were fragmented, with limited communication between planners in governments, the UN and NGOs. Actual preparations were limited by political, bureaucratic and funding constraints. Nor was there a way to formulate anything like a coordinated strategy to deal with humanitarian issues as the conflict played out, or in its immediate aftermath.[93]

Helton and Loescher's summing up of the situation was contradicted by the 30 May 2003 report of the UN Secretary General to the UN General Assembly and the Economic and Social Council. This document was submitted to ECOSOC in response not only to General Assembly resolution 46/182 of 19 December, with its injunction to submit a yearly report on the co-ordination of emergency assistance, but also to requests contained in General Assembly resolution 57/153 of 16 December 2002 and ECOSOC resolution 2002/32 of 26 July 2002 demanding a strengthening of UN coordination of emergency humanitarian procedures.[94]

On the subject of Iraq, the report said "The regional contingency planning and preparedness effort that the United Nations and its partners undertook prior to the war in Iraq was a comprehensive and resource intensive exercise. The IASC (Inter-Agency Standing Committee for NGOs, which includes NGOs and the ICRC as well as UN humanitarian organizations[95]) played a key role in ensuring the development of contingency plans in and around Iraq that allowed the agencies to pre-position supplies (a task hindered by the lack of advance contributions from donors) and to pre-deploy key response personnel. It also set the scene for close collaboration between the Resident Coordinators, UN Agencies, the Red Cross Movement, the International Organisation for Migration (IOM) and NGOs. Other important aspects of the contingency planning included the early launch of a "preparedness" Flash Appeal for Iraq, the deployment of humanitarian affairs officers in neighbouring countries, and the early establishment of common services, the Joint

[93] Arthur C. Helton and Gil Loescher, Preparing for unpleasant surprises, openDemocracy, 15.1.2003.

[94] UN General Assembly, Strengthening the coordination of emergency humanitarian assistance of the United Nations – Advance unedited draft, ReliefWeb, 30 May 2003.

[95] Larry Minear, Partnerships I the protection of refugees and other people at risk; emerging issues and work in progress, Working paper No. 13, Brown University, July 1999.

Logistics Center, humanitarian air services, the Humanitarian Information Center (HIC), the Integrated Regional Information Network (IRIN) and online coverage on Relief Web."[96]

Luckily for all concerned, the refugee situation in Iraq did not reach crisis proportions, at least this time. Dismissing the projected flight of hundreds of thousands from the battle field which did not take place, the agencies turned their attention to the internally displaced persons within Iraq and eventual Iraqi refugees in neighbouring countries and abroad, whose return to Iraq at this point in time would apparently have disturbed rather than reassured UN agencies, such as UNHCR.[97]

A new actor to appear on the humanitarian scene was the American government and military with their own special approach to how a refugee situation should be handled. The American administration, prior to the war, announced the six principles underpinning what they called their "humanitarian relief strategy", namely: 1. minimising civilian displacement and damage to civilian infrastructure; 2. relying on civilian relief agencies; 3. committing to effective civil-military coordination; 4. facilitating the operations of international organizations and NGOs; 5. pre-positioning relief supplies; 6. supporting the resumption of the UN Oil-for-Food Programme.[98] While no one had any objections to raise concerning the plan, American aid agencies did begin to feel concerned at the lack of resources put at their disposal and the failure to take action to implement the stated principles.[99]

The American administration also created an Office of Reconstruction and Humanitarian Assistance (ORHA) in the Pentagon, responsible for the reconstruction of Iraq. In preparation for this, ORHA sent advance teams to Iraq to "establish offices and to begin coordinating humanitarian assistance, assessing rebuilding needs and laying the groundwork for a new civil administration."[100]

In the past, Iraq had been considered a domain of European aid agencies. Now, USAID was making its presence felt, issuing regular "Reconstruction Assistance Fact Sheets", printing facts and

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[96] United Nations, Strengthening the coordination of emergency humanitarian assistance of the United Nations, op. cit., at para. 22.
[97] Emma Jane Kirby, Iraq "not safe for refugees", BBC News, 9.7.2003.
[98] Sandra Mitchell, Humanitarian Consequences Related to Iraq, Senate Foreign Relations Committee Statement, 11 March 2003, p. 2.
[99] US Announces Intention to Rely on Civilian Relief Agencies for Humanitarian Response to Iraq, Refugees International, 27 Feb. 03.
[100] Monte Reel, US Construction Office Sends Teams to Iraq to Assess Needs, Washington Post, Apr. 14, 2003.

figures on IDPs and Iraqi refugees and outlining measures taken by USAID and its special Foreign Disaster Assistance Office (OFDA) to alleviate the sufferings of the Iraqi population, in particular through "supporting NGO emergency assistance activities with quick-impact projects and IDP support."[101] Prior to operating in Iraq, NGOs, American ones in particular, had been obliged to apply for registration with the American Office of Foreign Assets Control (OFAC)[102] and get security clearance from military authorities before being allowed to enter Iraq. The following five big US NGOs launched operations inside Iraq after the war: International Medical Corps (IMC), International Rescue Committee (IRC), Mercy Corps, Save the Children USA and World Vision. The map of NGO activity in Iraq is still developing, writes Ruth Gidley, and more agencies are expected to arrive soon, although most of them have little or no experience of working in Iraq.[103]

The NGO community in and around Iraq have begun making their presence felt through their umbrella agencies ICVA, InterAction, SCHR and VOICE. The pattern of their activities has changed but little from the sanctions years, the majority of the organisations concentrating in the North and Baghdad and very few venturing to the Centre, the Upper South and the Lower South of Iraq.[104] How effective their work will finally be judged depends on their ability to recognise what the UN calls "the importance of promoting principled interaction with the Occupying Power."[105]

The other leading actor on the Iraqi humanitarian scene is, naturally, the United Nations and its partners. On 28 March 2003, Resolution 1472 readjusted the Oil-for-Food programme "in order to accelerate emergency deliveries of humanitarian aid to Iraq."[106] UN Security Council Resolution 1483 of May 22, 2003,[107] established a development fund for Iraq's oil revenues and mandated that the continuation of the UN's Oil for Food Programme should

[101] USAID: Iraq Humanitarian and Reconstruction Assistance Fact Sheet No. 9 (FY), 10 Apr. 2003.
[102] Fact Sheet: Treasury Announces Easing of US Iraq Sanctions, Department of the Treasury, 7 May 2003.
[103] Ruth Gidley, Tentative Start as Aid Agencies Move into Iraq, Global Policy Forum, April 17, 2003.
[104] OCHA, Minutes of NGO coordination meeting on Iraq, Relief Web, 27 May 2003
[105] UN GA, Strengthening the coordination of emergency humanitarian assistance of the United Nations, op. cit., p. 1.
[106] UN System Network on Rural development and Food Security, News, June 2003.
[107] UN Security Council Resolution 1483, May 22, 2003, see annex 2 for text in full.

be phased out over the following six months.[108] Furthermore, it lifted 13-year old economic sanctions against Iraq and appointed a special representative to assist in humanitarian relief, and economic and political reconstruction in the country for a period of four months. By May, many UN agencies, including WFP, FAO, WHO and UNICEF and UNDP, followed by OCHA, UNEP, UNESCO, UNFPA and UNHCR, had all opened or reopened offices in Baghdad and elsewhere.

In close collaboration with the US-run Office for Reconstruction and Humanitarian Affairs (ORHA), UN agencies were set to implement various programmes. A UN Office for the Humanitarian Coordinator for Iraq (UNOHCI) was established in Baghdad. On 1 June, WFP started its first nationwide post-conflict public food distribution programme. FAO and WFP joined forces to launch a mission to assess the crop, food supply and nutrition needs of Iraq and provide stopgap measures wherever the need was most urgently felt. WHO attempted to ensure efficient distribution of medicine and drugs throughout Iraq. UNDP launched a re-employment programme to provide 250,000 new jobs to Iraqis over the following sixth months.[109]

As for UNHCR, as already outlined in a previous section, the agency was reluctant to launch a program of quick return for refugees even though the agency was obviously eager to guarantee a safe return as soon as possible based on its mandate. It was the Allied Forces and in particular the US that wished to delay the process of return due to their misgivings regarding the security impacts of the return of refugees especially the large numbers from Iran. Priority was therefore given to the settlement of the internally displaced persons within Iraq, rather than to the return of Iraqi refugees stuck in neighbouring countries and abroad.[110]

Here, UNHCR will not be fully in charge, since the IDP responsibility has been split into two, IOM being given overall responsibility for IDPs in central, southern and northern Iraq,[111] a task it has been entrusted with by the American authorities in Iraq,[112]

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[108] Thalif Deen, "Iraq: NGOs Decry 'Bribes and Threats' behind U.N. Vote", IPS News Agency, 24 May 2003.
[109] UN System Network on Rural Development and Food Security, News, June 2003.
[110] Emma Jane Kirby, Iraq "not safe for refugees", BBC News, 9.7.2003.
[111] IOM, Emergency and Post Conflict Activities, April/May 2003.
[112] Patrick J. McDonnell, Displaced Iraqi Kurds, Wary Arabs Seek Justice, LA Times, August 3, 2003.

with USAID providing the funds, whereas UNHCR will apparently have a hand in setting up refugee camps for people arriving to claim their share of the land, and a secondary role to play in determining IDP status in Kurdish-held areas. IOM has long challenged UNHCR for the leadership role in humanitarian work for refugees, with sometimes the one, sometimes the other coming out on top. IOM's work in Iraq will undoubtedly prove arduous and risky.

6. Overall Assessment

In assessing the various humanitarian activities in Iraq in favour of refugees and displaced persons under the sanction regime, it would be fair to say that the transformation of Iraq to aid-recipient status for over a decade has created a generalised state of dependency among the population. Those who lived in Iraq were more and more dependent on their government, and those who fled from persecution or violence found themselves at the mercy of their neighbours and the international relief system.

During this period, Iraq has represented a hotbed for the activities of inter-governmental, governmental and non-governmental humanitarian agencies. A prime goal for all has been to alleviate the sufferings of the Iraqi refugees which manifested itself in different forms. Some of these humanitarian actors have acted on the basis of their constituent legal mandates for refugees, others as a part of their overall humanitarian service. The division of labour has not always been clear cut; hence competition, ulterior motives, lack of coordination and other inadequacies have also been involved.

Our preceding overview of how this system functions and the role played by humanitarian actors indicate that all the parts of a problem-solving machinery are already in place, although far from being perfect. The international relief system has gone through an incremental evolution, with Iraq acting as an important test case. It still requires major streamlining and coordination. To get it to run efficiently, however, what is primarily required is the will of the international community to provide political and financial support to such mechanisms, and a non-discriminatory approach vis-à-vis international humanitarian law. Whatever loopholes international law occasionally throws up – and addressing some of them with a view to eventual reform is the main purpose of this doctoral work – it still constitutes a viable blueprint for solutions in the world.

The 2003 Iraq war was marked by no mass displacements, no refugee crisis in the strict sense of the term. Against the background of post-war Iraq, the problems of returnees and the internally displaced still need to be tackled. Relief agencies, thronging Iraq today, will be judged on how they managed to help revive Iraq's displaced and refugee population and close a tragic file that has been open for decades, by showing due deference to international law. Iraq will also be remembered in the context of the benchmarks it contributed to the development of international relief and refugee protection systems.

B. Legal Terms of Reference

1. Architecture of Refugee Law

Three interlinked branches of International Law provide formal protection for disadvantaged groups and set minimum standards for their humane treatment: These are Refugee Law, Human Rights Law and International Humanitarian Law. In this triad, Refugee Law, although embedded in the broader international human rights protection regime[1] and drawing widely on various other sources of international law, takes first place when it comes to effective application of the principles of protection, since it can be invoked in a whole range of situations from armed conflict to natural disasters, from mass displacements to the asylum procedures individual applicants are subjected to. Refugee law can also be viewed as part and parcel of general international humanitarian law.

The principles of contemporary Refugee Law are enshrined in a set of fundamental treaties to which have been added, when necessary, norms and standards enacted by one or the other of the UN organs endowed with relevant mandates. This dynamic process of updating has contributed to turning the international protection regime – whatever other lacunae might be detected in the system – into an essentially flexible instrument of benefit to many people forced into displacement or downright flight. For Iraq, too, with its long-standing exposure to refugee crises, this body of law has served as the legal framework within which various humanitarian efforts by the international community have been inscribed.

1.1. *The 1951 UN Convention Relating to the Status of Refugees and Its Additional Protocol of 1967*

The founding instrument of refugee protection is the United Nations Convention relating to the Status of Refugees which was adopted on 28 July 1951 by the UN General Assembly and, as of February 2003, ratified by 141 States. Its inception coincided with a period in time when the Second World War was over and the Cold War

[1] World Conference for Human Rights, 1993, paragraph 23 of the Vienna Declaration and Programme of Action.

was yet to begin. Though, down the years, the Convention has been subjected to a great deal of criticism in certain respects, its legal, political and ethical significance has never really confronted any compelling challenge. Legally, the Convention is seen as offering the world the key standards against which principled action in refugee questions must be measured. It is said to serve both politically, as a universal framework allowing States to cooperate and assume their responsibilities vis-à-vis refugee groups, and ethically, because it stands as a symbol "for the 141 States which currently are Parties to it of their commitment to uphold and protect the rights of some of the most vulnerable and disadvantaged people."[2]

The document, invariably invoked as the ultimate legal basis for UNHCR action in crises, often appears to be ill adapted to meet conditions prevalent today. An invention of the 1950s, that is to say the post-war years, the Convention allowed the humanitarian community ample scope for action to resolve the problems of refugees on the European continent. When refugee-management situations spread to other continents, independence-seeking Africa in the 60s, Asia in the 70s, rocked by the upheaval of invasions and imposed wars, or South America, caught up in numerous revolutionary and counter-revolutionary movements, several of the provisions of the Convention no longer seemed wholly relevant. The narrow definition of the term refugee and the individualistic approach to asylum-acceptance on the part of signatory receiving states, for instance, or the time and geographical limitations which further hampered its application, all suggested that the 1951 Convention was not a perfectly designed legal tool, applicable in its entirety whenever a new refugee situation developed.

In the 1951 Convention, a refugee was defined as a person having a well-founded fear of persecution because of his or her race, religion, nationality, political opinion or membership of a particular social group or. The person in question was also outside the boundaries of his or her country of origin and unable or unwilling to rely on the protection of that country or to return within its borders for fear of persecution. To the basic definition was also added a temporal/geographical factor, limiting its application to people turned out of their countries owing to events which had taken place on the European continent before January 1, 1951.[3]

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[2] UNHCR, Refugee Protection in International Law, eds.: E. Feller, V. Türk, F. Nicholson, Cambridge University Press, 2003, pp. 164–170.

[3] 1951 Convention relating to the Status of Refugees, 169 UNTS 137, Art. A (2).

Since refugee crises continued to multiply after the date deadline set in the Convention, it became imperative to modify the original document. This was done through the 1967 Protocol relating to the Status of Refugees. Its main impact lay in lifting the time and geographic limitations contained in the Convention. These two documents, separate in scope but linked, cover the fundamental definition of a refugee, the legal status of the latter in any country of asylum, including protection from *refoulement* to a place in which his life might be at risk,[4] and the obligations of States to cooperate with UNHCR and facilitate its supervisory duties in the application of the Convention.[5]

1.2. *Regional Instruments*

Two other particularized refugee instruments, adapted to regional circumstances, the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 and the Cartagena Declaration for Central American States of 1984 complete the treaties that serve as a basis for the body of refugee law, around which has grown up an important collection of soft laws, standards and norms which a succession of large-scale refugee movements over time has called into being.

The OAU document differs from the Convention on several essential points. It expands the concept of the refugee to apply to "all persons compelled to flee across national borders by reason of any man-made disaster, whether or not they can be said to fear persecution."[6] Moreover, the OAU definition also extends international protection to persons who seek to escape serious disruption of public order "in either part or the whole" of their country of origin.[7]

The Cartegena Declaration,[8] to which 10 countries in South America are party, includes the innovative definition of the refugee enacted by the Organization of African Unity, but restricts its scope by requiring refugees to prove that "their lives, safety or freedom have been threatened"[9] by the circumstances they are attempting

[4] Ibid., Article 33.
[5] Ibid., Article 35.
[6] James C. Hathaway, The Law of Refugee Status, Butterworths Canada Ltd, 1991, p. 16.
[7] Ibid., p. 18.
[8] Adopted at a colloquium entitled "Coloquio Sobre la Proteccíon Internacional de los Refugiados en Américan Central, México y Panamá: Problemas Jurídicos y Humanitarios" held at Cartagena, Colombia from 19–22 November 1984.
[9] Ibid., p. 20.

to escape from and it does not "explicitly extend protection to persons who flee serious disturbance of public order that affects only part of their country."[10]

As for Asia, in June 2001, the Asian-African Legal Consultative Organization (AALCO) agreed to a non-binding set of principles for the treatment of refugees[11] which might in time expand.

These were basic legal instruments that formed the core of a universal, institutionalised approach allowing states to deal with the issue of forced displacement. But in the overall framework so established, the creation of an operational and supervisory body to oversee the application of this legal regime became a pressing need. The international community responded by setting up the United Nations High Commissioner for Refugees (UNHCR), mandated through its Statute, adopted by the UN General Assembly in December 1950, to provide protection to refugees and help them find lasting solutions to their plight.

1.3. *The UNHCR Statute*

The Statute, which antedates the Convention, is another legal document of resonance in the refugee question, setting forth as it does not only the competence attributed to the holder of the office of High Commissioner, but offering a definition of the term refugee, varying somewhat from that contained in the Refugee Convention. In Paragraph 8 of the UNHCR's Statute, reference to refugees is generally taken to mean the term as used in the broader sense, comprising asylum seekers as much as refugees. However, as Guy S. Goodwin Gill points out, an apparent contradiction is to be found in the text which affirms, on the one hand, that "the work of the Office 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 of subjective and objective elements."[12] He further adds that the massive increase in refugee movements over the past 30 years has made it necessary to broaden the original UNHCR mandate in order to include various new categories of so-called persons of concern to the international community.

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[10] Ibid., p. 20.
[11] 21st Refugee Law Course On Current Refugee Law Issues, San Remo, June 4–8, 2002, p. 2.
[12] Guy S. Goodwin-Gill, The Refugee in International Law, op. cit., p. 6.

UNHCR itself acknowledges this constant inflation of the term refugee when it writes in a recent publication: "On an *ad hoc* basis, the UN General Assembly and Secretary General have frequently asked UNHCR to take care of groups of people – usually referred to as "persons of concern" – who are not covered by the 1951 Convention or even by the extended refugee definitions. For example, some groups of internally displaced people, such as Kurds in northern Iraq need international protection."[13]

Starting in 1957, when, in the matter of Chinese refugees in Hong Kong, the General Assembly authorised the High Commissioner to assist people who did not come fully within the statutory definition of the word refugee,[14] UNHCR's protection mandate has undergone a steady expansion through General Assembly resolutions, allowing it to assume responsibility for more and more categories of persons, not included in the original Convention, and at the same time widening the areas over which it may exercise its competence. Thus UNHCR's responsibility has grown over the years and now extends to people known as "mandate" refugees (as opposed to "Convention" refugees, that is to say refugees whose profile would not really fit the definition provided by the Convention or Protocol, but would correspond to the definition found in subsequent legal instruments like the OAU Convention or Cartegena Declaration), returnees, stateless persons and, in many cases, internally displaced persons.[15] All of these categories of uprooted people together form what the agency means when it refers to "Persons of Concern to UNHCR".[16]

Another point to be borne in mind is that, whereas the responsibilities assumed by State Parties to the Refugee Convention and Protocol have remained theoretically static, the UNHCR's mandate has not and, by and large, thanks to the legal flexibility provided by taking recourse to UN General Assembly and ECOSOC resolutions, it has expanded considerably beyond its original framework to meet the challenges of changing refugee situations, thereby bridging the "protection gap" wherever it occurs.[17] Or, as one expert puts it: "The dichotomy between the UNHCR responsibilities on the one hand and limited obligations formally accepted by certain states on the other remains a major challenge."[18]

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[13] UNHCR, An Operations Management Handbook, Feb 2003, para. 2.8.
[14] GA Res. 1167(XII), 26 Nov. 1957.
[15] UNHCR, Refugee Protection: A Guide to International Refugee Law, op. cit., p. 22.
[16] Ibid., p. 23.
[17] Ibid., p. 22.
[18] Volker Türk, UNHCR's Supervisory Responsibility, New Issues in Refugee Research, Working Paper 67, October 2002, p. 6.

It goes without saying that, under international law, the main responsibility for safeguarding the human rights of refugees is entrusted to states, each of them safeguarding its sovereignty. To UNHCR, however, has been attributed the task of ensuring that, in any given refugee situation, governments do live up to their responsibilities, starting with admission and ending with the achievement of durable solutions. In large-scale influx, in particular, the humanitarian community's ability to give support and assistance to states badly affected by the phenomenon passes through the channel of the UNHCR, thus clearly underlining the leading role the agency plays in implementing effective international protection.[19]

In times of conflict states cling on to their prerogatives. UNHCR attempts to force them to commit themselves more and more to its efforts on behalf of persons of concern, a category which at times, unhelpfully, seems to put on the same level both people seeking temporary or permanent refuge and those entitled to protection.[20] States counter by putting up strong resistance. The result is that the main instruments regulating refugee law seem to sink more and more into obsolescence, and changes and reforms seem to come in, so to speak, through the backdoor.

Nevertheless, UNHCR achieves its best results when working closely with states exposed to large-scale refugee influx. It is clear that international refugee law standards stand much to gain from their incorporation into domestic legislation and corresponding procedures. Only thus can divergence in state practice be restricted and the viability of a universal commitment to protection be affirmed. Moreover, experience has confirmed that enforcement mechanisms are much more effective when situated at the national rather than the international level. Hence UNHCR's emphasis on the adoption of national legislation, regulations and procedures to deal with refugees' rights and obligations.

1.4. *Human Rights Law*

As already stated, international human rights law also provides important supplementary tools for refugee protection. According to UNHCR "human rights instruments, both universal and regional, are broader in scope than refugee-specific treaties, and they fre-

[19] UNHCR background papers on the first theme of the "third track" of the Global Consultations on International Protection on the protection of refugees in situations of mass influx, in Volker Türk, op. cit., p. 10.

[20] Guy S. Goodwin-Gill, op. cit., p. 117, n. 72.

quently provide their own supervisory, reporting and enforcement mechanisms."[21]

Human rights law primarily derives its fundamental principles from three main documents: the Universal Declaration of human rights of 1948 and the International Covenants of December 1966. Together they deal with the whole spectrum of rights vested in each individual. The first Covenant concentrates on civil and political, the second on economic, social and cultural rights. Basic standards guiding the protection of refugees can also be deduced from the principles set out in these two instruments, as they can from the 1949 Geneva Conventions and its Additional Protocols, which represent the system of international humanitarian law. Other human rights instruments, such as the Convention against Torture and other cruel, inhuman or degrading treatment or punishment (1984) or the Convention on the elimination of all forms of discrimination against women (1979) or the Convention on the Rights of the Child (1989) have also come to shore up the legal framework of reference for UNHCR protection activities in those specific fields.

1.5. *Soft Laws*

Soft laws are international legal documents and instruments that are not ratified by states and therefore are not legally binding. They are however drafted, negotiated and adopted by states through multilateral means of consensus or majority voting. They mostly act as policy guidelines in the form of resolutions and declarations of the international organizations, but also carry significant political and legal weight and therefore assume some authority. They are recognized as foundations of the future customary laws based on state practice and precedent.

Based on soft laws, additional mandates have widened UNHCR's scope of action, in particular the conclusions of the Executive Committee (ExCom). The Executive Committee of the High Commissioner's Programme was created in 1958 with the task of approving the High Commissioner's annual assistance programmes, and advising the High Commissioner in the exercise of his or her statutory functions, notably international protection. Protection is placed as a priority item at each session of the Executive Committee; whose members are elected from member states by ECOSOC and which meets once a year in Geneva.

[21] UNHCR, Introduction to International Protection, June 1992, p. 11.

The consensus reached by the Committee in the course of its discussion is expressed in the form of Conclusions. Although these texts do not have the legally binding quality of the basic international instruments, they nonetheless have come to contribute a great deal to the development of international refugee law by identifying deficiencies still present in protection issues and proposing appropriate remedies on the course of action to be taken. Conclusion No. 22,[22] adopted in 1981, for instance, changed the face of emergency management by defining the minimum standards of treatment to be afforded to refugees arriving in large numbers, pending arrangements for a durable solution.[23]

The primacy of the soft law principle of temporary protection, which is derived from the hard law *non-refoulement* principle, comes to the fore in situations of large-scale displacement. *Non-refoulement* is set out in Article 33(1) of the 1951 Convention, which expressly focuses on the individual rather than the collective, and is reiterated most recently in a document of the Commission of the European Communities entitled "Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons" in the following terms: "Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding *non-refoulement*."[24] In fact, this principle, reasonably embedded in cus-

[22] Executive Committee, Conclusion No. 22 (XXXII), 1981. To quote from the document:
"2. Asylum seekers forming part of such large-scale influx situations are often confronted with difficulties in finding durable solutions by way of voluntary repatriation, local settlement or resettlement in a third country. Large-scale influxes frequently create serious problems for States, with the result that certain States, although committed to obtaining durable solutions, have only found it possible to admit asylum seekers without undertaking at the time of admission to provide permanent settlement of such persons within their borders.
3. It is therefore imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment, pending arrangements for a durable solution, and to establish effective arrangements in the context of international solidarity and burden-sharing for assisting countries which receive large numbers of asylum seekers.
II. Measures of protection
A. Admission and non-refoulement
1. In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.
In all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed.

[23] UNHCR, Introduction to International Protection, June 1992, p. 14.

[24] Directive on Minimum Standards for Giving Temporary Protection in the Event

tomary international law, forms the very core of the legal justification evoked by the international community to compel states, even such among them which have not acceded to any of the basic legal instruments, to open their borders to mass influx.

If states, as a rule, bow to the inevitable and show compliance with the principle of *non-refoulement*, they demand in return that admission of large populations carry with it a clear limitation in time. Temporary admission in influx situations has become more and more the norm, figuring as such in various international instruments[25] such as, for instance, the 1969 OAU Convention, although it has by no means acquired the peremptory character of the *non-refoulement* standard.

2. Legal Basis for Humanitarian Intervention in Iraq

The focal point of this discussion is the legal underpinning of UNHCR activity in the various Iraqi refugee crises already described at length in Chapter Two and the first part of this Chapter. Some of these events have only been partially documented or not at all, but the ground-breaking intervention in northern Iraq during the 1991 Kurdish refugee exodus followed by rapid spontaneous return has attracted ample comment and analysis. It can be followed every step of the way as the international community, showing inconsistency in its decisions, granted derogation from the standards of protection law and devised a new method of humanitarian intervention in Iraq. At the same time almost total silence was observed on the achievements of certain regional players which, by addressing large numbers of persons of concern to the international community and complying with the principle of *non-refoulement* were actually acting on behalf of the said community.

2.1. *Pre-1988 Period*

In the foregoing pages, we enumerated up to three massive departures from Iraq for the Shiite population, four for the Iraqi Kurds. The earliest of these was the 1974 Kurdish movement out of Iraq

of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof, OJ 2001 No. L212/12, Article 3(2).

[25] Guy S. Goodwin-Gil, The Refugee in International Law, Clarendon Press, 1990, p. 116.

about which little has been written. UNHCR involvement was accordingly meagre and limited to the role of a diplomatic observer.[26] Furthermore, whereas until 1970 UNHCR problem resolution in Asia was restricted in scope and size, by 1971 it was fully engaged in handling an unprecedented 10 million mass flight of Bengalis to India. The Iraqi Kurdish refugee crisis, in comparison, with only a few hundred thousands on the move did not attract much attention, all the more so since Iran did not appeal to the international community for assistance for its refugee load and Turkey's refusal to open its border to the Kurds could be dismissed on the grounds that its accession to the 1951 Convention, but not the subsequent Protocol, allowed it legal latitude to do so.[27]

Likewise, the 1971 deportation of Faili Kurds or the flight of Shiite refugees from Iraq on the eve of the Iran-Iraq war seems to have made little impact on the international humanitarian body and no special mention is to be found of such refugee events in UNHCR annals.

2.2. *1988: The Kurdish Influx, UNHCR Response to Voluntary Repatriation*

By the time the 1988 Kurdish influx had got underway, things had changed enough to make UNHCR extend its sphere of interest, not to say influence, to Iraq and its neighbouring countries. Large groups of Kurds had made it known that they were willing and eager to return to the home country.

No legal problems were posed by the operations to be undertaken. UNHCR's mandate for voluntary repatriation had been "developed over decades through texts, instruments and practice",[28] both of a binding nature and of the "soft law" variety, based on international consensus. Even though the 1951 Convention provisions did not directly address the question of voluntary repatriation, they did incorporate the principles of *non-refoulement* and well-founded fear of persecution, both of which served to strengthen UNHCR's own statutory position. The Statute was more explicit, stating inter alia that governments were called upon to cooperate

[26] Cf. p. 16 of the present work, Chapter Two, Part A, Background of Refugee Crises of Iraq.
[27] UNHCR, Sadako Ogata, Conference on humanitarian intervention, sovereignty and the future of international society, 18 May, 1992, p. 2.
[28] UNHCR, Handbook: Voluntary Repatriation, International Protection, 1996, para. 1.

with the UNHCR by "assisting the High Commissioner in efforts to promote the voluntary repatriation of refugees",[29] a requirement reaffirmed in several General Assembly Resolutions, starting with the one authorising UNHCR to assist in the Algerian repatriation of 1961,[30] which further broadened the agency's area of competence. The formulation in the resolution, merely stating that UNHCR was requested to assist in the rehabilitation of Algerian refugees following their return to their homeland, was left vague enough to allow for interpretations.

As of 1980, the Executive Committee of the High Commissioner's Programme also examined the topic of voluntary repatriation, codifying in its Conclusion the complete range of UNHCR's special competence in dealing with returnees.[31] A UNHCR Executive Committee (ExCom) Conclusion, as we know, results from a consensus agreement reached at annual full session meetings of that intergovernmental body.

Monitoring the situation of returnees, receiving returnees in their country of origin and assisting in their reintegration were among the clarifications the new ExCom text presented. Taking up the matter again in 1985,[32] the Executive Committee placed added emphasis on UNHCR's role in movements of voluntary repatriation.

In particular, according to Conclusion 40, it was stated that UNHCR should:

- Keep the possibility of repatriation "under active review" from the outset of a refugee situation and actively pursue the promotion of this solution;
- Act as an intermediary and promote dialogue between all main parties;
- On all occasions be fully involved from the outset in assessing the feasibility and, thereafter, in both the planning and implementation stages of repatriation;
- Together with other UN Agencies, assist returnees in their reintegration and rehabilitation;
- Be recognized as having a legitimate concern for the consequences of return and be given direct and unhindered access to returnees.[33]

The Agency was thus well-positioned by 1988 to involve itself actively in promoting a durable solution to the crisis by supporting efforts

[29] GA Resolution 428 (V), 14 December 1950.
[30] GA Resolution 1672 (XVI), 1961.
[31] ExCom Conclusion 18 (XXXI), 1980.
[32] ExCom Conclusion 40 (XXXVI), 1985.
[33] UNHCR, Handbook: Voluntary Repatriation, op. cit. para. 1.4.

towards the voluntary repatriation of this Kurdish group. The task was made easier by an amnesty granted by the Iraqi government to refugees returning to the northern region, with the result that, to quote the words of the High Commissioner: "After the announcement of the amnesty for Iraqi Kurds, some 45,000 refugees were repatriated to Iraq before the cessation of the amnesty on 6 Oct., 1988".[34]

The statute of the Kurdish refugees in question can be defined by referring to James C. Hathaway's summing up of refugee categories under international law.[35] Category one contains Convention and Protocol refugees entitled to the full range of rights set out in the Convention and enabled to call upon the institutional support of the UNHCR. In Category two are to be placed refugees protected by a regional agreement like the OAU document or the Cartegena declaration. Category three covers refugees such as the Kurdish group in question who are caught up in a cycle of flight, and are unable to invoke a regional protection arrangement. Category four includes involuntary migrants, fleeing man-made or natural disasters, with claims on UNHCR for material assistance, aid in voluntary repatriation or resettlement and, in certain cases, legal protection, but enjoying no special claim to protection under international law.

Aid to yet another group of Kurds over the same time span was described in the report in the following terms: "Also in 1988, the High Commissioner acted upon a request by Iran to assist some 70,000 Kurdish refugees from Iraq who arrived in that country between March and October 1988. That assistance comprised medicine, etc. . . . Obligations for assistance to Kurdish refugees in 1988 totalled $8.3 million."[36] This was a typical example of the classic case of UNHCR responding to a request for assistance from a host country sheltering a mass influx whose many needs placed an intolerable burden on its own resources.

2.3. *The 1991 Crisis: New Reasons for Intervention*

The 1991 dual refugee exodus in the aftermath of the Kuwait war, with the Kurds heading for the mountains and the Shiites displaced in the south, tore a distinct rent in the fabric of both refugee and humanitarian law. As in early April, Kurdish refugees scram-

[34] Report of the UN High Commissioner for Refugees, 1989, Sept. 1989, para. 84.
[35] James C. Hathaway, The Law of Refugee Status, Butterworths, 1991, p. 27.
[36] Ibid., para. 179.

bled to the heights and sought refuge in Iran and Turkey – the former admitting the mass influx unconditionally, the latter, with no rebuke on the part of the international community, unwilling to back down from its long-held position that it was not required to comply with the *non-refoulement* principle demanding prima facie admittance of refugees and a guarantee at least of temporary asylum.

UNHCR, caught unawares because of a faulty early warning system and little preparedness, wavered about what its proper response to the crisis should be. Turkey's major allies, Britain, France and the USA opted to send in troops to establish a "security zone" inside northern Iraq. "This strategy" writes Astri Suhrke, "fundamentally violated the principle of asylum, which was central to UNHCR's mandate."[37] The agency was also concerned for the security of refugees. Finally, shored up legally by a Security Council resolution condemning Iraq's refugee-generating actions and invoking the notion of such actions being a threat to international peace and security,[38] UNHCR put its principles aside and accepted the solution of a "security zone".

The resolution did not endorse any military action. Yet, military action did take place. Chinese and Russian opposition aside, the majority of UN member states remained silent. By late May, troops withdrew from the area and UNHCR could begin its operations based on an agreement between the UN and Baghdad.[39]

The question that till today remains open, whichever way one might choose to look at it, is to what extent does the plea of humanitarian intervention justify the use of unauthorised force? Or, in other words, was the military entry into Northern Iraq in favour of the Kurds, followed by the setting up of the no-fly zone, an unlawful action? Attitudes towards the use of force in response to atrocities and other severe humanitarian emergencies have been evolving over the past few decades.[40] "Rather than view such interventions as flatly illegal or as 'excusable breaches' of the UN Charter," argues Jane Stromseth, a "third approach asks whether a norm of customary international law is beginning to emerge under which humanitarian intervention could be understood as lawful in rare cases under certain circumstances."[41] The writings of legal commentators seem

[37] Astri Suhrke, From one Crisis to Another: Organisaitonal Learning in UNHCR, 24 Aug. 2000, p. 7.
[38] S/RES/688 of 5 April 1991.
[39] S/22663, 30 May 1991.
[40] Nicolas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society, Oxford Univ. Press, Oxford 2000.
[41] Jane Stomseth, Rethinking Humanitarian Interventions, p. 246, in: Humanitarian Intervention, Ethical, Legal and Political Dilemmas, Cambridge Univ. Press, 2003, p. 350.

to favour the Stromseth approach, though certain notable exceptions can also be found. Michael Byers and Simon Chesterman, for instance, strongly defend the principle of non-intervention as firmly established in international law. Attempts to undermine this principle would lead to radical and unsound change in the international legal system.[42] In other words, the moral considerations that armed intervention premises as its foundation must not be allowed to triumph over the sanctity of the law. Nonetheless, a precedent had been created which was quickly repeated in the 1998 NATO bombing of Yugoslavia and which will no doubt serve again to justify the concept of regime change that caused the attack on and occupation of Iraq in 2003.

Not only were the principles of humanitarian law adversely affected by the decision to set up a safe haven in northern Iraq in 1991, but refugee law as it had been practised thus far came in for a bruising as well. On the one hand, Turkey's disregard for the *non-refoulement* principle in the Kurdish crisis was bitterly criticized by many refugee advocate organizations. They argued that Turkish behaviour on the frontier to Iraq was in breach of its international legal obligations, *non-refoulement* being considered not only a pillar of the 1951 Convention, but also a part of the customary rule of law, and therefore binding on all countries whether or not they were party to the Refugee Convention.[43] On the other, the United Nations fared little better as far as the respect it showed for existing legal principles.

In Resolution 688 of 5 April 1991, the Security Council, acting on the basis of a series of resolutions adopted under Chapter VII of the U.N. Charter "condemned the repression of the Kurdish and other civilians by Iraq"[44] and insisted that the Iraqi government allow international humanitarian organisations to provide assistance to those in need within safe areas inside Iraqi territory.[45] The principle of Iraqi sovereignty, reiterated by the General Assembly in connection with the Iraqi crisis – "The sovereignty, territorial integrity and national unity of states must be fully respected in accordance with the Charter of the United Nations" – was clearly

[42] Michael Byers and Simon Chesterman, Changing the Rules about Rules, pp. 177–203, in: op. cit. Humanitarian Intervention.
[43] Kemal Kirisci, UNHCR and Turkey: Nudging Turkey towards a better implementation of the 1951 Convention on the Status of Refugees, Interrnational Journal of Refugee Law, Vol. 13, No. 1/2, January 2001, p. 4.
[44] UNHCR's Operational Experience with Internally Displaced Persons, Sept. 1994, p. 83, para. 63.
[45] GA Resolution 46/182, Dec. 1992.

ignored. As was the requirement that UNHCR should undertake work in favour of persons displaced in their own country only with the consent of the concerned State.[46]

This last, however, was remedied as consent obtained through coercion, as some would not fail to point out, especially since Iraq was not a party to the 51 Convention or the 67 Protocol.[47] A Memorandum of Understanding was signed on 18 April 1991 by Iraq's Minister of Foreign Affairs and the Executive delegate of the Secretary General, Prince Sadruddin Agha Khan. Under the terms of the Memorandum, Iraq agreed to provide humanitarian relief to displaced persons "whenever such presence may be needed", through the establishment of UN sub-offices and humanitarian centres.[48] A new Memorandum, extending the agreement between the UN and Iraq for an additional six months was negotiated on November 24, 1991.[49]

The Iraqi precedent case was, of course, also utilized to justify intervention in the domestic affairs of a UN member state, Somalia,[50] although that state did not pose a military threat to its neighbours and had not consented to the said intervention. Somalia was entered by foreign troops on the basis of "the magnitude of human suffering" found in that country which was deemed to constitute a threat to international peace and security. In fact, the traditional notion of sovereignty, based on the provisions of the Treaty of Westphalia, has been revisited to such an extent that UN Secretary General Kofi Annan, in a speech to the general Assembly on 20 September 1999, found it perfectly normal to speak of "individual sovereignty", thereby meaning "rights beyond borders" or the human rights and fundamental freedom of each individual under the UN Charter.[51]

2.4. *The 1996 Kurdish Crisis*

During August 1996, the armed conflict between two opposing Kurdish factions resulted in significant population displacements, both within Iraq as well as into Iran. The majority of these people,

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[46] GE Res. 48/116.

[47] Sir Elihu Lauterpacht & Daniel Bethlehem, The scope and content of the principle of non-refoulement: Opinion, In: Refugee Protection in International Law, UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003, p. 167.

[48] UNHCR's Operational Experience with IDPs, op. cit. para. 64.

[49] Ibid., para. 64.

[50] UN Security Council Resolution 751 (April 24, 1993).

[51] Gary G. Troeller, Refugees in contemporary international relations: reconciling state and individual sovereignty, 28 March 2003, p. 15, p. 1.

however, started returning to Iraq in October 1996.[52] UNHCR estimated at 65,000 the number of Iraqi Kurds who fled to Iran. As of December 1996, however, UNHCR had registered 96,000 returnees, the gap between the two figures being attributed to returnees who had fled at earlier times to neighbouring Iran. Since monitoring returnees was already an integral part of UNHCR work at the time, no extension of its mandate was required to deal with the crisis.[53]

In covering its mandate regarding asylum-seekers, which constitutes the routine activity of the agency in times of tranquillity and with no massive refugee crisis in the offing, UNHCR's right to participate in refugee status determination procedures rests mainly on an *ad hoc* Executive Committee Conclusion,[54] whereas a second such Conclusion enables UNHCR to issue letters of protection to people it deems to have met the refugee criteria.[55]

2.5. *The 2003 Crisis*

The UNHCR left Iraq in June 1992 after completing its share of the emergency relief assistance programme for northern Iraq, as requested by the UN Secretary-General. In 1996, it returned and was briefly involved in the returnee movement of the Kurds who had fled after factional fighting between two of their parties broke out. Otherwise it had carried out routine repatriation work in the country. Following the 2003 occupation, as many other relief organisations were pulling out of Iraq, UNHCR was expanding its presence to deal with the return of more than 500,000 refugees, among them 200,000 from Iran, and displaced Iraqis.

The 2003 UNHCR operations in Iraq are based on UN Security Council Resolution 1483/2003. Resolution 1483 requires, in particular, that appropriate measures be taken by UNHCR in regard to "the voluntary return of refugees, return and reintegration programmes for internally displaced persons in conjunction with partner agencies and the protection of Iraq's existing communities and stateless persons."[56]

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[52] UNHCR Update on regional developments in Central Asia, South West Asia, North Africa and the Middle East, 6 Jan 1997, para. 16.
[53] Executive Committee Conclusion No. 1(g).
[54] Executive Committee Conclusion 28(e).
[55] Executive Committee Conclusion 35(e).
[56] SC Res. 1483/2003 in UNHCR, Briefing Notes: Iraq: High Commissioner appoints Special Envoy, 3 June 2003.

UNHCR's main partners in this enterprise are the Office of the High Commissioner for Human Rights, the International Committee for the Red Cross and the International Organisation for Migration.

For the four million Iraqis living abroad, including some one million asylum-seekers, refugees and other Iraqis under UNHCR protection in neighbouring countries, return would be the ideal opportunity to start a new life. However, the power and security vacuum in Iraq has made the agency cautious and it has been laying plans for a phased repatriation of more than half a million Iraqis. In the meantime UNHCR issued warnings that there was still too much volatility in Iraq to allow for any large-scale return of refugees from abroad. Governments hosting Iraqis were being requested to delay any forcible returns of rejected Iraqi asylum-seekers to their country[57] or of refugees having overstayed their welcome.

To accomplish the present task, UNHCR seems to feel new tools of refugee protection, hammered out in so-called High Commissioner's Forum meetings, round tables and global consultations, are urgently required so that refugee problems can henceforth be solved through better global management. The tools in question come in a package entitled "Convention Plus" whose scope and aim – the Iraqi crisis will serve as one of its first areas of application – are best described in the words of UNHCR itself: "Convention Plus" envisions comprehensive plans of action to ensure more effective and predictable responses to mass outflows of refugees, and the apportioning of responsibilities among countries of origin, transit and potential destination in situations of "secondary movements". It also envisions multilateral agreements to achieve durable solutions. These include the promotion of self-reliance through development assistance for refugees (DAR); development through local integration (DLI) schemes; sustainable repatriation, reintegration, reconciliation and reconstruction (4Rs) strategies and multilateral commitments for the resettlement of refugees. All these approaches require broad-based partnerships between governments, humanitarian and multi- and bilateral aid agencies."[58]

The programme is an ambitious one through which the UNHCR over-reaches itself in its desire to achieve more. The word "globalisation" suggests that the intention is to get more states to either ratify the relevant instruments or conform to UNHCR policies

[57] UNHCR says Iraq still volatile, says no rush to return refugees, 4.7.2003.
[58] UNHCR: Background documents: Initiatives that could benefit from Convention Plus (Forum/2003/03), 18 June 2003, p. 23, p. 1.

through alternative means. "Comprehensive" refers to an expanded mandate where protection and assistance functions seem to be indistinguishable from developmental strategies in conflict areas.[59] What will not be altered, however, is the funding process, based on the goodwill of donor countries, and no doubt subject to further restrictions in view of the overall gloomy economic situations.

War-torn Iraq offers UNHCR an important terrain on which to experiment with monitoring the existence of internally displaced people and returnees, two categories distinct from refugees themselves and of whom no mention is made in the agency's Statute.[60] So far, the former were the responsibility of the sovereign state in which they resided. But Iraq happened to offer the exceptional instance of a country deprived of any sovereign government. UNHCR's mandate to oversee internally displaced persons derives both from a special document on the subject, presented for approval to the UN Commission on Human Rights in April 1998,[61] as well as from an Executive Committee Conclusion reaffirming support for UNHCR's role with internally displaced persons on the basis of criteria specified by the General Assembly.[62]

Legally, nothing stands in the way for UNHCR to apply to its heart's content the patterns contained in its Convention Plus document. The agency has been warned in the past that "repatriation marks the beginning of the end of UNHCR's involvement with an uprooted population, whereas the organisation's mandated interest in refugees is open-ended, lasting as long as it takes for a durable solution to be found."[63]

As for division of labour, which also figures in Security Council resolution 1483 paving the way for UNHCR's return to Iraq, it could be argued that, in the aftermath of Iraq's occupation by the allied forces, a situation dominated by armed conflict, resistance and reprisal, with only a dormant threat of overwhelming refugee distress, the ICRC might be legally better suited than the UNHCR to take over and lead humanitarian activities in Iraq. Like the UN organisation, the most important role of the ICRC in terms of implementation of the law of armed conflict, and in particular in a state under occupation, is that of supervision.[64]

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[59] John Borton, The State of the International Humanitarian System, Briefing Paper, March 1998, p. 5.
[60] UNHCR, Returnee Aid and development. Evaluation Report, May 1994, para.
[61] UNHCR, Guiding Principles on Internal Displacement, April 1998.
[62] Executive Committee Conclusion No. 87(t), 1999.
[63] UNHCR, Returnee Aid and Development. Evaluation Report, May, 1994, para. 37.
[64] Edward Kwakwa, The International Law of Armed Conflict: Personal and

Protection and assistance to the population of Iraq in their new plight might prove more effective if based on the implementation of the Geneva Conventions and Protocols rather than on provisions borrowed from international refugee law, especially in view of the latitude afforded by the Geneva Conventions to pursue humanitarian activities which might render the lives of the victims of a conflict more tolerable.

For the post crisis situation, future events alone will determine which of the three branches of the international protection regime, human rights, humanitarian law or refugee law, finally gains the upper hand as legal reference for addressing humanitarian and refugee situations that may develop.

3. Legal Obligations of Regional States

Turning now from refugee protection in international law to how the concept may have come to be anchored in national legal instruments and municipal laws. And how their enforcement is ensured by local operational instances, we shall examine briefly practices by Iraq's six neighbouring countries according to the position they hold vis-à-vis the 1951 Convention and its Protocol as well as to other binding legislation involved. We shall, in particular, comment on the legal behaviour of states not only as regards international norms and regulations but also in the light of their domestic legislation.

3.1. *Iran*

Iran took in the greatest number of Kurdish refugees in 1988; these were in addition to the Iraqi Shiites in flight and the large uprooted Afghan population they were already hosting.[65] For the Iranian authorities, refugee management, though an arduous task, was made easier by the fact that Iran had already ratified the UN Refugee Convention in 1976, albeit with reservations expressed regarding articles 17 (wage-earning employment), 23 (public relief), 24 (labour legislation and social security) and 26 (freedom of movement). Both the Convention and its Protocol have force of law in

Material Fields of Application, Martinus Nijhoff Publishers, 1992, p. 208, p. 168.

[65] David McDowall, A Modern History of the Kurds, I.B. Taurus, 2000, pp. 360–361.

the country. Article 155 of the Iranian Constitution stipulates that the Government of the Islamic Republic of Iran may grant asylum to those who request political asylum, with the exception of traitors and criminals under Iranian law. In 1963, prior to acceding to the Refugee Convention, the Government of Iran had already adopted an ordinance relating to refugees that provided a legal and administrative framework for admitting refugees which still remains in force.[66] Iran's definition of a refugee is very similar to the one contained in the UN Refugee Convention. A "displaced person", on the other hand, is defined separately as "a person who owing to the outbreak of civil or international war, without any formalities, leaves or is driven from his country of origin".[67]

Iran implements its policies concerning refugees and asylum-seekers through two separate offices, the Iranian Bureau for Aliens and Foreign immigrants Affairs (BAFIA) which is in charge of refugee affairs, and the Foreign Nationals Executive Co-ordination Council (FNECC), chaired by the Ministry of the Interior and whose main focus is on the "arrival, settlement, deportation, expulsion, training, employment, health and medical treatment" of foreigners.[68] Legislation adopted in the Iranian Majlis in 2000 tightened existing refugee laws and required of the Ministry of the Interior to deport to their country of origin all foreign workers (in Iranian legal usage, the term includes refugees) not in possession of a valid work permit in Iran.[69] In order to safeguard its interests and independence, the Iranian government, holds UNHCR at arm's length and no longer allows the agency to issue protection letters to refugees.[70] But on 14 February 2000, Iran signed a Joint Programme with the agency to facilitate the voluntary repatriation of Afghan refugees.[71] A similar agreement has been reached concerning the return of the 200,000 Iraqi refugees in Iran.

3.2. *Turkey*

Turkey, the only other signatory to the 1951 Convention among the group of Iraq's six neighbours, has at its disposal three major legal sources of refugee policy. The first legal instrument, the Law on

[66] World Refugee Survey 2003, Middle East, p. 7.
[67] Ibid., p. 8.
[68] World Refugee Survey 2003: Middle East, p. 8.
[69] Ibid.
[70] Ibid.
[71] UNHCR 2001, Global Appeal, the Islamic Republic of Iran, p. 150.

Settlement,[72] which establishes a clear distinction between immigrants and refugees, was promulgated in 1934. The second source is the Convention itself with its time and geographical limit which allowed Turkey to shy away from extending refugee status to persons of non-European extraction fleeing into Turkey, and to insist on the absence of any specific mention of mass influxes in that document. This enabled Turkey to refuse to open its borders in times of refugee crisis. The provisions of the Convention after ratification became part of national law in 1961 as did, subsequently, the duly ratified contents of the 1967 Protocol Relating to the Legal Status of Refugees,[73] although the geographical restriction was not lifted, leaving Turkey to be the only country along with Monaco to continue to maintain the limitation. Lastly, there is the Regulation on Asylum that was introduced in November 1994 with the express aim of taking over from the UNHCR[74] the task of status determination of asylum seekers. This document, which once again concentrates on the individual, provides no legal indication as to how to deal with mass influx, if ever a crisis were to occur. However, in late 2000, the Turkish Ministry of the Interior concluded a co-operation framework document with UNHCR concentrating on capacity-building.[75]

The leading implementation organ for Turkish refugee policy is the Foreigners Department at the General Directorate for Security in the Ministry of Interior (MOI) in Ankara, aided by UNHCR for status-determination and resettlement procedures.

3.3. *Jordan and Syria*

Jordan is not a party to the Refugee Convention, but observes the terms of a Memorandum of Understanding signed in 1998 with UNHCR. The Memorandum made it incumbent on Jordan to admit asylum-seekers, including undocumented entrants, many of them Iraqi nationals, and to respect UNHCR's refugee status determinations. The refugee definition in the Memorandum is the one contained in the UN Refugee Convention and expressly forbids *refoulement*. In return, UNHCR agrees to find third countries within

[72] Official Gazette, 14 June 1934, No. 2733.
[73] Official Gazette (Resmi Gazete), 5 September 1961, No. 10891 & Official Gazette, 14 October 1968, No. 13026.
[74] Kemal Kirisci, UNHCR and Turkey: Nudging Turkey towards a better implementation of the 1951 Convention on the Status of Refugees, January 2001, p. 4.
[75] Co-operation Framework between the Turkish MOI and UNHCR, 2000.

six months for the resettlement of those entrants it determines to be *bona fide* refugees.[76]

Besides persons of concern to UNHCR, Jordan also hosts a considerable Palestinian population – 42% of all registered Palestinians – for which its operating partner is UNRWA.

Like Jordan, Syria has a large Palestinian population to look after, calculated as representing some 10% of the entire UNRWA caseload of registered refugees. Syria is also not a party to the UN Refugee Convention. Non-Palestinian asylum-seekers and refugees must register with UNHCR for assistance and protection, especially since recent legislation has introduced a new regulation restricting nationals of Arabs countries to a stay not exceeding three months in Syria.[77]

3.4. *Kuwait and Saudi Arabia*

Kuwait is not a party to the UN Refugee Convention and has no national legislation relating to refugees or any procedure for adjudicating refugee claims. In 1996, the Kuwaiti national assembly ratified an agreement signed by the Kuwaiti government and the UN High Commissioner for Refugees (UNHCR) specifying UNHCR's mandate for the protection of refugees in Kuwait. Henceforth, the agency adjudicates refugee claims, conducts refugee determination interviews and supports appeals against negative decisions. UNHCR protection letters are sealed by the Kuwaiti Ministry of Interior. Assistance to refugees in Kuwait is provided by UNHCR, the Kuwaiti Red Crescent Society and Zakat House, an independent humanitarian organisation under government supervision.[78]

Saudi Arabia is not a party to the UN Refugee Convention and is not in possession of any procedure to determine refugee status. Saudi Arabia's basic law, dating back to 1992, provides that "the State will grant political asylum." This stipulation is, however, qualified by the addition of a national interest clause, namely "if the public interest mitigates" in favour of asylum. Since September 1998, however, Saudi Arabia has permitted UNHCR to carry out refugee status determination procedures for individual asylum-seekers. The Saudi government also placed itself among UNHCR donors by handing over 1.68 million dollars to the agency in 2002.[79]

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[76] World Refugee Survey 2003, op. cit., p. 13.
[77] Ibid., p. 7.
[78] Ibid., p. 2.
[79] Ibid., p. 5.

Chapter 4

Applicability of International Law

A. Lacunae in the Refugee Definition and Treaty Obligations

Our purpose in this chapter will be to examine the legal framework within which the refugee regime is inscribed, with a view to addressing the following questions:

- Did the provisions of international law, namely Refugee Law, Human Rights Law and Humanitarian Law, succeed in effectively dealing with the refugee problem of Iraq?
- What, if any, were the shortcomings of the law in the text and in its application?
- What measures did the international community take to address these shortcomings?

In the first part we shall begin by describing the development of a refugee definition through various international efforts, and the creation of legal instruments having a bearing on this definition. We shall then take a closer look at the lacunae they may contain and which suggest that the international community might soon find itself faced with the necessity of adopting new contractual legal norms tailored to meet contemporary challenges in defining refugee status eligibility, and ensuring protection and assistance for the

ever-growing number of people whose survival often depends on equitable, balanced refugee laws.

1. The Definition

1.1. *Development of a Euro-Centric Juridical Focus*

Refugees in the loose sense of people in flight, seeking shelter away from their usual geographical living space, and within the confines of another collective entity have been known in history since time immemorial. The classic case cited in this respect in Europe is that of the French Huguenots who fled to Britain, the Netherlands, and Switzerland when Louis XIV revoked the Edict of Nantes in 1685. No less memorable is the absorption of Iberian Jews in Muslim States of North Africa and the Middle East when they fled Spain in 1492, and later because they refused to convert.[1] But only with the advent of the 20th century did the concept of the refugee undergo a serious transformation, turning it into a subject of law. Legal formulations of the refugee status coincided with the early years of the century as Western states decided to revisit their immigration policies.[2]

Sovereign nation states set in place normative standards and control mechanisms, including the "right to exclusion"[3] so as to keep the international movement of people in check. Following the upheavals of the First World War and the great revolutions it brought in its wake, the European continent was the theatre of several major population displacements, such as the flight of over one million Russians from their homeland between 1917 and 1922, or that of a large body of Armenians from Turkey in the early 1920s.[4]

The need for appropriate international legal instruments offering a clear-cut definition of refugees, and stating the rights and duties of States in their dealings with this group, was felt because Europeans incrementally understood that the refugee issue should

[1] Aristide R. Zollberg, Astri Suhrke, Sergio Aguayo, Escape from Violence, Conflict and the Refugee Crisis in the Developing World, Oxford University Press, p. 380, pp. 6–7.
[2] James C. Hathaway, The Law of Refugee Status, Butterworths, 1991, p. 252, p. 1.
[3] G. Goodwin-Gill, International Law and the Movement of Persons between States, 1978, p. 96.
[4] A. Grahl-Madsen, The League of Nations and the Refugees, 1982, 20 A.W.R. Bull, 86, at 86.

be dealt with in a regionally and internationally coordinated manner rather than by nationally entrenched policies. Ad hoc instruments were drafted and the result was the beginnings of refugee law. The first treaties and arrangements specifically focusing on the question of refugees date back to 1921 when the League of Nations endowed itself with an operational arm, appointing the Norwegian scholar, Dr. Fridtjof Nansen, as the High Commissioner for Russian Refugees, a mandate which was later extended to include Armenians, Assyrians, Assyro-Chaldeans and Turks, and refugees from the Near East.[5] On Dr. Nansen's death in 1930, a new Office was created bearing his name, the Nansen International Office for Refugees. In 1933, a new High Commissioner for Refugees Coming from Germany was appointed. In 1938, both offices were shut down in order to be replaced by a new High Commissioner for Refugees under the Protection of the League of Nations. But the outbreak of World War II brought to an end any League of Nations involvement in the question of refugees.[6]

The legal refugee protection framework during this period was mainly based on the following instruments:

- Arrangements with regard to the issue of certificates of identity to Russian refugees of 5 July 1922;[7]
- Arrangements relating to the issue of identity certificates to Russian and Armenian refugees, supplementing and amending the previous arrangements dated 5 July 1922 and 31 May 1924 of 12 May 1926;[8]
- Arrangements relating to the legal status of Russian and Armenian refugees of 30 June 1928.[9]

They provided a definition of the refugee seen chiefly through the juridical prism. According to this particular formulation, refugees were refugees first and foremost because of their membership in a group of persons effectively deprived of the formal protection of the government of their state of origin.[10] Presence outside the country of origin was, as a rule, a further pre-requisite for recognition of

[5] Yves Beigbeder, The Role and Status of International Humanitarian Volunteers and Organizations. The Right and Duty to Humanitarian Assistance, Martinus Nijhoff Publishers, 1991, p. 23.
[6] Ibid., p. 24.
[7] LNTS, vol. XIII, No. 355.
[8] LNTS, vol. LXXXIX, No. 2004.
[9] LNTS, vol. LXXXIX, No. 2005.
[10] L. Holborn, The International Refugee Organization: A Specialized Agency of the United Nations, 1961, p. 311; Report by the High Commissioner, League of Nations Doc. 1927. XII. 3, 1927, p. 13.

the refugee status.[11] The aim of the first definitions provided by the League of Nations was to amend legal "anomalies" in the new international system. They focused on the ethnic and territorial origin of displaced persons with emphasis being placed specifically on statelessness; as the titles of the arrangements enumerated above indicate, protection for this group concentrated on issuing travel documents allowing people in flight to cross national borders.[12]

1.2. *The Humanitarian and Individual Focus*

"In contrast to the initial juridical focus, the refugee agreements adopted between 1935 and 1939 embodied a social approach to refugee definition."[13] Refugees were henceforth regarded as victims, especially of socio-political events forcing them out of the home country. The country targeted by the new measures was Germany with its own particular set of political problems. The safety and well-being of refugees, as opposed to their legal status alone, slowly began to take centre stage.

The various instruments determining refugee protection during this phase included:

- Convention relating to the International Status of Refugees of 28 June 1933;[14]
- Provisional arrangement concerning the status of refugees coming from Germany of 4 July 1936;[15]
- Convention Concerning the Status of Refugees Coming from Germany of 10 February 1938;[16]
- Additional Protocol to the 1936 Provisional Arrangement and 1938 Convention Concerning the Status of Refugees Coming from Germany of 14 September 1939.[17]

Hence there was a gradual shifting of the attention of international law makers from the original phenomenon of statelessness, through a socially oriented phase, to an individualistic approach vis-à-vis refugees. By the time the third phase of international refugee pro-

[11] Guy S. Goodwin-Gill, The Refugee in International Law, Clarendon Press, 1990, p. 318, p. 3.
[12] Danièle Joly et al., Refugees: Asylum in Europe?, London: MRG, 1992.
[13] James, C. Hathaway, op. cit., p. 4.
[14] LNTS, vol. CLIX, No. 3663.
[15] LNTS, vol. CLXXI, No. 3952.
[16] LNTS, vol. CXCII, No. 4461.
[17] LNTS, vol. CXCVIII, No. 4634.

tection began (1938–1950), the way had been paved for the primacy of the individualist approach to refugee problems over that of group determination practices, with more precise criteria being applied to defining the refugee.

In the post-World War Two period, first the United Nations Relief and Rehabilitation Agency (UNRRA: 1943–1947), then the International Refugee Organization (IRO), established in 1948 and dissolved in 1952, were the leading agencies engaged in assisting and repatriating refugees and prisoners of war, most of them of European origin. The constitution of the IRO, like that of instruments preceding it, specified categories to be assisted:

> . . . the term refugee applies to a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories:
> (a) victims of the Nazi or fascist regimes . . .
> (b) Spanish Republicans . . .
> (c) persons who were considered "refugees" before the outbreak of the second world war . . .[18]

The IRO was also allowed competence to assist "displaced persons", defined as ". . . a person who, as a result of the actions of the authorities of the regimes mentioned in Part I, Section A, paragraph 1(a) of this Annex has been deported from, or has been obliged to leave his country of nationality or of former habitual residence . . .".[19] The document further expressly recognized the fear of persecution criterion as valid grounds for seeking asylum outside of one's country of nationality. The shift in the substantive scope of the definition away from humanitarian determination to more precise legal criteria, based on individual assessment, can probably be attributed to the fact that the new definition was felt to have "covered all the main categories likely to need protection at the time."[20]

1.3. *The Conventional Refugee Focus*

The landmark Convention relating to the Status of Refugees, from which the primary standard for refugee definition as we know it

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[18] Constitution of the International Refugee Organization 1946, Part I, Section A – Definition of Refugees, Art. 1 (henceforth IRO Constitution).
[19] IRO Constitution, op. cit., Section B – Definition of Displaced Persons.
[20] Danièle Joly, Haven or Hell: Asylum policies and Refugees in Europe, MacMillan Press, 1996, p. 6.

today is derived, was approved by the United Nations in 1951.[21] Under the terms of the convention, protection is to be extended to

> . . . any person who: has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Convention of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization . . .[22]

Furthermore, the mandate of the Convention covered any person who:

> . . . as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.[23]

Article B (1) of the Convention went on to specify that:

> For the purposes of this Convention, the words "events occurring before 1 January 1951" in Article 1, Section A, shall be understood to mean either
> (a) 'events occurring in Europe before 1 January 1951'; or
> (b) 'events occurring in Europe or elsewhere before 1 January 1951'[24]

As one commentator describes it, the international committee in charge of drafting the Convention decided in favour of defining a refugee as an abstract concept rather than adopting the categorical approach preferred by the earlier League of Nations. In this it was no doubt guided by the formulation already present in the Statute of the UNHCR.[25]

Equally enshrined in the Convention was the notion of *non-refoulement*, i.e. the prohibition to expel a refugee

> . . . in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[26]

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[21] 189 U.N.T.S. 2545, entered into force on April 22, 1954 ("Convention").
[22] Convention, op. cit., note 27, at Art. 1(A)(2), para. 2.
[23] Ibid., note 27, at Art. 1(A)2.
[24] 1951 Convention, op. cit., Art. B.(1).
[25] David Martin, Refugees and Migration in: C. Joyner (ed.), The United Nations and International Law, Cambridge University Press, 1997, pp. 155–180.
[26] 1951 Convention, op. cit., Art. 33(1).

The centrality of *non-refoulement* to the structure of refugee law is undisputed. It has come to be the basic protection tool to ensure the safety and well-being of a refugee. Professor Goodwin-Gill makes it clear that the principle of non-*refoulement* is far-reaching and of an absolutely binding nature, even though he expresses reservations as to the scope of application *ratione personae* of article 33 and its provisions concerning admissions at borders.[27]

> It may be affirmed that the new prohibition on the return of refugees to countries of persecution has established itself as a general principle of international law; binding on states automatically and independently of any specific assent.[28]

However, reservations have been expressed by several scholars as to the political aims pursued by the application of the Geneva Refugee Convention. James Hathaway, for instance, argues that the Convention refugee definition, was a cold war instrument of domination, since it contained a strategic dimension insofar as it provided protection chiefly to those induced to leave their country of origin due to 'pro-Western political values'.[29] G. Melander goes even further down this road, writing of the Convention concept:

> The intention was to protect persons from countries under communist domination and the definition was meant to describe the situation in those countries. A strong political element had thus been inserted in defining the term refugee.[30]

Whatever the intention of the authors was – and it is always difficult to prove intentions – the need was clearly felt for a more concrete legal framework for the protection of refugees at a time when even the chief principle of *non-refoulement* was not yet in existence, let alone a part of customary international law.

Although no one was excluded, the Convention was in fact the work of a limited group of States. 26 countries, 17 of them European, were represented in the conference held in Geneva from 2 to 25 July 1951. An additional two countries – Cuba and Iran – attended as observers. Prakash A. Shah has concluded that race was and has continued to be the central factor determining the response of various States to refugee movements.[31]

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[27] Guy Goodwin-Gill, op. cit., p. 72.
[28] Guy Goodwin-Gill, International Law and the Movement of Persons between State, Oxford Clarendon Press, 1978, p. 141.
[29] James Hathaway, The Law of Refugee Status, Butterworths, 1991.
[30] Göran Melander, The concept of the term refugee, in: Anna C. Bramwell (ed.), Refugees in the Age of Total War, Unwin Hyman, 1988, pp. 7–14.
[31] Prakash A. Shah, Refugees, Race and the Legal Concept of Asylum in Britain, Cavendish Publishing, 2000.

In the year preceding the signing of the 1951 Convention, international refugee protection had also been embodied in the Statute of the United Nations High Commissioner for Refugees (UNHCR), established by the UN General Assembly in 1950 both to act as the guardian of the Convention and oversee its application, to carry out the mandate "to provide necessary legal protection for refugees" and to seek "permanent solutions for the problems of refugees".[32]

To some extent, the UNHCR Statute and the 1951 Refugee Convention can be considered as overlapping documents that have formed and developed the conventional refugee concept. But, with regard to temporal and geographical limitations, the Statute was one step ahead of the Convention, having removed both from its formulation in an attempt to achieve more universal applicability. Thus, in Chapter II of the Statute, article B extends the term refugee to

> Any other person who is outside the country of his nationality, or who has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason 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.[33]

The instrument as it stands, however, is not entirely free from inconsistency. It is inconsistent in that it both relates UNHCR work to groups and categories[34] and provides a case by case individualistic approach to refugee definition which has often tended negatively to impact its efficiency when it comes to dealing with situations of mass exodus.

As a contribution to keeping the conventional refugee definition relevant, the 1967 Protocol was drafted to remove the specific World War II limitations of the earlier instrument, while retaining much the same language as that used in the Convention. Thanks to the Protocol, States were offered the choice of adopting a flexible approach to asylum more in keeping with the times. P. Weiss and others after him have insisted that far from simply amending the Convention within the meaning of Article 45 of that document, the Protocol is a legal instrument in its own right.[35]

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[32] Statute of the Office of the United Nations High Commissioner for Refugees, GA Resolution 428(V) of 14 December 1950 (henceforth UNHCR Statute).
[33] Ibid., Chapter Two, Art. B.
[34] Ibid., Chapter One, para. 2.
[35] P. Weiss, The 1967 Protocol relating to the Status of Refugees and some Questions of the Law of Treaties, 42 BIYL 39–70, 1967.

The Protocol's most important contribution to refugee law was to expressly remove from the Convention the limiting date of 1 January 1951 and to play down the European component in the refugee definition. But the geographical option, whereby States, which so desired, could restrict their obligations to only those refugees who had been made homeless following critical events occurring in Europe was not eliminated.[36]

It is also important to note that neither the Convention, nor the Protocol makes any direct reference to the concept of asylum. Therefore, in the conventional approach, lawful admission and the conditions under which it is individually granted, remain at the discretion of States. And States, perhaps for lack of a better alternative, have often felt comfortable about formally acceding to these instruments or meeting their obligations under the customary principle of *non-refoulement* derived from the conventional concept of refugee protection.

1.4. *Efforts to Expound*

Failed Declaration on Territorial Asylum

Over the years, the Convention and its Protocol remained the primary instrument of international protection in Europe and in various other parts of the world. In 1977, however, feeling the need to expand the scope of the 1951 Convention definition, 92 states convened to discuss a draft convention on asylum, the so-called Declaration on Territorial Asylum. The scope of this new Convention was broader than the document preceding it and specified that each contracting state may provide protection to a person seeking asylum if the person in question faced a definite possibility of:

> (a) Persecution for reasons of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion, including the struggle against colonialism and apartheid, foreign occupation, alien domination and all forms of racism; or
>
> Prosecution or punishment for reasons directly related to the persecution set forth in (a);
>
> Is unable or unwilling to return to the country of his nationality or, if he has no nationality, the country of his former domicile or habitual residence.

[36] Guy S. Goodwin-Gill, op. cit., pp. 150–151.

Important changes to the definitional standard derived from the original Convention were recommended. Furthermore, "clarifications of the notions of 'political opinion' to include opposition to apartheid and colonialism, and of 'persecution' to embrace prosecution grounded in persecutory intent were proposed."[37] Finally, however, the Declaration failed to assemble a majority, only 47 contracting states voting to approve it. Nonetheless, a step forward had been taken and many states showed responsiveness to the idea of updating the refugee definition in international law so as to take into account refugee movements in the developing world and "the collective nature of many refugee-producing phenomena".[38]

Regional Instruments of the OAU and OAS

There are two leading regional treaties with important impacts on the refugee definition, one elaborated on the African continent, the other in Latin America. In 1969, the Organization of African Unity established the first regional definition of refugee status entitled the OAU Convention governing the specific aspects of refugee problems in Africa.[39] The standard derived from this particular instrument has come to match in influence the definition contained in the 1951 Convention. The second paragraph of article 1 of the OAU Convention provides that, "apart from refugees recognized under the 1951 Convention, 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 whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

As James Hathaway puts it;

> This standard represents an important conceptual adaptation of the Convention refugee definition, in that it successfully translates the core meaning of refugee status to the reality of the developing world.[40]

Firstly, the OAU definition broadens the categories of abuse which may occur within a state to justify the claim of refugee status. Secondly, it brings to the fore again the notion of "group disfranchisement", commonly found in pre-World War II accords. Thirdly, a person under the OAU definition does not need to prove fear of

[37] James C. Hathaway, op. cit., pp. 14–15.
[38] Ibid., p. 16.
[39] U.N.T.S. 14,691 entered into force June 20, 1974 (henceforth: OAU Convention).
[40] James Hathaway, op. cit., p. 17.

persecution as under the Convention definition. It is enough for him or her to be "compelled" to seek asylum from some form of impending harm. Fourthly, the OAU Convention speaks of disruption of public order "in either part or the whole" of a country of origin in turmoil which allows people to seek safe haven across the border even if in certain parts of the country no disruption of public order has occurred.

The Cartagena Declaration, adopted by 10 Latin American states in 1984, because they felt the Convention definition no longer corresponded to today's realities, defines refugee status in terms similar to the OAU Convention, namely that, in addition to Convention refugees, protection must also be extended to:

> . . . persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.[41]

The Cartagena Declaration is not binding on states, yet several of the parties present at its inception have incorporated all or part of its provisions into their own domestic legislation.

Criticism aimed at the refugee protection regime set up by the OAU Convention and the Cartagena Declaration has usually targeted both the practical difficulties involved in implementing its provisions and the legal lacuna in the texts which omits any reference to so-called *de facto* refugees, that is to say the "internally displaced."[42]

2. Treaty Obligations

Having elaborated on the development of refugee definition as it exists today in international law, it is now time to take a look at states' obligations as developed over time and as set out now in the Geneva Refugee Convention and Protocol. Distinctions should be made between the rights enshrined for refugees and obligations subscribed to by states.

The social and economic rights granted by the Convention include Articles 17 (wage-earning employment), 20 (rationing), 22 (public

[41] Annual Report of Inter-American Commission on Human Rights 1984–65, OEA/Ser.L/II.66, doc. 10, rev. 1, at 190–193.

[42] Fernando González-Martin, The African Approach to Refugees, Internet: african-refugees.htm, p. 2.

education), 23 (public relief) and 24 (social security). Furthermore, States are also called upon to guarantee refugees human rights standards, derived from a myriad of treaties and declarations. Thus, a whole catalogue of basic and inalienable rights[43] to be respected by the State has come to be defined, as much in the case of its own citizenry as that of any refugees (or asylum-seekers) residing under its jurisdiction. Last but not least, under Convention provisions, obligations towards refugees are imposed on a State only then when potential refugees enter its territory, be it through legal or illegal means, and formally claim asylum.

Obligations within the meaning of the Convention and Protocol can be enumerated as:

1) *Non-refoulement*,
2) Non-rejection at the frontier, and
3) Treatment according to a well-defined legal standard following entry.[44]

It should be noted here that the refugee instruments were drafted with the countries of the developed world in view. Thus, for example, the principle of burden-sharing, a matter which will be taken up in greater detail in a later part of this work, whereby poorer countries and the main recipients of refugee outflows[45] would automatically gain some form of financial compensation in their fight to save refugee lives has yet to be given a binding formulation. Professor B.S. Chimni's position in favour of setting up a legal principle of burden-sharing, for instance, happens to be at odds with mainstream view on this issue, and much time will elapse no doubt before the law changes on this point.[46]

Among the above obligations, the principle of *non-refoulement* is no doubt the most reliable achievement of international refugee law which is now secure in customary law. The two others have received vast interpretations in state practices as well as legal argumentations since 1951, and countries have consistently tried to derogate from such obligations. The current asylum policies of the

[43] Roger Haines, Gender-Related Persecution, in: Refugee Protection in international law, UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003, p. 328.
[44] Guy Goodwin-Gill, op. cit., p. 18.
[45] 2003 statistics for refugee-load division: Developing countries: 10,694,327; Developed countries: 6,399.034. In: UNHCR, 2003 Global Refugee Trends, 15 June 2004, pp. 8–11.
[46] B.S. Chimni, ed., International Refugee Law: A Reader, Thousand Oaks/Sage Publications, 2000, p. 613.

industrialised states, based on the *non entrée* regime, safe havens, the "root cause" theory or military interventions like the one undertaken in Iraq in 1991, are in no way derived from the 1951 Refugee Convention and have more to do with ensuring the security of the West than providing protection for refugees.[47]

Refugee situations and humanitarian challenges have changed significantly over the past fifty years. Yet, the basic provisions of refugee law, in spite of the added safeguards for refugees provided by international human rights law and international humanitarian law instruments, have failed to evolve in such a way as to prevent erosion of international consensus on the purpose and value of traditional methods of refugee protection.[48]

Whenever the continuing relevance of the 1951 Geneva Convention comes up for discussion, the answer of its fervent partisans is usually couched in the following terms: By daring to criticise the treaty, one is only showing ignorance of what the Convention set out to do in the first place. The Convention is blamed for leaving problems unsolved when all it intended to do was to define with a large measure of clarity a certain class of refugees deserving international protection and to establish without wavering the inviolable principle of *non-refoulement*.[49]

Experts such as Volker Türk or Frances Nicholson have argued that ". . . the 1951 Convention and 1967 Protocol are the global instruments setting out the core principles on which the international protection of refugees is built. They have a legal, political and ethical significance that goes well beyond their specific terms."[50]

It is important to remember that a treaty represents a compromise between different and sometimes conflicting views of the initiators who have negotiated it. Therefore no treaty can be seen as perfectly encompassing the root causes. In evaluating the treaty obligations as stipulated in the Convention and the Protocol, this caveat should be taken into consideration. While we discuss the shortcomings which make the two treaties less than completely applicable today, we should be fair on the dynamics of the positive aspect of setting forth principles such as *non-refoulement* and

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[47] Tapan K. Bose, Crisis in Refugee Protection: Need to Strengthen International Refugee Regime, Asian Human Rights Charter, 14–17 May 1998, p. 6.

[48] Kathleen Newland, Refugee Protection and Assistance, Carnegie Endowment for International Peace, 2001, p. 522.

[49] Guy Goodwin-Gill, Interview in: Refuge Magazine, Sept. 10, 2003, pp. 14–18.

[50] Volker Türk & Frances Nicholson, Refugee protection in international law, in: UNHCR's Global Consultations on International Protection, op. cit., p. 6.

protection regime for refugees which had never existed before in international law.

3. The Lacunae

The validity of the conventional concept of refugees is challenged by several lacunae. Besides shortcomings, – such as not specifying the situations of mass influx, ignoring the plight of internally displaced persons, and not making provision for legally binding burden-sharing, that are not properly covered by the Convention and the Protocol and will be discussed in detail later in this Chapter, there are inherent lacunae in the way refugee definition and the obligations of adhering states are formulated. Two clusters are recognized in this regard which are also inter-related:

1. The scope of the definition in terms of time and locality and the individual character of refugees which was established on the luxury of the political inclination to attract individual refugees from the eastern block;
2. The equivocal and evasive nature of states' obligations.

The first argument one can use is against the lack of comprehensiveness of the Convention as it stands. The lacuna has to do with the narrow definition of the refugee it provides. As Guy Goodwin-Gill points out regarding refugee status, with the exception of the 1969 OAU Convention, no international instrument has formally expanded the basic definition of the original conventional refugee concept. Neither have any UN General Assembly resolutions "approving UNHCR action on behalf of those outside the Statute sufficiently and clearly" declared that "the Office's mandate was being extended" and that, "new and greater obligations were being imposed on States."[51] Refugees today tend to flee war, generalised violence and armed conflicts as the examples of Iraq, former Yugoslavia or Africa have shown us; well-founded fear of persecution is mainly relevant in the asylum system of the European countries.

In regard to the universal treaty situation, the two existing instruments, the 1951 Convention relating to the Statues of Refugees and the subsequent 1967 Protocol, a person shall be considered a refugee for the purposes of the Convention who

[51] Guy S. Goodwin-Gill, op. cit., p. 216.

> 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, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

This individualized refugee definition, which best served the requirements of its time of inception, remains the main reference of the treaty law regarding definition of refugees. Since 1967 efforts to develop this definition, in order to cover new characteristics of the concept, have yet to succeed. It is however symbolic of recent times that we have ceased to talk about those political refugees from the Eastern European countries who exiled themselves in the West as a personal and predominantly political choice. This idealistic and even romantic notion of refugees has been replaced by that of a great number of persons, more or less forced to leave their country through general circumstances. These refugees are less well-to-do and their reasons for departure are less explicitly political, compared to those of other refugees.

The Conference of Plenipotentiaries that adopted the Convention in 1951, in its final act, urged all State Parties to extend the benefit of the Convention as far as possible to persons who did not fall within its strict ambit.[52] Although it was indicative of the willingness of the states at that time, that a more liberal interpretation of the definition of refugees could determine who should receive international protection, it is certainly not sufficient to address the main concerns regarding new types of refugees, fifty years after that conference.

International developments in the 1980's and 1990's regarding the situation of refugees, the mass exodus of the Kurdish population of Iraq being one of them, made it more than clear that there existed lacunae in the Conventional definition of refugees, which is believed to be inadequate in covering those seeking refuge for reasons other than a "well-founded fear of persecution", such as those escaping from disruptive situations in their country or region and those in mass outflow due to military operations, civil wars and domestic disturbances.

During a mass exodus, a high number of people cross a frontier, sometimes in a matter of days or even hours. In such a case,

[52] Recommendation E of the final act of the Conference of Plenipotentiaries.

providing emergency arrangements by the receiving states, as well as the necessary legal and technical facilities in order to determine the legal status of the individuals, according to the conventional refugee definition, can be possible only in theory. It is practically impossible for the authorities of a state to examine all the individuals and their proofs, if any, especially if the number of people involved in the mass influx exceeds a manageable size. In practice, states have run into dramatic situations, faced with hundreds of thousands of refugees without shelter, food, sanitary facilities or security.

In reaction, the states' behavior varies according to their interpretation of the refugee definition, the legal status of the people in question and the political and international context surrounding the issue. They may prefer to take the "open door" approach in order to meet certain political needs or to promote their international image, not necessarily in compliance with international law obligations, which are poorly expressed by the existing definition. They might – alternatively – derogate in the exercise of their discretion and opt for closing frontiers, with justification that the receiving state's responsibility applies when the refugees are "outside" their own country.

In neither case, a person-by-person examination of status, which is required under the Convention, may be physically possible. Therefore, if those who seek to enter are considered compassionately, they will be received as refugees, even though their status has not been legally examined, and if rejected, the receiving state cannot be found liable according to refugee law.

On the other hand, the refugee is a person of concern to international law and the international community has an interest in defining the status of people in mass influx and in their protection. It seems that the definition in the 1951 Convention of the term refugee can no longer adequately meet the world situation and that there is a need for a more comprehensive and updated definition to be agreed through multilateral negotiations. Legal concepts are developed in response to recognized needs and not at an abstract level unrelated to actual reality. The recognized needs are necessarily a mixture of humanitarian and political concerns.

The fundamental instruments of the refugee protection system are unable "to cope satisfactorily with refugee crises, particularly where large numbers are involved."[53] The Convention did not give

[53] Guy Goodwin-Gill, The Refugee in International Law, op. cit., p. 229.

any consideration to large-scale movements of refugees and the protection they might require. The 1956 Hungarian exodus in Europe was handled successfully by UNHCR by waving aside the necessity of individual determination of persecution and according refugee status to all the Hungarians who managed to quit their country. The Hungarian example was also invoked later as a precedent for accepting *prima facie* evidence of refugee status for large groups in the developing world.[54]

And what of Iraq? If, at some point in time, large numbers of Iraqi refugees somehow managed to overcome the obstacles in their path, burst through the borders and gained entry to some European country or the other, could they too hope to be treated like the Hungarians and benefit from long-term protection under Convention terms? Strictly speaking, the fact of arriving in a group would already make them suspect in the eyes of the Convention definition and exclude them from consideration. Even if this difficulty were waived, proof would still be required that the risk of "being persecuted" criterion was being met on one of the five grounds of race, religion, nationality, membership of a particular social group or political opinion.

This group of Iraqis might argue in vain that they were escaping risk of war or other large-scale violence or oppression. No causal linkage or nexus between the Convention criteria and the risk of being persecuted would thereby be established, since no special rule in the Convention governs the application of this particular causal nexus standard.[55] The Iraqi refugees would have to plead that one of the other grounds recognized by the Convention was a contributing factor to their well-founded fear of being persecuted.

And even while they were marshalling their arguments, it is conceivable that the European State in question would evoke Convention Article 32 and arrange for the "lawful" expulsion of this massive Iraqi inflow on grounds of imperilled national security or public order.

The second argument concerns the equivocal nature of the obligations under the Convention and the Protocol. These two instruments have adopted an easy-going attitude to the way States have acceded to the provisions therein. It has thus been made possible

[54] Leon Gordenker, Refugees in International Politics, Columbia University Press, 1987, p. 39.

[55] James C. Hathaway, The Michigan Guidelines on Nexus to a Convention Ground, Second Colloquium on challenges in International Refugee Law, March 23–25, 2001.

for individual countries – Turkey is a case in point – to claim adherence to older definitions, thereby derogating seriously from the scope and spirit of the legal principles embodied in the instruments. Turkey's refusal to lift the geographical limitation it maintains in its ratification and which still allows it to turn away all nationals of countries other than the European ones led to the tragedy of Kurdish deaths in their 1991 flight away from the homeland and towards the relative shelter of neighbouring countries such as Iran and Turkey.

States are increasingly trying to undermine the spirit of the Convention and the Protocol especially as regards non-rejection at the frontiers and non-discriminatory treatment of refugees. The exception may only be the principle of *non-refoulement* that has been strengthened over time and that countries find it increasingly difficult to derogate from, having in mind the human rights sensitivities of world public opinion and the media effect.

Today the most ferociously critical voices raised against the Refugee Convention no longer belong to the developing countries, but rather to European countries and Australia which have begun to threaten back-stepping from their obligations under the traditional refugee treaties.[56] One Australian analyst states her objections to the Convention thus:

> The problem with the 1951 'Geneva' Convention, the basic instrument of refugee protection, is that it offers neither a comprehensive nor a flexible response to the diversity and complexity of forced population movements that are occurring today. It is distorting the responses, and diverting the resources of Western countries from developing coherent and ethical responses to these movements.

The problem with the Convention can also be summarised in simpler terms by stating what it does not include. It doesn't confer any right of assistance on refugees unless and until they reach a signatory country. It confers no right of assistance on the 'internally displaced' at all. It imposes no obligation on governments not to persecute their citizens, or to guarantee their safe return. It imposes no mechanism for preventing mass outflows, for burden-sharing between states, for ensuring speedy assistance for those most in need, or for maximising the effectiveness of international resources. And it takes no account of the capacity of receiving states.[57]

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[56] Jack Straw, An Effective Protection Regime for the Twenty-first Century, Speech to IPPR, the Guardian, 6 Feb. 2001, Phillip Ruddock, Speech to Australian Parliament, 28 Aug. 2001.

[57] Adrienne Millbank, The Problem with the 1951 Refugee Convention, Parliament of Australia, Research Paper 5 2000–01, 5 September 2000, p. 15.

The Dublin Convention Determining the State Responsible for examining Applications for Asylum lodged in one of the Member States which was adopted in 1990 and ratified in 1997 stands out as a document requiring examination in the present context. Even though the treaty abolished border controls within a number of the EU countries, it set out rules for examining asylum claims in one, and only one, country and has thereafter come to be regarded as "part of the retrenchment from generous asylum policies and acceptance of refugees in Europe".[58]

At the Tampere European Council (October 1999), EU member States, all of whom have ratified the Geneva Convention of 28 July 1951 and its subsequent Protocol, confirmed that the Union was "fully committed to the obligations of the Geneva Refugee Convention."[59] Yet, restrictive sentiment regarding the actual scope and nature of State obligations under the 1951 Convention is growing in Europe, as is opposition to a blanket acceptance of Convention standards and procedures.

Article 63 of the EC Treaty requires the European Council to adopt within five years of the entry into force of the Amsterdam Treaty[60] a harmonised asylum policy in all EU member States.[61] The results when they are finally enacted will affect the current refugee regime down to its foundations. Or as Joan Fitzpatrick very rightly points out:

> Because the Treaty of Amsterdam process is the most significant opportunity for re-codification of refugee standards at the regional level since the adoption of the 1969 OAU Convention, the extent to which the 1951 Convention emerges either revitalized or eroded at the end of the initial five-year drafting cycle for Community legislation on asylum matters will be highly significant, even outside the European region.[62]

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[58] Kathleen Newland, The Soul of a New Regime: Progress and Regress in the Evolution of Humanitarian Response, Conference on the Evolution of International Humanitarian Response in the 1990s, April 23–26, 1998, p. 2.

[59] Tampere Presidency Conclusions, Oct. 1999, point 4.

[60] The Amsterdam Treaty was signed on 2 October 1997 and came into force on 1 May 1999. The aim was to create the political and institutional conditions to enable the European Union to meet the challenges of the future such as the rapid evolution of the international situation, the globalisation of the economy and its impact on jobs, the fight against terrorism, international crime and drug trafficking, ecological problems and threats to public health.

[61] The Geneva Convention, UK Parliament, Select Committee on European Union Twenty-Eighth Report, 2002, p. 2.

[62] Joan Fitzpatrick, Taking Stock: The Refugee Convention at 50, Worldwide Refugee Information, 2001, p. 8.

Some important developments have also contributed to the erosion of the conventional concept of refugees, and the international community has condoned if not prescribed such developments. Between 1991 and 1994, the notion of protection of refugees in the "countries of origin" where refugees were best off and able to enjoy to the full their "right to remain" became fashionable. Such thinking was translated into action in the humanitarian intervention in northern Iraq, on behalf of the Iraqi Kurds who had fled to the mountains, and into Iran. A relief operation was undertaken and humanitarian assistance delivered, a safe haven was set up and the refugees returned to their starting point.

The humanitarian response at work here was primarily a blow to the integrity of the conventional refugee framework:

a) The international community accepted or condoned the non-admission of refugees;
b) The United Nations sanctioned multilateral intervention for humanitarian purposes;
c) An in-country safe haven defended by military force was created against the UN underlying principle of sovereignty, and
d) The validity of individual asylum requests, based on the conventional definition, was never established.

This was a clear example of how far one had drifted away from the original concepts of refugee protection enshrined in the 1951 Convention. Later events in Bosnia, Somalia and Kosovo would bring further evidence of how innovative humanitarian responses had grown and how alienated they are from their original sources.

More and more refugee law scholars warn that the international refugee regime as a whole might well be on the verge of collapse, as Western States begin questioning their obligations under the Convention, and seek to prevent refugee flows through the development of "temporary protection" measures in Europe and elsewhere in the developed world. Bill Frelick calls 1991 the "watershed year"[63] for this creeping process of disintegration and associates UNHCR closely with the efforts made by the richer countries to turn their backs on Convention provisions they had been willing to observe for almost half a century. In 1991, Frelick wrote: "Starting with the Iraqi refugee crisis precipitated by the Persian Gulf War and the European refugee flows bursting from the Balkans wars

[63] Bill Frelick, Secure and Durable Asylum: Articles 34 of the Refugee Convention, Worldwide Refugee Information, 2002, p. 3.

that began that same year, the international refugee regime, led by its new high commissioner, Sadako Ogata, became preoccupied with 'countries of origin'[64] – and with seeking to intervene somehow to prevent the causes of refugee flows or to resolve conflict quickly to enable fast repatriation and reintegration."

Tapan K. Bose, Secretary General of the South Asia Forum for Human Rights puts forward the claim that "the international refugee regime has never been under such strain as in the 1990s."[65] According to him even the principle of *non-refoulement* was not immune: "The rising number of forced repatriation in the 1990s carried out by powerful Western governments and the 'imposed' repatriation of refugees by UNHCR to areas where the safety of the returnees cannot be ensured raise several questions. Can the core protection provision of the international refugee regime endure? Should the UNHCR remain the guarantor of the international refugee regime or be an apologist of the Western powers who control its purse strings? Is the principle of global responsibility for refugees any longer valid? Has the time come for the reformulation of the international refugee regime on the basis of regional responsibility?"[66]

Kathleen Newland is no less pessimistic about the future of the existing refugee regime, writing:

> The edifice of humanitarian response that was built in the period following World War II is under serious challenge. The challenge grows both from a growing reluctance of states to offer the traditional asylum-based protections to people who are in danger, and from the perceived failure of alternative methods of helping the victims of humanitarian crises. Not only have humanitarian interventions failed to protect people adequately from terrible suffering and death, but they have in many cases seemed to exacerbate or prolong that suffering. The resulting disillusionment, and even cynicism, has already led to diminished financial and political support for humanitarian action.[67]

As for Professor James Hathaway, in one of his numerous articles discussing the challenges Convention provisions have failed to meet

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[64] UNHCR, Note on International Protection, Submitted by the High Commissioner, Executive Committee of the High Commissioner's Program, Forty-third session, UN General Assembly, August 25, 1992, para. 5, p. 3.

[65] Tapan K. Bose, Declaring of Asian Human Rights Charter: Crisis in Refugee Protection: Need to Strengthen op. cit., p. 1.

[66] Ibid., p. 1.

[67] Kathleen Newland, The Soul of a New Regime: Progress and Regress in the Evolution of Humanitarian Response, Conference on "The Evolution of International Humanitarian Response in the 1990s", April 23–26, 1998, p. 1.

in the context of today's refugee situation, he asserts: ". . . the present breakdown in the authority of international refugee law is attributable to its failure explicitly to accommodate the reasonable preoccupations of governments in the countries to which refugees flee."[68] Hathaway is an advocate of the notion of temporary protection (as opposed to the permanent protection most specialists deduce from the provisions of the 1951 Convention), a measure which was introduced in the context of mass influx and which has become the European norm in dealings with asylum-seekers.[69] Professor Hathaway's "revisionist" stance is based on a fresh reading of the Convention which allows him to argue that in the 1951 Convention "there is no binding requirement to grant permanent residence in the asylum state."[70]

Refuge law specialist, Joan Fitzpatrick, also discusses the dissatisfaction felt with the 1951 Convention in certain quarters, and comments on the fact that "a serious reconsideration of the nature of protection is underway both within UNHCR and among the 1951 Convention's scholarly analysts."[71] She discusses the new options now in place as support for refugee protection within the Convention meaning erodes and is replaced by the notions of complementary protection (i.e. based on humanitarian considerations rather than legal ones and carrying with it less generous social and economic benefits to recipients) or temporary protection which, from being the preferred solution in situations of mass influx, might end up being extended to individual cases as well. Fitzpatrick's conclusion, however, is not devoid of optimism as regards the survival of the 1951 Convention as the basic refugee instrument provided, as she puts it, serious progress can be achieved on key issues, including complementary and temporary protection, cessation of protection, internally displaced persons, and UNHCR's supervisory role.[72]

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[68] James C. Hathaway, Can International Refugee Law Be Made Relevant Again?, Worldwide Refugee Information, World Refugee Survey, 1996, p. 1.
[69] Bill Frelick, Secure and Durable Asylum, op. cit., p. 4.
[70] Manuel Angel Castillo and James C. Hathaway, "Temporary Protection, in: Reconceiving International Refugee Law, Martinus Nijhoff, Kluwer Law International, 1997, pp. 1–2.
[71] Joan Fitzpatrick, Taking stock: The Refugee Convention at 50, Worldwide Refugee Information.
[72] Ibid.

4. Conclusion

As we have seen, the 1951 Convention, groundbreaking treaty though it was, is felt by many today to be "outdated, unworkable and irrelevant".[73] We argued that the conventional definition of refugees had proven to be old and not sufficiently applicable to the needs of our time. It might already have even been old in 1967 when the Protocol tried to update it by removing limits of time and locality. But even with that modification it could never properly address the modern challenges. It was, however, important to note that the Convention had anchored an important principle of international law namely *non-refoulement* and that this has gained the consensual respect of the international community and is now a part and parcel of international customary law.

The changing nature of the refugee phenomenon since the enactment of the Convention in 1951 no doubt accounts for the gap between many of its provisions and the facts on the ground. Its definitional anachronisms have already been dealt with at length above. Some other assumptions in the Convention have also proved shaky in standing the test of time. The European refugees for whom the Convention was drafted were considered to be primarily in need of legal protection, rather than material assistance. The Convention's focus on individual rights makes it ill-suited to serve as the basis of protection for massive refugee outflows, whose needs are of the most basic type, namely food, shelter, clean water, sanitation, group rights and protection from cruel, inhuman or degrading treatment. Camp life and Convention rights of the kind enjoyed by recognised conventional refugees hardly go hand in hand.

Besides, even the affluent societies of the industrialised nations are less and less willing to shoulder the hugely expensive refugee-determination procedures the Convention imposes on them, as well as other conventional obligations, and are seriously considering opting out. As for the developing countries, they have long since realized the shortcomings of the Convention in managing their own refugee crises, the legal basis for which is more contained in the "soft laws" produced by the United Nations and its *ad hoc* instances (as we will discuss at a later stage) than the Convention and the Protocol. For them, at least, this has not been sufficient to uphold

[73] Marilyn Achiron, UNHCR, The 1951 Refugee Convention, A 'Timeless' Treaty under Attack.

refugee law based on modern requirements. A new contractual definition has therefore been felt to be necessary.

Thus, a profound reform of the refugee rights and protection system, starting with a modern definition for refugees, seems inescapable. Such reform must be both principled and politically sustainable and take into account the needs of both the affluent and the poorer countries. What may be needed to bridge the gap is primarily an advanced up-to-date definition which should necessarily include modern types of refugee and restrict the possibility of reservations by states, at least as regards the core thrust of the instrument. And a less onerous operational modus for refugee determination might permit the West to emerge from the daze of its present dilemma and put its considerable wealth to better use in relieving refugee suffering.

Under a redesigned, differentiated refugee protection system, some might stand to lose the privileges they are entitled to today. But, all in all, the resources so released and the momentum so generated might go far to improve life for the majority rather than the minority of refugees. For, to quote Professor Hathaway in conclusion: ". . . a reduction in the Cadillacs of the few could, I believe, provide bicycles for the many."[74]

[74] James Hathaway, Can International Refugee Law Be Made Relevant Again?, op. cit., p. 6.

B. Protection for Refugees Compared to IDPs

The goal of this part of our work is first of all to examine the protection regime for refugees as compared to IDPs in general, and then in the particular case of Iraq. It is frequently argued that while refugees are protected (however feebly) under certain provisions of international law, IDPs are deprived of a viable protection system supported by the international community. This dilemma has long been a subject of discussion among advocates of the so-called *droit d'ingérence* who are vocal in pinpointing the discriminatory approach adopted by international law to two categories of victims of persecution and violence whose only difference is their ability to cross a border.

The general contention is that, among uprooted people and populations a person who has crossed an international border and sought safety in a country other than his own, enjoys an unquestioned legal status as a refugee, whereas the same does not hold true for the internally displaced person (IDP). People forced into movement in areas enclosed by foreign borders have never found it easy to attract and hold international attention and protection beyond the sovereignty of their country, with the result that no international legal framework for dealing with IDPs exists. Thus, if refugee law in the conventional sense of the term dates back at least to the 1951 Convention relating to the Status of Refugees, IDPs became an issue for public international law only in the nineteen nineties.

1. Legal Grounds for Humanitarian Intervention in Favour of IDPs

Humanitarian intervention is in the words of one expert, "the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread or grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied."[1] Its ethical, legal and political implications have

[1] Robert O. Keohane, Humanitarian Intervention, Ethical, Legal and Political Dilemmas, Cambridge University Press, 2003, p. 350, p. 1.

been variously appraised by jurists. Some, like Fernando Teson,[2] Allen Buchanan[3] or Thomas Franck,[4] have spoken out in favour of the principle, dismissing any deference to arguments presuming the sanctity of existing international law. Others rush to the defence of the international legal system based on state sovereignty and customary law, warning that disruptions there could have disastrous consequences.[5]

Humanitarian intervention at the height of its post-Cold War fame was often regarded by its proponents as an answer to many of the world's human problems. Of necessity, it premised strongly the existence of a humanitarian paradox including the existence of an IDP population, growing dramatically to a size that refugees relief workers had not, until then, been in the habit of facing.

As a rule, the consent of the state concerned is a prerequisite to any humanitarian protection and assistance extended to IDPs. If such consent is not forthcoming, there is little that outside agencies can undertake to assist IDPs. UNHCR, for instance, is the first to acknowledge that "with respect to persons in need of protection and assistance who remain within their own national boundaries . . . consideration of state sovereignty may take precedence over humanist concerns."[6]

1.1. *Evolution in UN Thinking*

The United Nations is clearly bound by respect for the sovereignty of states. The Charter of the United Nations provides that: "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of a state . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII."[7] This Chapter, entitled "Action with Respect to Threats to the Peace,

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[2] Fernando Teson, A Philosophy of International Law, Westview Press, Boulder, 1998.

[3] Allen Buchanan, "Reforming the International Law of Humanitarian Intervention, in: Humanitarian Intervention", op. cit. above 12, pp. 130–175.

[4] Thomas M. Franck, Interpretation and Change in the Law of Humanitarian Intervention, in: Humanitarian Intervention, op. cit., above 14, pp. 204–231.

[5] Michael Byers and Simon Chesterman, Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law, in Humanitarian Intervention, op. cit. 15 above, pp. 177–203.

[6] UNHCR, Note on International Protection, 1994 in: 6 International Journal of Refugee Law 679, 708.

[7] Article 2(7) of the Charter of the United Nations, 1945.

Breaches of the Peace and Acts of Aggression", is the one invoked when the UN decides to authorise armed intervention when international peace and security are in danger. Although Chapter VII was not invoked by resolution 688, armed 'humanitarian intervention' in Iraq was given a theoretical basis in 1991 when the Security Council established a link between gross human rights violations, forced displacement, and international peace and security.[8] This new departure was welcomed by many, including humanitarian activists and the growing number of *droit d'ingérence* advocates in the West.

Article 2(7) of the UN Charter, they tend to argue, should be superseded by Article 55(c), which provides that the UN shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all", and Article 56 requiring all UN member states to agree "to take joint and separate action for the achievement of" the purposes set out in Article 55(c). According to one expert, for instance, the doctrine of *abus de droit* can take precedence over the sovereign rights of states. In other words, the failure of a state to respect human rights may constitute an *abus de droit* with respect to IDPs justifying UN action without the consent of that state.[9]

Arguments such as these disregard the critical provision of the UN Charter contained in Article 2(4) whereby: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." The basic sense of this Article cannot be dismissed: "the use of force across borders is simply not permitted."[10] Yet, UN practice nowadays tends to contradict the provisions of the text of its own Charter. One reason for this change in direction is no doubt the higher profile given to human rights considerations in UN policy in the 1990s which has led to "humanitarian issues playing a historically unprecedented role in international politics".[11]

UN thinking underpinning the new logic of war as a means of achieving humanitarian aims was given full expression during the events in Kosovo. As the Kosovo crisis escalated, UN Secretary

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[8] Security Council Resolution 688, 5 April 1991.
[9] Richard Plender, The Legal Basis of International Jurisdiction to Act with Respect to the Internally Displaced, 1994, 6 International Journal of Refugee Law, pp. 355–356.
[10] Michael Byers & Simon Chesterman, Humanitarian Intervention, op. cit., p. 181.
[11] Adam Roberts, The role of humanitarian issues in international politics in the 1990s, International Review of the Red Cross, No. 833, 31.3.1999, pp. 19–43.

General Kofi Annan did not hesitate to wave the flag of what he called "individual sovereignty" (i.e. respect for the human rights and fundamental freedoms enshrined in the UN charter) which, in a globalised environment of international co-operation, apparently superseded considerations of state sovereignty. As the individual became the focus of UN concerns, then, according to Annan, every justification was present for preventative action, or intervention – even across state boundaries – to stop gross and systematic violations of human rights (by which is generally meant genocide, war crimes or crimes against humanity).[12]

The Security Council, for its part, did not add anything of substance to the theoretical debate fired by the Kosovo conflict. It restricted itself to expressing grave concern at the flow of refugees from Kosovo, and, without establishing any special distinction between refugees and IDPs, demanded that the safe return of refugees and displaced persons to their homes be facilitated so that immediate steps to improve the humanitarian situation could be taken to avert an impending humanitarian catastrophe.[13] The situation of IDPs was, however, given due prominence in reports presented by the Secretary General based on figures arrived at through monitoring by the High Commissioner for Refugees.[14] In the final analysis, however, one can maintain with some degree of justification that the unauthorised humanitarian intervention in Kosovo was prompted above all by geopolitical interests,[15] and that humanitarian considerations, when they existed at all, had more to do with the fear of a mass exodus of refugees into European countries than with any genuine concern for the plight of the internally displaced in the conflict area.

It is now obvious that national sovereignty does not serve as an absolute principle. States cannot invoke this principle to protect themselves while at the same time committing war crimes or crimes against humanity. But the question is whether internal displacement of people *per se* provides sufficient justification for overlooking such a fundamental principle of public international law. If the modern UN practice can be an answer to this question, it implies that gross violation of human rights has become an explicit reason

[12] Kofi Annan, The legitimacy to intervene. International action to uphold human rights requires a new understanding of state and individual sovereignty, Financial Times, December 31, 1999.
[13] UNSC Res. 1199, 23 Sept. 1998.
[14] Report of the Secretary General, UN doc. S/1998/834, Add. 1, 4 Sept. 1998; UN Press Release, SC/6577, 23 Sept. 1998.
[15] Jules Lobel & Michael Ratner, Humanitarian Military Intervention, Foreign Policy in Focus, Vol. 5, No. 1, Jan. 2000.

for derogation from respect for sovereignty. A displacement of people, therefore, can potentially be a reason for a UN authorized international humanitarian intervention, if the case is established as a war crime or crime against humanity.

With all the above, it is still a far reaching goal for the United Nations, in the interest of IDPs, to be able to surpass the well established principle of state sovereignty deeply rooted as it is in the nation-states system, especially in the absence of unequivocal evidence of threat to international peace and security. The legal ground for humanitarian intervention to protect the IDPs, therefore, remains the explicit consent of sovereign states in whose territory displacements have occurred. The exception is arguably when a link is established between a given displacement and the requirements invoked in Chapter VII of the UN Charter which may trigger a Security Council resolution authorising international humanitarian intervention in favour of the victims, even without the assent of their central government.

Again as on many other previous occasions, the catalyser in the process of drawing the international community's attention to the IDPs, was none other than the Iraqi crisis of 1991 in which the Kurds passed back and forth from refugee to IDP status, triggering off fully-fledged military operations in northern Iraq in the name of humanitarian intervention. In fact the Security Council resolution not only created a precedent as to how to deal with humanitarian intervention in general but also opened eyes to the need for a principled approach to the issue of internally displaced persons in particular.

2. Protection of IDPs under International Law

There is no precise legal definition of internal displacement. Two generally accepted working definitions on internally displaced persons, have served so far to determine who IDPs are. In the first instance, IDPs have been described as "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."[16] Another proposal,

[16] Analytical Report of the Secretary-General on internally displaced persons of 14 February 1992.

originally emanating from UNHCR, suggested that IDPs should be defined as people finding themselves in a refugee-like situation without having crossed an international border.[17]

IDPs are first and foremost the responsibility of the national authorities under whose jurisdiction they live. When State sovereignty is no longer in a position to live up to its responsibilities, two areas of international law cover IDP needs, namely international humanitarian law and international human rights law.

The founding documents of international humanitarian law are, of course, the four 1949 Geneva Conventions and the two 1977 Additional Protocols. Among these, Article 3 common to all four Geneva Conventions and the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) are relevant to non-international armed conflicts. For those eager to draft an entirely new legal framework to cover the requirements of IDPs, the argument runs that the terms used by the Geneva Conventions and the Additional Protocols are too narrow compared to the IDP definition found in the Guiding Principles. They further find fault with the definition of armed conflicts and, in particular, with the restrictive effect of Article 1(2) of Protocol II which stipulates that the Protocol may not be applied to "situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

On the other hand, more than one expert has claimed, like Subrata Ray Chowdbury, for instance, that at least four provisions of Protocol II form *jus cogens*, the chief of them being Article 17 prohibiting the forced movement of civilians, and that these can be taken as peremptory norms for the protection of IDPs.[18]

Jean-Philippe Lavoyer, who shares Chowdbury's views in many respects, points out that international humanitarian law adopts a global approach aimed at safeguarding the civilian population as a whole. He insists that the fact that population displacements are only rarely mentioned in the relevant documents does not mean that legal protection is lacking. On the contrary, according to him, if the rules of humanitarian law were scrupulously respected, it would make it possible to avoid the majority of displacements. He

[17] Francis Deng, Comprehensive Study, UN doc. E/CN.4/1993/35.

[18] Subrata Roy Chowdbury, A Response to the Refugee Problems in the Post-Cold War Era: Some Existing and Emerging Norms of International Law, International Journal of Refugee Law 100, 1995/7, pp. 108–109.

ends by saying that "Evidently there will never be such a thing as 'total' legal protection; even if every rule of international humanitarian law were respected, population displacements would still take place. However, respect for the rules would make it possible to avoid most displacements resulting from war, which is at present the main cause thereof."[19]

Dr Luke T. Lee, a renowned specialist of IDPs, makes a similar point as Lavoyer about displacement within borders and humanitarian law when he insists that equal protection of refugees and internally displaced persons can be achieved,[20] citing in this respect the International Committee of the Red Cross which "does not make any distinction between refugees and internally displaced persons in its protection of civilians – as set forth in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War[21] and its two Additional Protocols in 1977.[22]

International human rights law is primarily enshrined in three basic documents, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights. Referring specifically to Article 12 of the ICCPR which stipulates the right of a person "to liberty of movement and freedom to choose his residence", Australian commentator Ben Playe declares that "International human rights law provides far greater protection to IDPs than international humanitarian law", although he does add that Article 4 of the same document, permitting parties to derogate from most of their obligations under the Covenant "in time of public emergency which threatens the life of the nation",[23] tends to detract somewhat from its overall impact. Non-derogable at all times in human rights law remain Article 6 on the right to life and Article 7 ensuring freedom from torture, both of them peremptory international norms and, as such, *jus cogens*.

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[19] Jean-Philippe Lavoyer, Refugees and internally displaced persons: International humanitarian law and the role of the ICRC and the Red Cross and Red Crescent Movement, Coll. Of Doc., UNHCR, Almaty 1998, p. 338.

[20] Luke T. Lee, Internally Displaced Persons and Refugees: Towards a Legal Synthesis? Journal of Refugee Studies Vol. 9, No. 1, 1996, p. 37.

[21] August 12, 1949, 6 U.S.T. 3516; T.I.A.S. 3365; 75 U.N.T.S. 287.

[22] ICRC 1977; 16 I.L.M 1391 (Protocol I), 8 June 1977 & 16 I.L.M. 1442 (Protocol II), 8 June 1977.

[23] Ben Playe, op. cit., p. 2.

3. Guiding Principles on Internal Displacement

The first explicit mention of internally displaced persons was made in a 1992 UN General Assembly resolution.[24] Since the constraints of state sovereignty had been challenged by the military intervention on behalf of the Kurds, further groundwork was now clearly required to establish legality in dealing with the apparently huge, but elusive group of IDPs. In 1992, following a General Assembly request for a study on IDPs, the then-UN Secretary-General Boutros Boutros-Ghali appointed as his Representative on IDPs the former Sudanese diplomat Francis M. Deng.[25] Deng's original mandate, renewed on several occasions, included operational elements, dialogue with governments and "most importantly, an appraisal of existing legal standards and institutional arrangements for IDPs."[26]

Called upon to submit annual reports to the UN Commission on Human Rights (UNCHR), Deng has numerous works to his credit, though his most outstanding contribution to alleviating the plight of IDPs is no doubt the ground-breaking study he produced and submitted to the 54th Session of the UN Commission on Human Rights in 1998, the addendum to which, under the title Guiding Principles on Internal Displacement,[27] was widely considered to be the most comprehensive reference to date on the question of providing the international protection that IDPs had lived without until then. At their core, the Guiding Principles represent a useful tool for the protection of IDPs. In addition, they provide guidelines for UN agencies and international and non-governmental organisations dealing with IDPs. Finally, and most importantly, the Principles "do not involve additions or alterations to laws, but instead draw on existing laws, particularly those governing human rights, international humanitarian law and refugee law by analogy."[28]

Although not a binding treaty, the Guiding Principles (and its several companion publications (Handbook for Applying the Guiding Principles, 1999, Manual on Field Practice in International

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[24] General Assembly resolution 47/105, 1992, para. 14.
[25] UN General Assembly resolution 1992/73 of 5 March 1992.
[26] Ben Playe, The UN and Internally Displaced Persons, The University of Western Australia, Winner, ALSA Paper Presentation Competition 2000, p. 1.
[27] Francis Deng, Addendum UN doc. E/CN.4/1998/53/add.2, 11 February 1998 in: Report of the Representative of the Secretary-General, Mr Francis M. Deng, submitted pursuant to Commission resolution 1997/39.
[28] Guiding Principles: A tool for the empowerment of the internally displaced, IRIN Web Special on Internal Displacement, 2002.

Displacement and Annotations) have been unanimously acknowledged by UN bodies and circulated and promoted by international and local NGOs as an advocacy tool. Opposition to the Principles, when it is encountered, has usually come from various governments which had initially voiced their support for the development and dissemination of the instrument. At an ECOSOC meeting in July 2000, for instance, a number of governments turned critical, expressing the view that principles not drafted or formally adopted by governments could not have real standing.[29]

The Guiding Principles are essentially based on international instruments drafted by governments, merging human rights and humanitarian law to form a legal approach that is relevant in the field. Nonetheless, the Guiding Principles continue to be regarded as an informal document whose eventual legitimacy will emerge from widespread application, affording them a degree of standing sufficient for them to be equated with the force of law.

Whatever the reservations felt about the Guiding Principles, their formulation has had the undeniable merit of codifying and clarifying matters of concern to a large group of people in a "refugee-like situation", whose total numbers are often estimated to be in the vicinity of 20 to 25 million worldwide.[30]

As regards the definition, the Guiding Principles, published in 1998, broadly define IDPs as: "Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised border."[31]

According to one commentator, Deng's definition finally "provides the flexibility necessary to protect and assist IDPs according to their needs, rather than to satisfying legal technicalities."[32] The breadth of the IDP description provided by the Guiding Principles has often aroused heated controversy. In practice, however, the focus of many agencies remains firmly fixed on victims of conflict or persecution-related flight, with few attempting to put into practice

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[29] International Colloquy on the Guiding Principles on International Displacement, Background Paper, Vienna Austria, September 2000, p. 2.
[30] Monette Zard, The Internally Displaced in Perspective, Migration Policy Institute, May 22, 2002, p. 1.
[31] Francis Deng, op. cit., Introduction, point 2.
[32] Ben Playe, op. cit., p. 2.

the more casually liberal approach which has claimed to discover shortcomings in Deng's definition because it excludes people who are displaced due to extreme poverty.[33]

Francis Deng made no secret of his view that existing international instruments which have explicit reference to IDPs are deficient in providing necessary legal protection for IDPs. To quote his words: "Human rights law does not directly address some of the most critical situations affecting the displaced, such as forcible displacement or return to unsafe areas, and access to humanitarian assistance."[34]

To make up for what he sees as deficiencies in humanitarian and human rights law, Deng, in his Guiding Principles, proposes extensions of existing international law by applying refugee law to IDPs by analogy, since the conventional refugee definition is too restrictive to make room for the internally displaced.

The principle of *non-refoulement*, the cornerstone of refugee protection, is therefore extended to IDPs by analogy. Principle 15 provides that IDPs have "the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk" as well as second-country resettlement if a person so desires.

Also extended to IDPs by analogy are the other two durable solutions available to refugees: voluntary repatriation and local integration. Furthermore, a wide range of human rights, most of them derived from the International Covenant on Civil and Political Rights (ICCPR), are accorded to IDPs, categorised according to the broad lines set out in the Principles.

4. Refugee Protection versus IDP Protection

The international regime for the protection of refugees seems a model of clarity in comparison with the approach to the protection of IDPs.[35] The essential difference between the refugee and the internally displaced person is, in the eyes of the law, one of status. Or in the words of Bill Frelick: "To be an IDP is not a legal status.

[33] Monette Zard, op. cit., pp. 3–4.

[34] Francis Deng, Internally Displaced Persons: Report of the Representative of the UN Secretary-General, Mr Francis Deng, Commission on Human Rights, January 1994, in (1994) 6 International Journal of Refugee Law, p. 296.

[35] Philip Rudge, The Need for a More Focused Response: European Donor Policies toward IDPs, The Brookings Institution, Jan. 2002.

To be a refugee is. 'Internally displaced person' is a descriptive term."[36]

The refugee definition as set down in the 1951 Geneva Convention, is individual, widely subscribed to and based on legally binding commitments, although the criterion used to determine refugee status is practically reduced to one reason alone: a well-founded fear of persecution.

As earlier elaborated, internally displaced persons, on the other hand, are categorised as those "forced or obliged to flee or to leave their homes or places of habitual residence in particular as a result of, or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human made disasters, and who have not crossed an internally recognised border."

Although based on existing human rights and humanitarian law and therefore carrying great moral authority, international protection of IDPs has to be qualified as being not legally binding on any parties and at odds with the sovereignty of nation-states principle. Persecution no longer figures in the formulation.

Any person recognised as a refugee enjoys protection, in theory at least, against being returned to his own country under the widely disseminated prohibition against *refoulement*. A well-oiled system is already in place. By contrast, in its actions on behalf of IDPs, the international community has to allow for the difference in status and the constraint of sovereignty. Here, no automatisms can be set off as in the refugee regime, and crises can only be met on a case-by-case basis.

To mark even better the distinction between refugees and IDPs, we can turn to Professor Walter Kälin, one of the legal experts who helped to formulate the Guiding Principles. In a subsequent work on Annotations of Guiding Principles on Internal Displacement, he notes that internally displaced persons "need not and cannot be granted a special legal status comparable to refugee status because refugees have lost the protection of their own country, and, therefore, are in need of international protection not necessary for those who do not cross borders." IDPs, on the other hand, he argues, do not require substitute protection, for "they are entitled to the enjoyment of all relevant guarantees of human rights and humanitarian law, including those of special importance to them."[37]

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[36] Bill Frelick, Displacement without end: internally displaced who can't go home, Forced Migration Review 17, 2 June 2003, pp. 10–12.

[37] Walter Kälin, Guiding Principles on Internal Displacement: Annotations, ASIL, 2000, p. 276.

Based on Professor Kälin's reasoning, one could possibly even argue that, in an ideal situation, IDPs may end up by having a better legal standing than their refugee counterparts who seek the protection of entities other than their own national government. Theoretically they can draw from human rights and humanitarian law to make their case but in reality the situation may not be as rosy as it looks.

5. Treatment of IDPs by International Organizations

5.1. *UN Institutional Arrangements for IDPs*

With the inherent legal constraints of the IDPs in mind, the UN has been reluctant to establish a new independent agency for IDPs alone. The UNHCR has been the agency closest to the issue of displacement. However, among institutions involved in the responsibilities of caring for the internally displaced, some have argued for a lead role for the High Commissioner for Human Rights, since concern for the human rights of IDPs tops the list of priorities. Nevertheless, some may propose other agencies such as, for example, UNICEF that has focused on women and children.

Lastly, there is the school of thought which leans towards putting an end to any UN involvement in IDP operations. Reserving a coordination role for itself, the UN could leave the actual task of providing protection and assistance to IDPs in sensitive situations to various competent NGOs, including the International Committee of the Red Cross. Such a solution would also have the merit of bypassing to some extent the prickly issue of state sovereignty.

Based on the individual characteristics of each crisis, the UN seems to have opted for a concerted effort on the part of all relevant agencies whenever a crisis occurs. It has therefore set up the following coordination system at headquarters and field level to oversee IDPs:

1. The Emergency Relief Coordinator (ERC), as Chair of the Inter-Agency Standing Committee and focal point for the inter-agency coordination of protection and assistance to IDPs, is responsible for global advocacy on protection and assistance, resource mobilisation, global information on IDPs and ensuring that field arrangements are adequately supported.
2. The principal responsibilities of the Representative of the Secretary-General on Internally Displaced Persons (RSG on IDPs) include

serving as an advocate on behalf of IDPs and undertaking missions on their behalf.
3. The Inter-Agency Standing Committee (IASC), chaired by the ERC, is the inter-agency forum for consultations on all matters regarding IDPs.
4. At the field level, a Humanitarian Co-ordinator (HC) or Resident Coordinator is in charge of supervising IDP activities.[38]

Following increased pressure put on the world body by NGOs such as Refugees International (RI), which deplored the lack of any global network of support for IDPs and recommended "an approach involving the designation of a lead agency to advocate for and respond to IDP crises in individual countries",[39] the United Nations responded by setting up an additional Special Unit on Internal Displacement within the Office of the Coordinator of Humanitarian Assistance (OCHA) in Geneva. The IDP Unit became operational in January 2002.

It may be relevant here to briefly study the current track record of the UN System for IDPs in Iraq and elsewhere. The UN system for co-ordinating IDP humanitarian efforts in Iraq, so hopefully set up at the start of the war in 2003, has never really got off the ground, just as the UN has so far remained almost uninvolved in any rebuilding efforts in Iraq. After the August 2003 bombing of the UN compound in Baghdad, the UN's entire international staff in Iraq began to operate out of Cyprus or Jordan, where they had been temporarily relocated in view of the violence prevailing against all foreigners. This long-distance, low-profile approach has made it impossible for the UN to point to precise achievements in the immediate post-war phase.

For the IDP population of Iraq, whose pre-war figures were estimated at some 900,000, this has meant that little of what had been expected has actually been carried out. Registration work has been done to a certain extent. Some IDPs, have returned home, but it is very difficult to establish exact figures due to a lack of international staff on the ground because of insecurity.[40]

Elsewhere, in Africa, for example, the UN IDP system as a whole, and the IDP Special Unit established in 2001 to monitor emergency situations on the ground in particular, are also struggling to prove

[38] Protection of Internally Displaced Persons, Inter-Agency Standing Committee Policy Paper, Dec. 1999, p. 27.
[39] United Nations establishes unit on Internally Displaced People, Refugees International, Relief Web, 14 Feb. 2002.
[40] UN OCHA, Special Report on IDPs, 5 January 2004.

their worth. The IDP Unit operates primarily by dispatching assessment teams to crisis areas.[41] An external review of the Unit was undertaken in late 2003 and came to the conclusion that the Unit's effectiveness was linked to the overall effectiveness of the "collaborative approach"[42] under the responsibility of the Emergency Relief Coordinator (ERC). The main obstacle identified in the path of successful IDP crisis management was reported to be the lack of transparency and predictability in the decision-making process in assigning operational roles, leading to major gaps in addressing protection concerns.[43]

According to humanitarian specialist Roberta Cohen, displacement emergencies in Africa, including the Darfur region of Sudan, have taken on frightening proportions. "The UN's new top official for humanitarian issues, Jan Egeland, has recently taken up this challenge and has been speaking out on the issue and encouraging the different international agencies like WEF, UNHCR and UNDP to work together more closely under the coordination of his office so as to make the international response to IDPs more predictable and more inclusive of both assistance and protection of personal security and human rights."[44] Since the new UN system for IDPs is still very recent, it is too early to judge its effectiveness and the contributions it could make to the life of IDPs.

5.2. *UNHCR and IDPs*

Once empathy with the problem of global IDPs had grown sufficiently in the international community and discussions on how to come to their assistance dominated the humanitarian scene, many tended to believe that of all available agencies, UNHCR, the custodian of refugee law, would be best placed to take over overall responsibility for IDPs as well. But this did not take place.

UNHCR *per se*, might have been unwilling to assume the task of monitoring IDPs, since it has been accused more and more often with being a political body, which is unpalatable to many states. It is thus clear that a role as lead enforcement agency in IDP matters would ill suit the refugee agency as it is constituted today.

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[41] United Nations establishes unit on Internally Displaced People, op. cit., p. 2.
[42] Strengthening the coordination of emergency humanitarian assistance of the United Nations, op. cit., p. 8.
[43] Ibid., p. 8, para. 34.
[44] Roberta Cohen, Internal Displacement in Africa: Where Does the Responsibility Lie?, The Brookings-SAIS Project on Internal Displacement, May 26, 2004, p. 2.

Of course, right from its inception, a few ventures into the field of displacement by UNHCR are on record, although its founding Statute[45] contained no mention of the IDP category, thus entrusting it with no specific legal competence in its dealings with this particular group of uprooted people. However, Article 9 of the Statute left a back door open to extending the activities of the High Commissioner by providing that he or she may "engage in such activities . . . as the General Assembly may determine within the limits of the resources placed at his/her disposal".[46] It is this provision which has constituted "the basis upon which the General Assembly has, on several occasions, and in various forms, either authorised the High Commissioner to act on behalf of internally displaced persons, or expressed support for actions already taken by UNHCR in respect of such categories."[47]

The first instance of such authorisation was in 1957 when UNHCR used its famous "good offices" to assist in transferring funds to Chinese of Taiwanese origin stranded in Hong Kong.[48] In 1972, UNHCR was involved in relief and resettlement operations for refugees and other displaced persons"[49] in the Sudan for which, in the words of the General Assembly resolution, the High Commissioner's "Office has particular expertise and experience".[50]

Thereupon followed various other well-documented UNHCR in-country operations in favour of the internally displaced,[51] all based on *ad hoc* UN resolutions, the most far-reaching among them being the one dated 20 December 1993 in which the UN General Assembly expressed ". . . support for the High Commissioner's efforts, on the basis of specific requests from the Secretary-General or the competent principal organs of the United Nations, and with the consent of the concerned state, and taking into account the complementarities of the mandates and expertise of other relevant organisations, to provide humanitarian assistance and protection to persons displaced within their own country in specific situations calling for

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[45] General Assembly res. 428 (v).
[46] Ibid.
[47] Dennis McNamara, UNHCR's Mandate in Relation to Internally Displaced Persons, In: Rights Have No Borders, Internal Displacement Worldwide, Ed. Wendy Davies, Norwegian Refugee Council, Global IDP Survey, 1998, Section 4, pp. 1–5.
[48] GA resolution 1167 (XII) of 26 November 1957, para. 2.
[49] GA resolution 2956 (XXVII) of 12 December 1972, para. 2.
[50] Ibid.
[51] UNHCR's Operational Experience with Internally Displaced Persons, September 1994.

the Office's particular expertise, especially where such efforts could contribute to the prevention or solution of refugee problems".[52]

Subsequently UNHCR's own Executive Committee of the High Commissioner's Programme ExCom endorsed the position adopted by the United Nations, calling GA resolution 48/116 an "appropriate framework for the involvement of the High Commissioner in situations of internal displacement"[53] and stressing the innumerable points of resemblance between internal displacement and refugee situations.

Nonetheless, as Dennis McNamara points out "the various authorisations to UNHCR by the General Assembly and ExCom do not amount to a *carte blanche* for UNHCR involvement in issues of internal displacement."[54] In other words, although IDPs had over time come to be recognised as a particular category of persons of concern to UNHCR, the agency could only come to their assistance on a case-by-case basis. Unlike refugees, no specific international regime had been set up to protect these so-called "refugees in all but name" whose one difference with their more far-travelled cousins, technically speaking, lay in the fact that they had not crossed any international borders.

According to an empirical observation of an expert, for UNHCR even to consider taking responsibility for internally displaced persons one of the following four situations must obtain:

1. IDPs live alongside a refugee population and have similar needs for protection and assistance; (A case in point is Afghanistan)
2. IDPs are already present in or going back to the same area as returning refugees; (In Iraq, where such a situation exists. UNHCR has nonetheless not assumed any lead role)
3. The same events have resulted in both refugees and internally displaced persons, and it makes sense to cater for the needs of both in one single operation; and
4. There is a potential for cross border movement, and therefore protection and assistance in the country of origin would enable the internally displaced to remain in their country of origin.[55] (The Iraqi Kurds in 1991 can be considered a telling example)

A further list of criteria must be met before UNHCR can finally agree to take responsibility for IDPs, namely:

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[52] GA resolution 48/116 of 20 December 1993, para. 12.
[53] UNHCR EXCOM Conclusion No. 75 of 1994.
[54] Dennis McNamara, op. cit., p. 2.
[55] Anne Christine Eriksson, Protecting Internally Displaced Persons in Kosovo, Rosemarie Rogers Working Paper No. 3, May 1999, p. 27.

1. As discussed above, a specific request should be made by the Secretary-General or General Assembly to UNHCR;
2. The state concerned and other relevant parties should give their consent to UNHCR's involvement;
3. Resources such as funds and human capacity must be available;
4. The activities should be compatible with regular protection functions so that UNHCR's expertise is brought into play;
5. The right of IDPs to seek asylum abroad should not be compromised, UNHCR's first duty being to safeguard the institution of asylum;
6. UNHCR must be guaranteed unhindered, secure access to the affected IDPs.[56]

In view of the foregoing it is no wonder that there has so far been no automatic expansion of UNHCR's mandate to include IDPs. Several practical prerequisites were attached to UNHCR's intervention. Then lack of donor interest perhaps, or operational constraints, or even the prospect of any bungled action tarnishing UNHCR's institutional image all contributed to UNHCR's avowed reluctance automatically to add IDPs to its mandated refugee caseload.[57]

5.3. *ICRC and IDPs*

The position of the International Committee of the Red Cross represents a more victim-oriented approach emphasizing implementation of international instruments and in particular the provisions of the four Geneva Conventions and their two Additional Protocols. The ICRC acknowledges the fact that, compared to refugees, internally displaced persons are not beneficiaries of a specific convention guaranteeing their rights. But, in its eyes, this is not to say that the legal protection instruments at their disposal are in anyway deficient.

The ICRC makes it a point to stress the importance of national law since this is the basic source of protection for all IDPs. It emphasizes that "the majority of IDPs are nationals of the State in which they find themselves. As such, they are entitled to the full protection of national law and the rights it grants nationals, without any adverse distinction resulting from the fact of their displacement."[58]

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[56] Ibid.
[57] Ibid., p. 27.
[58] ICRC, Legal protection of internally displaced persons, 30.8.2002, p. 1.

That failing, and in times of peace as in wartime, the provisions of human rights law become applicable, aiming both at preventing displacement and ensuring basic rights should it occur.

In situations of armed conflict, whether international or non-international, humanitarian law, which expressly prohibits compelling civilians to be displaced, "unless their security or imperative military necessity renders this essential",[59] becomes the relevant legal standard. Those not party to the hostilities are considered to be civilians and therefore entitled to the full range of protection afforded to civilians under the Geneva Conventions and Protocols, including *a fortiori* right of return should arbitrary displacement have taken place. In conclusion, the ICRC defends its standpoint, insisting that: "Existing law covers the most important needs. There are no significant gaps in the legal protection of IDPs. The challenge lies in ensuring the implementation of existing rules."[60]

6. Refugees versus IDPs in Iraq

A close look at Iraq, is necessary in order to study how international protection could be accorded to these two categories of Iraqi uprooted civilians, both IDPs and refugees vying for the attention of the humanitarian community after the collapse of Saddam Hussein's regime. In an article written in April 2003 entitled "Internally Displaced Persons in Iraq: A Potential Crisis", two scholars who had devoted their life to humanitarian work, Arthur Helton and Gil Loescher,[61] seemed to feel UN contingency planning for Iraqi IDPs was inadequate, especially as regards the nomination of a lead agency.

UNHCR, originally marked out for the leading role in Iraq, dropped out of the race for various reasons and maintained only a small presence in the occupied country. Overall responsibility for IDPs was then invested in the UN Humanitarian Coordinator, Lopes de Silva, with specific tasks being delegated to two other agencies, namely the UN Office for Project Services (UNOPS) for IDP assistance in the three northern provinces of Iraq, and the

[59] Ibid.
[60] Ibid., p. 2.
[61] Both persons were caught in the August 2003 bombing of the UN headquarters in Baghdad, Arthur Helton lost his life and Gil Loescher survived after amputation of both legs.

International Organisation for Migration (IOM) whose tasks in Central and Southern Iraq include registration, camp management and distribution of non-food items to IDPs.

> "This decision," wrote Helton and Loescher, "caused consternation among NGOs and some governments who are concerned that neither UNOPS nor IOM have extensive experience working with IDPs. UNOPS, which was spun out of UNDP in 1995, provides contract services to other entities in the UN system. IOM has no prior experience with IDPs in Iraq. Several NGOs and government agencies expressed their concerns about IOM's inexperience in this area to Gil Loescher. They are particularly critical of IOM's recent experience with registration and camp management for IDPs near Herat in western Afghanistan, where it ran out of funding, resulting in a precipitous withdrawal. Reportedly, IOM did not even carry out a detailed evaluation of its operation there, causing some NGOs to worry that IOM had learned too few lessons from earlier mistakes in that country."[62]

According to Loescher, not only NGOs but also UN officials had expressed the view that agencies other than the ones actually selected would have been better suited to lead the international response to Iraqi IDPs. Among UN agencies, UNICEF was the one thought to be best prepared to deal with the emergency in Iraq. ICRC, with its mandate under international humanitarian law to protect civilians in armed conflicts, could no doubt also provide effective leadership to humanitarians in Iraq.[63] It is important to note that the decision to appoint lead organizations in charge of resettlement of ex-refugees and IDPs was not taken by the United Nations *per se* since the humanitarian organizations could only be mandated by the occupying powers following the collapse of the Iraqi government.

Some NGOs have expressed concern as to how the protection of IDPs will henceforth be ensured. They voiced the thought that neither UNOPS nor IOM had a legal protection mandate for IDPs. Since no established protection agency for the internally displaced exists at the international level, three NGO international networks addressed a letter to Kofi Annan in March 2003, asking who would be in charge of providing protection to IDPs in Iraq and how well would they perform.

Ken Bacon, President of Refugees International, urged the UN Secretary-General to appoint UNHCR as the lead agency for IDPs

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[62] Arthur C. Helton and Gil Loescher, Internally Displaced Persons in Iraq: A Potential Crisis, Open Democracy, 10.4.2003, p. 3.
[63] Ibid., p. 3.

in Iraq, adding that neither UNOPS nor IOM "has a protection mandate, and neither will be able to provide the full range of services that IDPs will need."[64] Similarly, Kenneth Roth, Executive Director of Human Rights Watch, in a letter to General Jay Garner dated April 23, 2003, voicing concern over how best to respond to Iraqi IDP needs, said that "Human Rights Watch is also concerned that two of the main organizations specifically designated to provide support to IDPs in Iraq – the International Organization for Migration (IOM) and United Nations Operations (UNOPS) – have neither a protection mandate nor the capacity to monitor, investigate and remedy protection violations."[65]

They were duly informed that the responsibility for the protection of IDPs would devolve on the Humanitarian Coordinator, aided in his task by the UN country team and a member of OCHA's IDP unit in Geneva. Help would also be forthcoming from the Office of the UN High Commissioner for Human Rights.[66]

IOM later became a part of the UN country team for Iraq and therefore IOM program activities for Iraq were integrated within the UN strategic plan for 2004, coordinating the humanitarian assistance, reconstruction efforts, technical assistance and development needs in Iraq. IOM in Iraq was integrated into the three UN program clusters namely health, Internally Displaced Persons (IDPs) and refugees, and poverty reduction and human development. IOM assumed the role of Deputy Task Manager for the Internally Displaced Persons and Refugees cluster.[67] IOM liaises closely with UNHCR on the overall return and reintegration strategy for IDPs and returnees from abroad.[68]

Iraq's IDP population has been calculated in various ways. The figures usually put forward are in the region of between 700,000 and one million people.[69] Among them, to the north, Kurds, Assyrians and Turkmen, have often suffered displacement at the hands of successive Iraqi governments. To the south, since the failed uprising of 1991, Shiite Arabs, foremost among them being the inhabitants of the so-called Mesopotamian marshlands whose numbers

[64] Refugees International urges UN secretary-General to designate UNHCR to respond to IDPs in Iraq, Relief Web, 17 Mar. 2003, p. 1.
[65] HRW Documents on Iraq, HRW Letter to Gen. Jay Garner on Human Rights Priorities During Iraqi Reconstruction, April 23, 2003.
[66] Arthur C. Helton and Gil Loescher, op. cit., p. 3.
[67] IOM in Iraq, IOM Iraq Program, External Update, April 2004, p. 1.
[68] Migration Initiatives, IOM Appeal 2004, Dec. 2003, p. 21.
[69] Norwegian Refugee Council, Background information on the IDP situation in Iraq, 10 June 2002, p. 1.

have been estimated at anything in the region of 350,000 to 500,000, were forced to evacuate their homes. In the south, the only real obstacle to giving back their habitat to the Shiite Arabs would be the high sums required to restore the marshlands to their original state, whereas in the north, the seeds of ethnic conflict have been sown. The untangling of who among Kurds, Assyrians, Turkmen and Arabs have the best-founded right to land, seems to be an almost insoluble problem.

To these already large numbers of indigenous IDPs will be added those ex-refugees or returnees from neighbouring and other countries as well as post-2003 war displaced people who count for a sizable portion of IDPs in Iraq.[70] Such persons exchange one status for another from the perspective of international law, since they will cease to be subject to the provisions of refugee law alone, and enter the broader areas of law on which the Guiding Principles are based, namely national law, human rights law, humanitarian law and refugee law by analogy. This merging of the so far separate categories represents yet another complication for the humanitarian agencies in charge of the problem of uprooted people and displacement in Iraq.

In the south, to cite one example of repatriation, the spontaneous process of the return of Iraqi refugees from Iran started without much control either by the Iranians or the UNHCR or the occupying powers in Iraq. Back on home ground, distinctions between returnees and IDPs tend to blur and they are all contenders for the same kind of reparations and protection set out in the Guiding Principles: Principle 28 talks of the duty of authorities to facilitate the reintegration of returned or resettled persons, Principle 29, paragraph 2 makes it incumbent on the authorities to support the displaced in their efforts to regain their property, whereas Principle 29, paragraph 1 prohibits the discrimination of people formerly displaced.[71]

Future Iraqi authorities will have their hands full with sorting out conflicting land claims from IDPs and refugees, on the one hand, and from newly-arrived claimants and those already established and in possession, on the other. If IDPs and refugees are legally entitled to reclaim property, many property deeds and other documents demonstrating proof of ownership may well have disappeared or been destroyed down the years. Responding to all these

[70] IOM in Iraq, Ibid.
[71] Francis Deng, Guiding Principles on Internal Displacement, op. cit.

legal and logistical challenges will require considerable expertise and, in the case of non-restitution or forcible dislocation of those presently occupying various properties and land, equally considerable funds, since high levels of compensation in one form or the other will have to be paid. According to IOM estimates, total funding required for the IDP program, to be exhausted by the end of 2004, was USD 20 million.[72]

The resources at the disposal of the international community have never been unlimited. One can profitably remind oneself of the concept of the Cadillac for the one or bicycles for the many made famous by Professor J. Hathaway.[73] A realist like expert James Kunder, in a paper written for the US government on Internally Displaced Persons entitled Present but Not Accounted for, refrained from drawing a contrast between IDPs and refugees because, as he put it, he wished to avoid the pitfall of deciding "how to cut up an already small pie."[74] Another American IDP specialist, Anne Hendersen, pointed out that international priorities were constantly shifting from one focal point of interest to another, with the result that budgets were often cut and money was deflected to meet other challenges. She observed that "Such shifts in availability of the limited resources available for IDP programs are typical."[75]

It will remain a major challenge to any Iraqi government in the future to satisfactorily settle claims and counter claims by ex-refugees and internally displaced persons on rights and properties, without the indispensable and continued international support that is bound to cease when all those categories of uprooted people are back in their country under a democratic and international law abiding government.

7. Conclusion

Suffering from insufficient recognition as a group by the international community, IDPs have been pushed to the forefront of humanitarian crises in recent years and their condition as suffer-

[72] IOM in Iraq, Ibid., p. 5.
[73] James Hathaway, Can International Refugee Law Be Made Relevant Again?, Worldwide Refugee Information, World Refugee Survey, 1996, p. 6.
[74] Jennifer McElhinny, Fixing Responsibility for the Internally Displaced, Carnegie Endowment, March 2, 2000, p. 3.
[75] Christian Bourge, New Internal Refugee Project Launched, United Press International, September 10, 2002, p. 2.

ing humanity has attracted immense attention. Although it is undeniable that IDPs fall outside the scope of international refugee law, this does not by any means imply that they are condemned to be in a legal vacuum. Protection instruments are at their disposal, as the preceding pages have brought to light.

But it would be unrealistic to believe that international law can be overstretched to effectively address the issue of IDPs. Legally speaking, the maximum influence that the international community could exercise in this regard would belong to the realm of human rights. National sovereignty and non-interference in the internal affairs of states are still considered as pillars of the international system. Therefore, the legal basis for the protection of refugees who are outside the jurisdiction of their own country is and will continue to remain essentially different from that of IDPs.

Gaps and grey areas in IDP protection may appear in different circumstances, as institutional bodies working to their advantage seem to be missing. Such deficiencies must be met on an *ad hoc* basis and, eventually, include strengthening the collaborative approach of all relevant actors to IDP problems. When deficiencies are of a legal nature, they should be incorporated as law principles into existing instruments.

One must, at the same time be cautious about turning IDPs into a special interests group requiring preferential treatment by the international community. It is a fact that special treatment of these groups of people – in the absence of the constituent government's consent – runs contrary to the principle of sovereignty, a pillar of the nation-states system and the Charter of the UN. There is obviously more than IDP protection in such a venture which nurtures the *droit d'ingérence.*

At the core of the IDP problem lie fundamental and unresolved questions regarding the scope of humanitarian action and the limitations of sovereignty.[76] The advocates of humanitarian intervention insist that refugees are better treated than IDPs and this state of affairs must imperatively be changed. They argue that "there is no difference between being a refugee or an IDP."[77] This argument is taken to mean that the international community has the same jurisdiction over IDPs as they do over the refugees they allow to enter their countries, and this argument is used to mount and justify attempts at armed intervention in favour of victims.

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[76] Monette Zard, The Internally Displaced in Perspective, op. cit. p. 4.
[77] Richard Holbrooke, Statement to Cardozo Law School, New York, 28 March 2000.

There seem to be two completely different sets of underlying reasons for such an advocacy. The first is naturally humanitarian and as such is firmly against the application of discrimination to the IDPs whose mere inability to cross an international boarder has deprived them of the advantages refugee law has to offer.

This argument looks politically attractive but is legally flawed. It may be politically correct since it exposes an unjust situation where the international community is required to justify why it is able to help certain people in need but is neglectful of certain others with almost identical characteristics. The case of Iraq is a clear example. We pointed out in part C of Chapter two that in addition to the post-2003 war IDPs, over a million Iraqis were displaced mainly due to forced relocation policies by Saddam Hussein. Now when it comes to the return of refugees from abroad with the assistance of the international community, one may expect anxiety among IDPs who compare themselves and their treatment with that of the assisted refugees.

This situation is, however, legally flawed since it clearly undermines the distinctive borders between Human Rights law and International Refugee law. The solution for a faulty implementation of Human Rights law by a given government is not to resort to a non-applicable branch of law to the detriment of principles of international law such as sovereignty.

The second underlying reason may well be a political need for intervention for purposes extraneous to humanitarian work, such as the prevention of refugee flow to neighbouring and other countries. As Roberta Cohen puts it "There was a sense that if you didn't address these things (i.e. IDPs) they would spill over borders and increase instability in regions."[78] There are also less innocent purposes for advocacy of humanitarian intervention in favour of IDPs, that look even politically flawed.

[78] Christian Bourge, op. cit.

C. Deficiency in Addressing Mass Influx

1. Development of the Scope of Legal Protection in Mass Influx

Like the plight of the internally displaced, discussed in the previous part, that of people involved in a situation of mass exodus has also been largely ignored by the 1951 Refugee Convention and the subsequent Protocol, both of which documents focused exclusively on individual, border-crossing refugees fearing personal persecution in their country of origin. Collective flight beyond internationally recognised boundaries on grounds of war or generalised violence was not included in the area of concern of the Convention. This turned out to be an ominous omission. In fact, it would not be inappropriate to say that if the international protection regime for refugees has so far failed to address properly and completely the refugee issue, in Iraq and elsewhere, the conceptual inability to foresee the phenomenon of mass influx is among the principal causes.

If the Convention and Protocol paid little attention to mass influx and the victims of war, one of the reasons might well have been that the protection of civilians in wartime was actually regarded as falling under the competence of international humanitarian law.[1]

In times of war, the legal basis for the protection of refugees on the territory of one of the parties to an international conflict has usually been drawn from the instruments of international humanitarian law. IDPs are a case in point, in that these instruments provide an important source of legitimacy pertaining to the displacement of civilians uprooted by military actions. Moreover, the Geneva Conventions offer the added advantage of being adhered to by all UN member countries, whereas the list of signatories of the 1951 Convention is more limited, with countries such as India, Pakistan, not to mention several neighbours of Iraq, being unable or unwilling to ratify the treaty. However, as Walter Kälin points out, international humanitarian law limits its protection to refugees who are on the territory of one of the parties to an international conflict. Refugees driven by war to flee to third States are not

[1] Walter Kälin, Flight in times of war, IRRC September 2001, Vol. 82, No. 843, p. 629.

covered by its provisions.[2] Therefore, when protection is needed for mass exoduses of people fleeing across international borders and seeking asylum abroad, international humanitarian law bows out, leaving the field open for refugee and human rights law to take over.[3]

In any case, those fleeing armed conflicts and civil wars, whether in groups or individually, did not come within the terms of the 1951 Convention or 1967 Protocol. Other later attempts to make up for this failure and codify the particular needs of masses in flight have also achieved little by way of setting up a coherent formal regime, owing as much to the lack of readiness on the part of states to accept further legal undertakings as to their increasing tendency to undermine those to which they are already committed.

This is not to say that the international community simply turned its back on the phenomenon of mass exoduses. On the contrary, as far back as 1957, the definitional straitjacket regarding refugees, as provided by the Convention or the UNHCR Statute, was used in the case of mainland Chinese stranded in Hong Kong.[4] Thereafter followed UNHCR assistance to Algerian refugees fleeing Tunisia and Morocco in the wake of independence insurgency movements,[5] followed by grappling with wide-scale refugee problems in Africa throughout the 1960s, all of them tackled on the basis of *ad hoc* resolutions, instrumentalising the good office approach.

By the early eighties, the world could total up to 105 armed conflicts worldwide, including the deadly Vietnam War with a high count of civilian deaths, and at least 51 "Third World" states led by a military junta.[6] To deal with such recurrent crises involving masses of people driven to flight as a result of radical changes within their countries of origin, and who had also crossed some international border in the process, the international community continued to pursue its pragmatic policy of offering vital assistance to people in need through reference to the "good offices" of the UN High Commissioner for Refugees.

But the time had also come for the international community to update the legal instruments at its disposal in order to meet the challenge of masses in displacement. In 1981, Prince Sadruddin Aga Khan was appointed Special Rapporteur by the UN Human Rights Commission, his task being to study "the question of human

[2] Ibid.
[3] Ibid., p. 630.
[4] GA Resolution 1167 (XII), 26 Nov. 1957.
[5] GA Resolution 1286 (XIII), 5 Dec. 1958.
[6] Charles Humana, World Human Rights Guide, The Economist, 1986, p. 1.

rights and mass exoduses".[7] At the same time, the phenomenon of fleeing war-affected populations was brought firmly within the scope of regular UN deliberations. In the words of G.J.L. Cole: "Within the United Nations Commission on Human Rights, Canada sponsored the consideration of the item "Human Rights and Mass Exoduses" and within the General Assembly, the Federal Republic of Germany obtained the consideration of the item "International Co-operation to Avert Further Mass Flows of Refugees."[8] Thus the current legal and institutional framework to cover the assistance and protection needs of people caught up in mass exoduses could finally begin to evolve.

The first task facing the drafters of the new soft laws relating to masses in displacement was one of terminology. The first official appellation for mass exoduses was that of "displaced persons of concern" to the Office of the UN High Commissioner for Refugees, first figuring in a 1975 GA resolution authorising UNHCR involvement in the Indo-China peninsula.[9] "Large-scale movements of asylum-seekers" to describe the same phenomenon was also used by some experts.[10] "Humanitarian refugees" was yet another term applied to mass refugee flows seeking shelter from armed violence and war rather than from personal persecution.[11] Or they were referred to as "de facto refugees".[12] In each of these cases, the emphasis remained on the individual, no doubt under the influence of the conventional definition of the refugee term. Two other categories, that of the internally displaced, regarded as the human pool preparing future mass influxes on the one hand, or forced or involuntary migrants, on the other, have also tended to obscure the clearly collective nature of the mass exodus phenomenon as it emerged from major refugee crises in Africa, South America, Asia and, most notably for our present purposes, Iraq or the Former Yugoslavia.

The group approach to people in movement finally prevailed, commentators settling for mass influx, mass exodus or mass movement to describe large-scale displacement across a country's borders.

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[7] Study on Human Rights and Massive Exoduses, UN doc. E/CN.4/1503 Rev. 1.
[8] G.J.L. Coles, International Law and the Movements of People, Some General Reflections, IIHL, 1982, p. 10.
[9] GA Resolution 3455 (XXX), 9 Dec. 1975.
[10] Guy S. Goodwin-Gill, The Refugee in International Law, Clarendon Press, 1983, p. 11.
[11] Luise Drüke, Preventive Action for Refugee Producing Situations, Peter Lang, 1993, p. 143, p. 22.
[12] Davor Sopf, Temporary Protection in Europe after 1990: The "Right to Remain" of Genuine Convention Refugees, Journal of Law & Policy, Vol. 6:109, 2001, p. 122.

With this change came, too, a shift away from international refugee law to international human rights law as the future basis for the conceptualisation of refugee norms regarding massive flows, drafted by the former United Nations High Commissioner for Refugees, Prince Sadruddin Aga Khan under the title of Human Rights and Mass Exoduses.[13]

The report was prepared and submitted to the UN Commission for its consideration in 1981. In his note to the Chair of the 38th Commission, Aga Khan rightly warned that "the phenomenon of mass exodus . . . is bound to become more serious with time unless imaginative and concrete measures are urgently taken",[14] He made several recommendations, chief among them to dispatch "humanitarian observers" to areas of violence, thereby securing UN presence there from the start, to set up an "early warning system" to gather information on underlying problems before the occurrence of a crisis and to appoint "a special representative for humanitarian questions to monitor situations which might give rise to refugee production and outflow".[15]

The Special Rapporteur also proposed a thorough revision of refugee, nationality and labour laws in the context of what he termed a "New International Humanitarian Order."[16] Even if the findings of the Special Rapporteur produced no immediate government action or obvious institutional reforms, it did serve to underline the fact that human rights abuses and refugee outflows were closely connected, and that where the one was to be found, the other might well follow. Foundations were thus being laid not only for what was hoped would be a better handling of the mass exodus situation, but also for the political doctrine of prevention as the preferred solution to humanitarian problems.

The two UN initiatives led by Canada and the Federal Republic of Germany already mentioned above focused on issues of state responsibility in creating refugees, and preventive action in this respect.[17] A group of intergovernmental experts was set up in 1981 with a mandate to study how best to counter mass exoduses through enhanced international cooperation. The final report of the Group of Governmental Experts to Avert New Flows of Refugees was deliv-

[13] Commission on Human Rights, Res. 28 (XXXVII), 11 Mar. 1981.
[14] Sadruddin Aga Khan, Study of Human Rights and Massive Exoduses, 1981 (UN Doc. E/CN.4/1503).
[15] Ibid., i–ii.
[16] GA Res. 36/136, 14 Dec. 1981.
[17] Report of the Secretary General: UN doc. A/36/582, 18, 21–5.

ered to the UN in May 1986[18] and adopted by consensus of the UN General Assembly.[19]

The acknowledgement that government policies were mainly responsible for the forced movement of populations across international borders was stated in the document in the following terms:

> Causes of new and massive flows of refugees throughout the world resulting in great human suffering include policies and practices of oppressive and racist regimes, as well as aggression, colonialism, apartheid, alien domination, foreign intervention and occupation . . .[20]

Among their recommendations, one was promptly translated into action and the short-lived UN Office for the Research and the Collection of Information (ORCI) was established,[21] prominent among whose tasks was, of course, the monitoring of factors related to possible refugee flows thus providing early warning of the build up of critical situations. ORCI was later absorbed into the Department of Humanitarian Affairs which in turn was renamed the Office for the Coordination of Humanitarian Affairs (OCHA) in 1998.

As for the normative framework required to ensure protection and assistance principles for the masses of uprooted people spilling over borders, their formulation became the task of the UN Commission on Human Rights and other relevant UN bodies.

In various documents UNHCR has acknowledged that most States, even when not a party to international instruments providing for the protection of refugees from armed conflict and civil strife, have accepted as a rule the need to provide international protection to persons in flight, whether or not they were deemed to fall within the terms of the 1951 Convention. This, it adds, was the general practice reflected in the adoption of the 1994 Conclusion on International Protection,[22] a non-binding instrument.

It should be noted that some States, especially in the developing countries, have often undertaken refugee protection and assistance as part of their moral humanitarian responsibility, without specific reference to international legal obligations. After all, a mass influx of refugees was nothing new for many parts of the world, particularly in Africa, Asia and South America, where notions of hospitality rather than legal constraints, ensured the survival of

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[18] Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees, UN doc. A/41/324, May 1986.
[19] UN GA Res. A/Res/41/40 of 11 Dec. 1986.
[20] Sadruddin Aga Khan, op. cit.
[21] Luise Drüke, op. cit., p. 63.
[22] UN Doc. A/AC.96/839, 11 Oct. 1994, para. 19(n).

masses in flight. In many instances, without great fanfare, influxes were taken in, housed and fed and otherwise left to fend for themselves until such time as conditions changed for the better and voluntary return to countries of origin became possible.

Nonetheless, over time, it was clearly felt that there was a pressing necessity for the establishment of an international protection system specially geared to the needs of mass influxes and founded on a predictable and secure legal basis, especially in the context of events in northern Iraq and the Former Yugoslavia. The elaboration of new norms, albeit of a soft law nature, was all the more urgent since UNHCR acknowledged in this document that certain deficiencies in the refugee system did indeed exist. Thus, the 1994 UNHCR Conclusions observed that limitations to the existing legal tools have arisen "in part from the way in which the definition of "refugee" in the Convention has been interpreted by some States, in part from the way the Convention together with the Protocol has been applied, and in part from limitations inherent in the instruments themselves" as well as in the fact of non-accession to this or other instruments of refugee protection.[23]

By the 1990s, however, the existence of refugees in a mass influx situation came to be viewed as a security threat by the international community. More specifically, it was felt that they posed a security problem for the world, based on which argument, action under Chapter 7 of the UN Charter (authorizing humanitarian relief operations by invoking a threat to international peace and security, with or without specific reference either to Article 41 providing for non military measures, or Article 42 providing for military sanctions) seemed to become common.[24] In northern Iraq (UN SC Res. 688, 5 April, 1991), former Yugoslavia (UN SC Res. 770, 13 August, 1992), Somalia (UN SC Res. 794, 3 December, 1992), Rwanda (UN SC Res. 929, 22 June, 1994) or Haiti (UN SC Res. 940, 31 July, 1994), trans-frontier intervention and interference in the domestic affairs of the States concerned was adopted as the legitimate response to refugee displacement.

Mass exodus and displacement crises, whether in the African Great Lakes region (UN SC Res. 1152, 5 February, 1998), Liberia, (UN SC Res. 788, 19 November 1992 and UN SC Res. 866, 22 September, 1993), Sierra Leone (UN SC Res. 1270, 22 October,

[23] UN Doc. A/AC.96/830, 1994, para. 21.
[24] Guy S. Goodwin-Gill, After the Cold War: asylum and the refugee concept move on, in: Forced Migration Review 10, April 2001, pp. 14–15.

1999), Albania (UN SC Res. 1101, 28 March, 1997), Kosovo (UN SC Res. 1160, 31 March, 1998) and East Timor (UN SD Res. 1264, 15 September, 1999) triggered off similar responses based on Chapter 7. Here, too, it was felt that mass exoduses were best met by resorting to military operations. Thus UN forces or regional forces mandated by the UN did not hesitate to intervene in intrastate conflicts in an attempt to tackle the crises which, it was believed, had caused displacement in the first place.

In humanitarian annals, the 1990s can aptly be termed the decade of complex emergencies, with the departure from usual practice first occurring in 1991 when the Security Council mandated the UNHCR to protect, assist and reintegrate Kurdish refugees in northern Iraq where safe havens were set up, instead of promotion of a system aimed at convincing regional states to open their borders to the people in flight. As John Stremlau puts it "The motivation for establishing these safe areas reflected the strategic, more than the humanitarian interests of major Western powers that led the Gulf War coalition. Kurdish refugees posed a major security threat to Turkey, and its NATO allies, the United States, Britain and France, resolved not to allow those who had been forced from their homes . . . to cross the frontier, while encouraging those who had crossed the frontier to return."[25]

For the first time in UN history, the Security Council decided that no threat of aggression by any state was required to legitimise a military response. A mass exodus, turned away at the Turkish border was cause enough to warrant international action under the terms of Chapter VII, and armed humanitarian intervention took place in northern Iraq.

The text of the Resolution, in this regard, reads as follows:

> The Security Council, Mindful of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security, Recalling Article 2, paragraph 7 of the Charter of the United Nations,[26] Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of

[25] John Stemlau, People in Peril. Human Rights, Humanitarian Action and Preventing Deadly Conflict, Report, Carnegie Commission on Preventing Deadly Conflict, May 1998, p. 5.

[26] "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under *Chapter VII*".

> refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region, . . .
>
> 1. Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region;
> 2. Demands that Iraq, as a contribution to remove the threat to international peace and security in the region, immediately end this repression . . .
> 3. Insists that Iraq allow immediate access by humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations.[27]

B.S. Chimni argues that the statement in UN Security Council resolution 688 that refugee flows constitute a threat to peace and security was motivated by the unwillingness of Turkey to grant temporary protection to Kurds from Iraq.[28]

The relative success of the safe-haven system in northern Iraq, at least until 1996 and a fresh outbreak of Kurdish factional infighting, no doubt made it appear in the eyes of many as the right way to go in dealing with massive outflows. The new trend towards the "politics of containment", designed to prevent unwanted migrants and asylum seekers from leaving their countries of origin was firmly in place. Hence the seven major military operations during the course of the 90s aimed – inter alia – at preventing massive refugee flows. Six of them, in Northern Iraq,[29] Somalia,[30] Bosnia and Herzegovina,[31] Haiti,[32] Rwanda[33] and East Timor,[34] were authorised by the UN Security Council, the seventh, in Kosovo,[35] resulted from NATO action.

[27] UN SC Res. 688, 5 April 1991.
[28] B.S. Chimni, ed., International Refugee Law: A Reader, New Delhi/Thousand Oaks/London/Sage Publications, 2000, p. 613.
[29] UN SC Res. 688/1991.
[30] UN SC Res. 733/1992 and UN SC Res. 794/1992.
[31] UN SC Res. 749/1992.
[32] UN SC Res. 841/1993.
[33] UN SC Res. 929/1994.
[34] UN SC Res. 1264/1999.
[35] UN SC Res. 1199/1998.

2. Legal Eligibility of Mass Influx Refugees

2.1. *UNHCR Practice*

In the new situation of military confrontations during the nineties, UNHCR found itself promoted to being the "humanitarian arm of the UN's peace-keeping efforts."[36] UNHCR was invited to address the Security Council in November 1992, the first time that such a thing had happened in the 42 years of existence of the refugee organization. UNHCR became a willing partner in promoting the concept of the refugee as a menace. In the then UN High Commissioner Mrs Ogata's words: there is "a greater willingness on the part of the international community to collectively address the threat to international security posed by the internal conflict and large-scale population displacements, as in the Former Yugoslavia and Somalia."[37] This represented recognition of the international departure from the luxurious concept of refugee individualism to the fear of the threat posed by refugees *en masse*.

UNHCR brought with it technical skills for solving the problem of massive population overflows notably in Europe. Since individual determination of refugee status as required under Convention and Statute was no longer possible, usual screening procedures were waived, to be replaced by *prima facie* recognition of the group as persons of concern to UNHCR. Thus the mass exodus category, so far neglected under codified international law, found itself afforded a degree of protection almost equivalent to that reserved for Convention refugees, thanks to UNHCR's broadening of the refugee definition in practice.

Commentators have often expressed concern that, in mass exoduses, the refugee concept might be put on hold and restrictive norms applied, thereby jeopardising the essential principles of protection. UNHCR, for its part, has always emphasised fair status determination procedures for asylum-seekers. Yet, in large-scale flows of persons, it has been willing, for reasons of practicality, to forego individual eligibility procedures in favour of group determination of refugee status.[38]

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[36] Sadako Ogata, Statement made at the Royal Institute for International Relations, Brussels, 25 Nov. 1992, p. 3.
[37] Ibid.
[38] UNHCR, The scope of international protection in mass influx, EC/1995/SCP/CRP.3, 2 Jun 1995, p. 4.

International law, in its present form, grants recognition to four categories of refugees:

- In privileged first place come the refugees corresponding to the definition contained in the Refugee Convention and Protocol. Such people, on grounds of fear of persecution in their country of origin, are entitled to claim *non-refoulement* protection from any one of the States that is party, to the refugee instruments.
- Secondly, we have the refugees covered by a regional agreement such as the OAU for Africa or the Cartegena Declaration for South America and who are usually protected against return in the same way as Convention refugees.
- Third, there are refugees (such as those who fled in their masses from Iraq or the former Yugoslavia), although fearful of succumbing to serious disturbances of the public order, they are in no position to invoke preferential rights, since they are covered by no particular treaty. In their case, international law foresees no guarantees against return beyond those contained in national legislation and therefore they are often exposed to temporary protection measures.
- Lastly, all forced or involuntary migrants are entitled to turn to UNHCR for certain forms of assistance and protection, but they enjoy no legal right to *non-refoulement* under international law.[39]

Internally displaced persons, as we noted earlier on, do not enjoy refugee status as such and are therefore outside the realm of refugee law, since by definition they are subject to the domestic jurisdiction of states. They remain, however, persons of concern to the international community, generally monitored through human rights and international humanitarian law and the relevant bodies of the United Nations, even if their rights are curtailed to some extent by the principle of state sovereignty.

In comparing the legal implications of being a Convention refugee as opposed to a mass influx or non-Convention refugee, where no other regional arrangement exists, as in Europe or Asia, the following points need to be highlighted:

a) an ideal refugee claimant within the terms of the 1951 Convention is a person who has left his country of origin because
b) there exists an actual risk of harm in the country of origin and
c) the claimant has a well-founded fear of persecution related to that risk,

[39] James Hathaway, The Law of Refugee Status, Butterworths, 1991, p. 27.

d) based on his or her race, religion, nationality, membership in particular social groups or political opinions. In sum, "the refugee's claim is judged by criteria related to unexpressed political opinions and explicit political action."[40]

"De facto" refugees, on the other hand, are those fleeing because of civil war or generalized violence.[41] Their exclusion from Convention refugee status is based on three legal arguments:

- First, actions carried out by a government during a situation of civil war or generalised violence is not tantamount to personal persecution, since the task of a government is to preserve law and order and the integrity of the national territory. In other words, governmental actions in a situation of crisis are not dictated by the race, religion, ethnic origin or political opinion of its citizens. This being so, the condition *sine qua non* of the 1951 Refugee Convention is not met.[42]
- Then, people fleeing civil war or generalised violence cannot be said to have been "singled out" for persecution as is required of 1951 Convention refugees. So, mass influx refugees are not regarded as having been exposed to direct and individual persecution. Rather, they are considered victims of the general turmoil within their country of origin.[43]
- Lastly, it has been argued that the principle of *non-refoulement*, if strictly interpreted, does not actually apply to people escaping situations of civil war and generalised violence.[44]

2.2. *Non-Refoulement as Legal Protection*

Many UNHCR experts and several like-minded scholars have defended the opinion that the 1951 Refugee Convention and its Protocol are in themselves adequate to provide the necessary legal basis for the protection of refugees, whatever category they may belong to. Overlooking the refugee definition itself, or the conditions which must be fulfilled for refugee status to be granted, advocates of the Convention put forward the principle of *non-refoulement* as the core of the Convention and claim that Article 33 of that document,

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[40] Davour Sopf, op. cit., p. 122.
[41] Pirkko Kourula, Broadening the Edges, Refugee Definition and International Protection Revisted, Martinus Nijhoff Publishers, 1997, p. 428, p. 159.
[42] 1951 Convention on Refugee Status, art. I(A)(2).
[43] Guy S. Goodwin-Gill, The Refugee in International Law, 2nd ed. 1996, p. 76.
[44] 1951 Convention, art. 33.

as it stands, is fully applicable to any situation of mass influx which may arise.

Thus E. Lauterpacht and D. Bethlehem write: "The requirement to focus on individual circumstances as a condition precedent to a denial of protection under Article 33(1) must not be taken as detracting in any way from the application of the principle of *non-refoulement* in cases of the mass influx of refugees or asylum seekers."[45] They go on to concede that some scholars, referring to the *travaux préparatoires* of the 1951 Convention, have taken the opposite standpoint, but they dismiss such views, arguing that: "The words of Article 33(1) give no reason to exclude the application of the principle to situations of mass exodus."[46]

Backing for this universality and far-reaching scope attributed to *non-refoulement* comes from, among others, the Executive Committee of the High Commissioner's Programme which has on many occasions reaffirmed the non-derogable character of the prohibition on *refoulement*, observing at the same time that "the principle of *non-refoulement* . . . was progressively acquiring the character of a peremptory rule of international law."[47]

Similarly, the European Union has agreed, in principle, that *non-refoulement* will prevail in cases of temporary protection – a new concept designed to address the difficulties posed by mass influx situations.[48]

Nonetheless, as Professor James Hathaway makes it clear in his Law on Refugee Status, *non-refoulement* is not necessarily all encompassing.[49] Professor Goodwin-Gill, basing his arguments on the recognition of a new class of refugees in customary international law, extends article 31 protection to Convention refugees and non-Convention refugees alike, claiming that states are henceforth obliged to observe the principle of *non-refoulement*, at least of a temporary nature while hostilities rage in countries of origin, also in connection with a mass influx. As he sees it:

> . . . the essentially moral obligation to assist refugees and to provide them with refuge or safe haven has, over time and in certain contexts, developed into a legal obligation (albeit at a relatively low level

[45] E. Lauterpracht and D. Bethlehem, The scope and content of the principle of non-refoulement: Opinion, in: Refugee Protection in International Law, UNHCR, 2003, p. 717, p. 119.
[46] Ibid., p. 119.
[47] UNHCR Executive Committee Conclusion No. 25 (XXXIII) 1982, at para. (b).
[48] Commission of the European Communities, "Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons . . .", Provisional Version. May 2000.
[49] James Hathaway, op. cit., pp. 24–26.

> of commitment). The principle of *non-refoulement* must now be understood as applying beyond the narrow confines of articles 1 and 33 of the 1951 Refugee Convention.[50]

Kay Hailbronner, on the other hand, dismisses such views as nothing more than "wishful legal thinking", questioning the tendency to assert international rights for refugees outside the scope of the Convention in the following terms:

> There is no evidence for a generalized recognition of an individual right of humanitarian refugees not to be returned or repatriated. On the contrary, states have generally taken care not to narrow the range of possible responses to mass influxes of aliens . . . Municipal law, in fact, shows that states are not prepared to surrender in advance the ultimate option of returning to their home countries large categories of persons not meeting the definition of the 1951 Refugee Convention.[51]

UNHCR itself has also at times sounded tentative in its claim that the basic instruments of refugee law are unlimited in scope. For example, when it writes in one of its documents:

> . . . as the 1994 Note of International Protection observed, limitations to the existing legal tools have arisen in part from the way in which the definition of "refugee" in the Convention has been interpreted by some States, in part from the way the Convention together with the Protocol has been applied, and in part from limitations inherent in the instruments themselves.[52]

James Hathaway tries to conclude the debate with a cautious weighing of pros and cons, stating: "In my view, Goodwin-Gill's assertion of a *right* to protection against "*refoulement*" overstates the extant scope of customary law in regard to non-Convention refugees."[53] He goes on to note that developed countries have put into place a whole arsenal of discretionary measures both to block access to their territories and to cope with those asylum seekers who do manage to find their way in. Developing states, for their part, take in humanitarian refugees on the double understanding that the costs of offering them shelter will be shared by the international community and that their stay will be only temporary, pending resettlement to a third State.

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[50] G. Goodwin-Gill, Non-Refoulement and the New Asylum-Seekers, 1986, 26(4) Virginia J. Intl. L. 897, p. 898.

[51] K. Hailbronner, Non-Refoulement and 'Humanitarian' Refugees, 26(4) Virginia J. Intl. L. 857, p. 887.

[52] UNHCR, The scope of international protection in mass influx, EC/1995/SCP/CRP.3, para. 2, p. 1.

[53] James Hathaway, op. cit., p. 25.

If *non-refoulement* is not quite universal practice in favour of non-conventional refugees yet, what has emerged from all the international striving to find solutions is a global consensus as to the necessity of coming, in some form or the other, to the aid of mass influx refugees.

To avoid the debate on how far-reaching Article 33 of the 1951 Convention actually is, one can also take guidance from human rights instruments which also enshrine the principle of *non-refoulement*. Thus, Article 13 of the International Covenant on Civil and Political Rights (ICCPR) provides that anyone who is lawfully within the territory of a state shall not be expelled from that state without due process.[54] However, since Article 13 is subject to derogation in the event of national security being at risk, Article 7 of the same instrument ensuring protection against torture, can gain in relevance in avoidance of *refoulement*.[55]

The link between torture and refugees is even more relevant when the Convention against Torture is examined. Article 3(1) of this Convention states that

> no State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[56]

On the one hand, Article 3(1) can be interpreted as providing broader protection than the 1951 Convention in that it is an absolute right. On the other, its effect is restricted in that it applies exclusively to situations involving torture.[57]

Among regional instruments, Article 2(3) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, expands the scope of the *non-refoulement* principle and allows for no derogations.[58] Article 3 of the European Convention on Human Rights prohibiting torture affords refugees protection similar to the one found in the Torture Convention and has often

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[54] International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 UNTS 171.

[55] David Weissbrodt and Isabel Hortreiter, The Principle of Non-Refoulement: Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement provisions of other international human rights treaties, 1999, 5 Buff.Hum. Rts.L.Rev.1, 43.

[56] Convention against Torture or other Cruel, Inhuman or Degrading Treatment, 10 Dec. 1984, 1465 UNTS 113.

[57] David Weissbrodt and Isabel Hortreiter, op. cit., p. 8.

[58] Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa, 10 Sept. 1969, 1001 UNTS 45.

been invoked when non-return is the issue at stake.[59] Foremost among EU instruments dealing with asylum and refugee flows is the Council of Europe's Minimum Guarantees for Asylum Procedures, Article II(1) of which provides that member states' asylum procedures will fully comply with the 1951 Refugee Convention and with the *non-refoulement* provision.[60] As for the American continent, the Convention on Human Rights, Article 22(8) deals with *non-refoulement* in terms reminiscent of the 1951 Refugee Convention, and Article 27 seems to suggest that the non-return rule can be breached in case of massive influxes.[61] In the 1984 Cartegena Declaration, however, non-binding though it is on states, *non-refoulement* is not subject to exception.[62]

It would be fair to say in general that the principle of *non-refoulement* has been greatly promoted since it first came to be enshrined in refugee law. The problems of application it has sometimes posed, and continues to pose, have mainly to do with differing definitions in various legal instruments and their case-by-case interpretations, particularly in the case of of mass influx events. If, however, it could effectively be demonstrated that *non-refoulement* had attained the status of a customary rule (and assuming clarity as to its content), one expert observes that many of the difficulties it has encountered would be overcome.[63]

According to Professor Goodwin-Gill "there is substantial, if not conclusive authority that the principle is binding on all states independently of specific assent".[64] A point of view supported by UNHCR which has even been known to go so far as to aver that not only has *non-refoulement* gained customary status, it may even be *jus cogens*.[65] Roman Boed makes the point that a duty may exist for states to take in refugees in general, but different rules may apply in respect of a mass influx.[66] Several other writers have come to

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[59] European Convention on Human Rights, 4 Nov. 1950, 213 UNTS 221.
[60] Council of Europe, Minimum Guarantees for Asylum Procedures.
[61] American Convention on Human Rights, 18 July 1978, 1144 UNTS 123.
[62] Annual Report of Inter-American Commission on Human Rights 1984–85, OEA/Ser.L/II.66, doc. 10, rev. 1, pp. 190–193.
[63] Jessica Rodger, Defining the Parameters of the Non-Refoulement Principle, LLM Research Paper, University of Wellington, International Law (Laws 509), 2001, para. 21, p. 4.
[64] Guy S. Goodwin-Gill, The Refugee in International Law, Clarendon Press, Oxford, 2nd ed., 1996, p. 167.
[65] Robert L. Newmark, Non-Refoulement Run Afoul: The Questionable Legality Repatriation Programs, 71 Wash. U.L.Q.833, 845.
[66] Roman Boed, State of Necessity as a Justification for Internationally Wrong Conduct, 2000, 3 Yale Human Rights & Dev. L.J. 1, p. 9.

the conclusion that if *non-refoulement* is custom, the exact parameters of the rule still require clarification and a clear framework of application.[67]

State practice has often turned up examples of breaches of *non-refoulement*, especially in mass influx situations. However, the fact that States have usually felt the need to justify their actions seems to bear out the conclusion that though *non-refoulement* is undermined in some cases of mass influx, it eventually qualifies for that of a customary principle.[68]

2.3. *Temporary Protection*

Temporary protection "is widely regarded as an international legal norm that is now obligatory on states in certain circumstances with regard to their treatment of refugees or persons fleeing 'refugee-like' situations."[69]

It is increasingly seen as an appropriate tool in dealing with the issue of mass influx.

For UNHCR,

> . . . the basic elements of temporary protection, as identified in past Executive Committee Conclusions and subsequently put into practice in the protection of refugees from the former Yugoslavia, may assist in providing international protection in situations where the application of the Convention and the Protocol do not fully respond to the need.[70]

For a long time, European countries stuck to offering protection only to refugees under the Refugee Convention, designing for *de facto* refugees a so-called B-status allowing them to remain as rejected asylum-seekers until such time as a safe return to the country of origin could be arranged.[71] The disintegration of the Former Yugoslavia with its large group of some 700,000 persons fleeing across the border and into European territory made it necessary to find other means to contain the flow. This further gave

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[67] Todd Howland, Refoulement of refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law, 1998, 4 U.C.Davis, J.Int'l L & Pol'y 73, p. 81.
[68] Jessica Rodger, op. cit., para. 53–56.
[69] Susan M. Akram, Temporary Protection and its Applicability to the Palestinian Refugee Case, Badid Information & Discussion Brief, Issue No. 4, June 2000, p. 4.
[70] UNHCR, The scope of international protection in mass influx, op. cit., p. 3.
[71] Walter Kälin, Flight in times of war, op. cit., p. 639.

rise to the notion of temporary protection. The concept, often used previously in the context of less prosperous countries to help them respond to various refugee influxes, was among the elements presented in UNHCR's Comprehensive Response to the Humanitarian Crisis in the Former Yugoslavia, the idea being

> . . . to provide protection against *refoulement* and respect for fundamental human rights while awaiting return in safety and dignity following a political solution of the conflict in former Yugoslavia. The other intention was to avoid overwhelming the national refugee status procedures already considered overburdened.[72]

Although it may have facilitated the international community's efforts in the crisis of the Former Yugoslavia, in the eyes of some commentators, temporary protection and all it implies remains no more than a stop-gap measure, "undercutting the traditional idea of refugee protection expressed in the Convention."[73] It is not an established part of public international law, as D. Sopf points out. "Rather it is a political instrument designed to cope with specific situations, such as the mass migration of people"[74] caused by war.

Temporary Protection was not the only new element to enter national legislation in the West and elsewhere. Under the impetus of what is now being called "a forced migration crisis", a *non entrée* system has now begun functioning outside borders, whereas within various countries, asylum systems have been overhauled in order to introduce the notion of the safe third country to which asylum-seekers need to apply in order to obtain permission to stay. Furthermore, States are now in a position to designate any country of origin as "safe", provided it is a party to the European Convention on Human Rights and the Refugee Convention.[75] The fear is that the established categories may fade away and mass exoduses in the future might well be assimilated into the category of forced migratory movements, thus justifying deliberate inaction on the part of the international community.

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[72] Luca Donatella. Questioning Temporary Protection, Int. Journal of Refugee Law, Vol. 6, No. 4, 1994, p. 535.

[73] Matthew J. Gibney, Between Control and Humanitarianism: Temporary Protection in Contemporary Europe, 2000, 14 Geo.Immigr.L.J., p. 689.

[74] Davor Sopf, op. cit., p. 132.

[75] Kathleen Marie Whitney, Does the European Convention on Human Rights Protect Refugees from "Safe" Countries?, 1997, 26 Ga.J.Int'l & Comp.L., p. 375, p. 387.

3. Measures Applied to Recent Cases of Mass Influx

3.1. *Figures*

The number of people 'of concern' to the UNHCR (including refugees, returned refugees, asylum seekers, internally displaced and stateless persons) nearly doubled during the 1990s, from 14.9 million in 1990 to 19,000,000 in 1993, before reaching its peak year in 1995 which produced 27 million refugees in the wake of the Persian Gulf War against Iraq, the dissolution of the Former Yugoslavia and the eruption of ethnic warfare in Rwanda and Africa's Great Lakes region.[76] The increase in numbers also reflects the steady broadening of UNHCR's focus of protection to include the more recent categories of mass influx refugees, internally displaced persons, and returnees.

At the start of 2003 the number of people 'of concern' to UNHCR was 20.6 million, compared with 19.8 million a year earlier, with the following breakdown:

- Refugees (including mass influx): 10,389,700
- Asylum Seekers: 1,014,400
- Returned refugees: 2,425,000
- Internally displaced: 5,777,200
- Stateless and various: 950,800

UNHCR's totals for the year were on the increase, since, to quote the agency, ". . . the decrease in uprooted peoples" was "offset by ongoing assistance and protection provided to many of them in order to begin rebuilding their lives once they had returned home."[77] In other words, returnees (2,425,000 persons) and IDPs (5,777,200 persons) together make up a group with the potential of keeping UNHCR busy for years to come, however low the figures for Convention refugees might otherwise dip. Similarly, asylum-seekers world-wide, numbered at 1,014,400 for 2003 (compared with 940,000 in 2001), with Iraqi nationals topping the list of new claimants (59,000), will ensure that UNHCR's special protection function will not be under-shadowed by its growing humanitarian and development activities.

Mass movements during 2002, were restricted to the African continent, with the largest group made up of 105,000 Liberians seeking refuge in neighbouring Sierra Leone, Guinea and Côte d'Ivoire.

However, mass exodus numbers recorded over the past two decades

[76] Michael Head, Wither the refugee convention? A new perspective for the 21st century, Univ. of Western Sydney, Mots Pluriels No. 21, May 2002, p. 2.
[77] UNHCR, Refugees by Numbers 2003, p. 1.

starting in 1980; make it clear that the problem still remains a severe one. The following figures are indicative in this regard:[78]

FIGURES FOR LARGE-SCALE REFUGEE EMERGENCIES OR MASS INFLUX 1980–2000

In the 1980's		Total
A. Africa		
Ethiopian refugees in Somalia	620,000	
Ethiopian refugees in Sudan	500,000	
Ethiopian refugees in Sudan, Somalia	300,000	
Somali refugees in Ethiopia	365,000	
Mozambican refugees in Malawi	1,300,000	3,085,000
B. Asia		
Afghan refugees in Iran	3,000,000	
Afghan refugees in Pakistan	3,300,000	6,300,000
C. South America		
Nicaragua, El Salvador, Guatemala	2,000,000	2,000,000
Grand total 1980's		11,385,000
In the 1990's		Total
A. Ex-Soviet Union		
Armenia, Azerbaijan, Georgia, Chechnya	1,500,000	1,500,000
B. Iraq		
Iraqi Kurds in Iran	1,300,000	
Iraqi Shites in Iran	70,000	
Iraqi Kurds on Turkish border	450,000	1,820,000
C. The Balkans		
Croatian and Serb refugees	200,000	
Bosnian refugees	500,000	
Kosovo Albanians	800,000	1,500,000
D. Africa		
Rwandan refugees	2,000,000	2,000,000
Congolese refugees	1,000,000	1,000,000
Grand total 1990's		7,820,000

[78] UNHCR, The State of the World's Refugees 2000: Fifty Years of Humanitarian Action, 1 Jan. 2000, Chapters 5: Proxy wars in Africa, Asia and Central Asia, 8: Displacement in the former Soviet Union, 9: War and humanitarian action: Iraq and the Balkans, 10: The Rwandan genocide and its aftermath and UNHCR Refugees in numbers, 2003.

Therefore between 1980 and the year 2000, the UNHCR estimate for refugees in a mass exodus situation reached 19,205,000 persons.[79]

Comparing these figures over a similar time frame (1980–1999) with those of conventional refugees, we discover that: "Europe received some 6.3 million asylum applications, North America and the United States received another 2 million asylum-seekers, whereas Australia, Japan and New Zealand together recorded some 107,000 applications."[80] This gives us a grand total of 8,407,000 people.

Notwithstanding the compelling need created by this huge number to urgently devise codified instruments on massive exodus, there has been little serious multilateral effort to deal with the matter in a just and comprehensive manner. Mass exodus continues to remain therefore the most inadequately treated of the major humanitarian problems of our time.[81]

3.2. *Mass Exodus from Bosnia and Herzegovina*

The crisis in Bosnia and Herzegovina drew the attention of the international community to the situation of persons in mass influx that was different from anything that had occurred before. It is a sad fact that unless a crisis, close to home, happens, major international players do not find it vital to do much about a refugee situation.

As violence raged in the Former Yugoslavia between 1991 and 1995 in what has sometimes been termed "wars of dissolution",[82] a large-scale refugee movement formed at the borders of the leading Western States, demanding some form of aid. The Refugee Convention was put aside by the regional countries as a source of refugee protection. Instead a compromise solution was elaborated, effective on two different levels. Within Yugoslavia in turmoil the international peace process was at work, keeping people within active war zones through the offer of material assistance, thereby ensuring that they did not spill across international borders.[83] Outside Yugoslavia, shelter was granted to the uprooted in vari-

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[79] UNHCR, The State of the World's Refugees 2000. Fifty Years of Humanitarian Action, Oxford University Press, 2000.

[80] Asylum Applications in Industrialised Countries: 1980–1999. Trends in Asylum Applications Lodged in 37, mostly Industrialised, Countries, UNHCR, Nov. 2001, p. vii.

[81] G.J.L. Coles, The Problem of Mass Expulsion, IIHL, 1983, p. 2.

[82] Davor Sopf, op. cit., p. 110.

[83] James Gow, Triumph of the Lack of Will: International Diplomacy and the Yugoslav War, Columbia University Press, 1997, pp. 12–45.

ous European states on the strict understanding that protection would be only temporary in nature.

The formal legal framework for these actions was provided in the first instance by reference to the obligation of a State to safeguard human rights and not to produce refugee outflows, and by its logical consequence, namely the new notion of the right of people to remain or the "right not to become a refugee". Temporary protection, on the other hand, was applied to those who had managed to cross a border. Apart from being limited in time, as its name implies, it was firmly anchored to the concept of the right to return, this particular norm having been established in international law since the dawn of modern refugee protection.[84] In other words, temporary protection was repatriation-oriented from the start.

The 1951 Refugee Convention contains a paradigm of temporary protection, including the right to repatriate when refugee status comes to an end.[85] The standard of voluntary return (figuring in the Statute of the Office of the High Commissioner for Refugees), commonly practised till then, became relatively irrelevant by recipient countries, since the Convention itself merely required state parties to ensure safe return. Voluntariness, argued Professor Hathaway, could not be "superimposed on the text of the Refugee Convention" and "once a receiving State determines that protection in the country of origin is viable, it is entitled to withdraw refugee status".[86] The cessation clauses within the Convention, Article 1C (1) to (6),[87] which many States had avoided using so far, were finally coming to the surface.

The next step consisted of new guidelines disseminated by the UNHCR under its concept of "imposed return" for refugees who could now be moved back "to less than optimal conditions in their home country."[88] Here again it was obvious that the mass influx refugees were left to the discretion of receiving countries and the UNHCR at large, since it was impossible to resort to clearly identified rules of international law.

Yet, as B.S. Chimni puts it: From the point of view of international law ". . . the fact of mass influx has no bearing on the standards which control return. The standard of return is linked more

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[84] Davor Sopf, op. cit., pp. 111–112.
[85] James C. Hathaway, The Meaning of Repatriation, International Journal of Refugee Law, Vol. 9, No. 4, 1997, pp. 551–8 at p. 553.
[86] Ibid., p. 553.
[87] 1951 Convention relating to the Status of Refugees, 189 UNTS 150.
[88] Dennis McNamara, Reuters, 29 September 1996.

to the principle of *non-refoulement*."[89] And forcible return as the new acceptable standard, it goes without saying, will further erode the prestige of this principle, often referred to as the cornerstone of refugee law.

Commentators are split over the merits of the temporary protection regime, detractors claiming it has no real basis in international law and supporters voicing the opinion that no other form of legal redress could properly address a mass influx situation.

The notion of durable solutions should also be referred to in the context of refugees from Bosnia and Herzegovina. Like other similar refugee concepts, this notion has also been subjected to several defining phases according to the needs of the moment. Between 1945 and 1985, "the solution of resettlement was promoted in practice, even as voluntary repatriation was accepted in principle as the preferred solution."[90] Resettlement takes two forms, either in the country of refuge or resettlement in a third country.

In the period following that and up to 1993, voluntary repatriation was presented as the durable solution par excellence. After 1993, when the experience of enforcing full-blown temporary protection in the European context had been somewhat assimilated, the notion of safe return was given due attention, with UNHCR putting forward the claim that: "Neither the Convention nor its Protocol, nor UNHCR's Statute, give special emphasis to the solution of integration."[91]

3.3. *Mass Exodus from Kosovo*

International law seems to have acted somewhat better in the 1999 Kosovo crisis where it once again applied a temporary protection regime to a mass exodus. Recalling in many ways the flight of Kurdish Iraqis in 1991, some 800,000 Kosovo Albanians fled from their province in fear of being ethnically cleansed in the midst of general lawlessness on the ground during NATO's air strikes.[92] In a first phase, their primary destinations were Albania, Macedonia and Montenegro. In Macedonia, memories of Iraq returned with

[89] B.S. Chimni, From resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems, New Issues in Refugee Research, Working Paper No. 2, May 1999, p. 10.
[90] Ibid., p. 1.
[91] UNHCR, The scope of international protection in mass influx, op. cit., para. 14, p. 4.
[92] UNHCR, The State of the World's Refugees, 2000, p. 234.

the authorities temporarily closing the borders and "denying entry to tens of thousands of Kosovo Albanians in a situation reminiscent of the Turkish response to Iraqi Kurds in 1991."[93] This first setback was overcome by a promise of burden-sharing involving the evacuation of part of the refugees to third countries.

UNHCR cooperated closely with NATO forces to come to the assistance of the refugees, arguing that ". . . as had been the case in northern Iraq in 1991, the military appeared to be better placed than any other actor to provide the logistical support and security necessary to bring the humanitarian crisis under control."[94]

Another similarity with 1991 northern Iraq was the speed with which refugees began to return to Kosovo once hostilities had ended in early June 1999. 500,000 Kosovo Albanians had returned within the first three weeks. By the end of the year, these figures had risen to 820,000.[95]

Once the Kosovo experience was over, it was commonly argued that temporary protection had been used more effectively here than in the Bosnian refugee crisis, properly serving as interim protection while seeking to reach a more durable solution, rather than a means to bypass the obligations of the 1951 Refugee Convention.[96] But dissenting voices were also raised; pointing out the lack of clearly defined legal standards to be observed by all countries in applying temporary protection was as much in evidence in 1993 as in 1999.

Furthermore, although UNHCR did take the unprecedented step of announcing that "all refugees from Kosovo qualified for refugee status under the 1951 Convention",[97] in certain countries, such as Italy, temporary protection was still the status applied to Kosovo Albanians, allowing them, on the face of it, greater benefits in the short term, since asylum claims were subject to long drawn-out administrative procedures.[98]

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[93] Ibid., p. 234.
[94] Ibid., p. 238.
[95] Ibid., p. 241.
[96] Joan Fitzpatrick, Temporary Protection of Refugees: Elements of a Formalised Regime, American Journal of Int'l Law 94(2), pp. 279–306.
[97] C. Hein, Italy: Gateway to Europe, but not gatekeeper?, in: Kosovo's Refugees in the European Union, J. Van Selm, London, Pinter, 2000, p. 152.
[98] Katia Amore, Temporary Protection status: What consequences for Kosovar-Albanian refugees in Italy?, WIDER Conference on Poverty, Int'l Migration and Asylum, Helsinki, 27–28 Sept. 2002, p. 15.

3.4. *Mass Exodus from Iraq*

Further examination of how international law was applied to other aspects of past Iraqi mass exodus situations, forces one to admit that the lack of any reference to mass influx in the basic refugee instruments was the real missing legal provision which made the task of saving lives in that region so much harder. As periodic Shiite and Kurdish overflows were fielded by neighbouring countries, the fact that no legally binding protection ensured the safety of people fleeing *en masse* became frighteningly clear. Iraqi refugees, as much those who would have qualified for the status under Convention criteria as those who would have been found wanting because they were simply escaping generalised violence, were both left to the mercy of neighbouring countries, with no protection to be hoped for from impartial, effective provisions in international law.

The reluctance of some of Iraq's neighbours to accept waves of refugees on certain occasions – the flight of Kurds from chemical weapons attacks in 1988 comes to mind – must be viewed in the light of a lack of specific international legal obligations in the event of a mass influx, a fact which underlined the deficiencies in protection obligations in the international normative framework.

International law could not be effectively applied to protect Iraqi mass influx refugees due to the absence of necessary provisions in favour of non-Convention refugees. *Non-refoulement* was not raised as an inviolable principle overriding Turkey's time and geographical area arguments against compliance. Even alternative ways and means, promoted by the UNHCR, such as temporary protection and an expanded refugee definition, later used to good effect in the Yugoslavia crisis, were not applied to them. In dealing with the refugee wave from Iraq, potential host countries mainly exercised their own national discretion. That is why no visible concerted action resulted and the behaviour of neighbouring countries and the protection that they offered the refugees varied significantly. If, in some cases, mass influx refugees were accepted and treated well, international law can hardly lay claim to any credit.

4. Conclusion

The above discussion shows that the status that can legally be granted to individual refugees based on the definition of the Convention, is not normally applied to refugees in masses. Case by

case examination of well founded fear of execution, is neither feasible nor conducive to establishing refugee status for those in mass exodus. Even if in some exceptional cases, such a measure can prove to be feasible, evasive behaviour of states would limit the possibility.

Mass influx refugees, as we have seen, do not as a rule qualify for admittance under the terms of the 1951 Refugee Convention and its protocol. In the absence of such a conventional protection, advocates of the convention have promoted *non-refoulement* as an alternative. However, in spite of the strength of this principle and the overwhelming support for it by UNHCR and international law experts in general, its applicability to the situations of mass influx is very dubious. It is obviously established that such refugees cannot even rely with certainty on the guarantee of protection and avoidance of forcible return contained in the *non-refoulement* provision. States' behaviour and municipal law also indicate that states still exercise their rights to expel to their home countries large categories of persons not meeting the definition of the 1951 Refugee Convention.

On the other hand the notion of temporary protection which is often highlighted as a viable alternative to protect mass influx refugees remains mostly a political tool devoid of any safe place in public international law. Furthermore the few instruments drawn up in favour of such people have no encompassing, binding character on States. This represents a major deficiency of international refugee law.

The international community has done very little in terms of multilateral legal efforts to codify the minimum required rules on mass exodus. To make things worse, mass influx refugees are viewed as a threat by the international community and, as our case studies have indicated, the more they approach developed and wealthy communities, the more *ad hoc* the treatment they can expect.

In short, unless the deficiencies uncovered in the preceding pages are remedied within a reasonable time-frame, and a coherent protection system (through codifying new regulations or further developing effective soft laws), is put into place to address their needs, future refugees including from Iraq, if ever – as is so often predicted – civil war did generate refugees, will stream out in large numbers and meet with the same non-preparedness, on the part of the international community as they have known, to their cost, in past responses to their plight.

D. The Principle of Burden-Sharing

1. Evolution of the Concept

Towards the end of his first year as the 9th UN High Commissioner for Refugees, Ruud Lubbers, addressing a 140-nation meeting, described the state of the refugee system, in a world in which international solidarity was on the wane, as follows: "We see governments refusing to accept refugees because they are so many, refusing to accept them because they are mixed up with economic migrants, refusing to accept them because of a lack of burden-sharing among states."[1] The lack he mentioned was one which states had been deploring for decades, with little to show for their efforts to promote burden-sharing beyond lip-service to the idea. Yet burden-sharing as an essential part of the refugee protection system is no sudden invention of refugee-receiving countries. It traces its origins back to the 1951 Refugee Convention itself.

In paragraph 4 of the Convention preamble, the authors of the document wrote: "Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international cooperation."[2] Among all the legally binding principles regarding refugees that were placed on states by the Convention, a thought had also been spared for the difficulties states may encounter, and international solidarity was put forward as the key to future solutions: refugee obligations should be offset by international solidarity and shared responsibility.

But, for many years, the concept of burden-sharing was dormant in the backyard of refugee law decision-making. It awakened briefly in 1967 to figure in the Declaration of Territorial Asylum, adopted unanimously by the General Assembly, which, although it refused to enshrine any state obligation, whether legal or moral, to grant asylum to refugees, did acknowledge that the refugee question was of concern to the entire international community and that if the grant of asylum caused any state insuperable difficulties, other

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[1] Ruud Lubbers, The Independent, Dec. 13, 2001; Report of the Ministerial Meeting of State Parties to the 1951 Convention . . ., 12–13 Dec. 2001, UNHCR Doc. HCR/MMSP/2001/10, p. 7, para. 18.

[2] Convention Relating to the Status of Refugees, 1951, Preamble.

states should consider lessening its burden in a spirit of international solidarity.[3]

At its 1979 Session, in connection with the treatment given to asylum seekers arriving by boat, the UNHCR Executive Committee also stressed that states "faced with a large-scale influx, should as necessary and at the request of the state concerned receive immediate assistance from other states in accordance with the principle of equitable burden-sharing."[4]

In the conclusions of the final report of the Group of Experts on Temporary Refuge in Situations of Large-Scale Influx, which met in Geneva in April 1981, reference was also made to the importance of international solidarity and burden-sharing.[5] These were later endorsed by the Executive Committee at its 32nd Session in October 1981 which was devoted to protection in situations of large-scale influx.[6]

Even so, although recognition of its necessity had become a given fact, little progress could be seen in turning the principle of burden-sharing into an obligation incumbent on states. Under the refugee law as it stands at present, states are under an obligation to receive refugees, whether or not other States come to their assistance, because burden-sharing is not a legal pre-condition to opening the doors to the uprooted. To quote Professor Goodwin-Gill on the difference he perceives as separating the two principles under international law: "The peremptory character of *non-refoulement* makes it independent of principles of solidarity and burden-sharing, but these cannot be denied in a society of inter-dependent states."[7] An unfortunate development, in the eyes of the many who hold that both principles together, acting in conjunction, could best serve the interests of refugees, since the-one-without-the-other situation, presently to be observed in refugee practice, harms rather than helps people in need of protection against danger to life or limb.

In document after document, the international community, has voiced its full support for burden-sharing in a non-binding manner. On numerous occasions the United Nations Security Council and ECOSOC have adopted resolutions with the aim of promoting the concept. Every two years since 1981, the UN Secretary General

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[3] GA Res. 2312(XXII), 14 Dec. 1967, Art. 2.
[4] UN doc. A/AC.96/572, para. 72(2) (f).
[5] UN doc. EC/SCP/16.
[6] UN doc. A/AC.96/601.
[7] Guy S. Goodwin-Gill, The Refugee in International Law, Clarendon Press, 1990, p. 318, p. 120.

has presented the General Assembly with a report on human rights and mass exoduses,[8] based on which a resolution is voted.

UN usual phrasing of the principle leaves out the word "burden" and stresses "responsibility" and "cooperation" thus: The General Assembly "emphasized the responsibility of all states and international organizations to cooperate with those countries, particularly developing ones, which are affected by mass exoduses of refugees and displaced persons."[9] The resolutions also place states and international organizations on the same footing in the execution of their duties towards developing countries overwhelmed by refugee masses.

In various resolutions the humanitarian segment of the UN Economic and Social Council (ECOSOC)[10] has also urged all states and relevant non-governmental and other organizations, in conjunction with the Office of the High Commissioner, to co-operate and mobilize resources with a view to enhancing capacity and reducing the heavy burden borne by states, in particular in the case of developing countries, as well as countries with economies in transition, that have received large number of refugees and asylum-seekers.[11]

As for the UNHCR, whether in Executive Committee conclusions or in other documents, the refugee agency has made it a matter of policy on the one hand to praise the efforts of the developing countries in coping with massive influxes, and on the other to call upon states to accomplish their burden-sharing duty.

The ExCom Conclusion 22 (XXXII) of 1981 relating to the Protection of Asylum Seekers in Situations of Large-Scale Influx is especially interesting in this regard as it sets out a clear rationale for burden-sharing: "A mass influx may place unduly heavy burdens on certain countries, and a satisfactory solution could not be achieved without international cooperation. States should, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, states that have admitted a mass influx of refugees."[12]

Regarding implementation parameters, it offers the following guidance:

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[8] UN Report A/54/360, 1997, A/56/334, 4 Sept. 2001.
[9] UN Res. A/RES/54/180, 1999, A/RES/56/166, 2001.
[10] UNGA Res. 52/12B.
[11] ECOSOC doc. A/C.3/56/L.74.
[12] ExCom Conclusion 22 (XXXII) of 1981, Protection of Asylum-Seekers in Situations of Large-Scale Influx.

- Such action could be multilateral or bilateral, regional or universal, and in cooperation with UNHCR, as appropriate.
- Similarly, such action should be adapted to the particular situation at hand, and be directed towards strengthening the capacity of host states to provide asylum, the facilitation of voluntary repatriation, promoting local settlement in the receiving country or providing resettlement opportunities in third countries as appropriate.
- States would also consider the strengthening of existing mechanisms or new arrangements, as appropriate, to ensure the necessary funds and other material and technical assistance are immediately available.
- Governments would seek to ensure that causes leading to large-scale influxes are removed, and, where such influxes had occurred, that conditions favourable to voluntary repatriation be established.[13]

Noting the scale and complexity of current refugee problems, the 1994 General Conclusion on International Protection,[14] stressed the importance of burden-sharing in reinforcing the protection of refugees. It also called "upon all States to take an active part, in collaboration with UNHCR, in efforts to assist countries, in particular those with limited resources, that receive and care for large numbers of refugees and asylum-seekers."[15]

Similarly, in The Scope of International Protection in Mass Influx, the UNHCR Executive Committee stipulated that "More concerted action is called for regarding international solidarity and burden-sharing."[16] It drew attention to the burden placed on impoverished countries in hosting large refugee populations in the following terms: "In some regions, such as Africa and Latin America, regional instruments explicitly provide for the protection of refugees from armed conflict and civil strife, as well as those fearing persecution. Safe refuge, at least on a temporary basis, has normally been granted in these regions in mass influx situations, despite the enormous burdens this has often imposed on impoverished countries. If protection is to continue to be extended to asylum-seekers in such situations, it is essential that the principles of international solidarity

[13] Ibid.
[14] UN doc. A/AC.96/839, 1994, para. 19.
[15] Ibid.
[16] UNHCR Executive Committee, The Scope of International Protection in Mass Influx, EC/1995/SCP/CRP.3, para. 6.

and burden-sharing are both acknowledged and acted upon in support of these receiving States."[17]

In the General Conclusion on International Protection, the Executive Committee, stated that it "recognises that countries of asylum carry a heavy burden, in particular developing countries, countries in transition, and countries with limited resources, which, due to their location, host large numbers of refugees and asylum-seekers; it reiterates in this regard its commitment to upholding the principles of international solidarity and burden-sharing, and calls on Governments, UNHCR and the international community to continue to respond to the assistance needs of refugees until durable solutions are found."[18]

In the latest version of the General Conclusion, dating October 10, 2003, the Executive Committee reiterated its strong commitment to international burden and responsibility sharing and reaffirmed UNHCR's catalytic role in assisting and supporting countries receiving refugees, particularly developing countries, and in mobilizing assistance from the international community to address the impact of large-scale refugee populations.[19]

ExCom language has always linked international solidarity and burden-sharing in its declarations. Starting with the idea of large-scale influx in general as the situation triggering off burden-sharing mechanisms it recommends that states shall take all necessary measures to assist other states ". . . which have admitted asylum-seekers in large-scale influx situations";[20] in other words, burden-sharing is seen in the light of the overall protection regime for refugees. Countries in need of lightning their refugee burden are now more clearly defined as "those with limited resources, that receive and care for large numbers of refugees and asylum-seekers",[21] whereas the large numbers have been specified as including both refugees and asylum seekers.

By 1995, not only had the recognition of the close connection between international protection and the principle of international solidarity been reiterated, but the mention of UNHCR, no doubt as the custodian of the former, had become frequent in various doc-

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[17] Ibid.
[18] ExCom General Conclusion on International Protection, No. 81 (XLVIII) – 1997, para. j.
[19] ExCom General Conclusion on International Protecton, No. 95 (LIV), 2003, para. g.
[20] ExCom Conclusion No. 22, (XXXII),1981, op. cit.
[21] ExCom General Conclusion on International Protection, No. 74 (XLV), 1994.

uments. Thus, states were urged to "manifest their international solidarity and burden-sharing with countries of asylum, in particular those with limited resources, both politically and in other tangible ways which reinforce their capacity to maintain generous asylum policies, through cooperation in conjunction with UNHCR to support the maintenance of agreed standards in respect of the rights of refugees."[22]

In Conclusion No. 82 (XLVIII) on "Safeguarding Asylum", the Executive Committee again called on states "to respect and comply with the precepts on which the institution of asylum is based, and to implement their obligations in a spirit of true humanitarianism, international solidarity and burden-sharing."[23]

In short ExCom Conclusions have clarified UNHCR's position on burden-sharing as an essential principle allowing developing countries to sustain their ability and commitment to take in new population flows.

2. Retrospect: The EU Practice

Europe's bureaucratic practice[24] in the refugee question, based on documents such as the Trevi or Schengen treaties or the Maastricht Treaty's third pillar (or the Tampere Conclusions) form "a very peculiar, homogenous and cohesive 'internal security regime'.[25] Refugees are no longer recognised as a group. They have all turned into forced migrants subjected to the *non entrée* policies of the West.[26] Addressing the root causes of their forced migration became a top-priority policy object. As stated in the 1992 Edinburgh Summit's Declaration on Principles Governing External Aspects of Migration Policy, the EU was "conscious of the role which effective use of aid

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[22] ExCom General Conclusion No. 77 (XLVI), 1995.

[23] ExCom Conclusion No. 82 (XLVIII), Safeguarding Asylum, 1997.

[24] Having in mind the existing limits in the competence of the EU in this regard, it is not expected that any major change would occur in the manner in which the EU is handling the refugee issue.

[25] Jörg. Monar, Justice and Home Affairs in Wider Europe: The Dynamics of Inclusion and Exclusion, ESRC 'One Europe or Several?' Programme Working Paper 07/00, Sussex, 2000, pp. 11–12.

[26] The term itself, used to designate measures to restrict legal access to asylum procedures in developed countries, was first coined by Professor J.C. Hathaway in: J.C. Hathaway, Can International Refugee Law Be Made Relevant Again? In: Hathaway J.C. (ed.), Re-conceiving International Refugee Law, Martinus Nijhoff Publishers, 1997, p. xxi.

can have in reducing longer term migratory pressures through the encouragement of sustainable social and economic development."[27]

The European Commission's 1994 Communication on Immigration and Asylum[28] further promoted restriction-oriented policies, proposing that EU aid, trade and foreign policies should all be guided by migratory implications. As for the 1998 Vienna Action Plan, apart from a migration regime based on concentric circles round an EU inner circle, it foresaw the possibility of "eliminating push factors" for Third World nationals through the offer of financial assistance.[29] Here, in essence, we see the tendency to forego the implementation in good faith of obligations under international refugee law, keeping alive all the while the pretence that no violations have taken place since development aid is being offered in the place of protection.[30]

In 1998 the EU High Level Working Group on Migration and Asylum was established. The aim was to develop a number of action plans for the following countries: Afghanistan/Pakistan, Albania and its neighbours, Iraq, Morocco, Somalia and Sri Lanka which would recompense increased cooperation in keeping refugees out of the EU through material gain. Among those designated by this group as receiving countries for future refugees under the name of 'Regional Protection Areas' figure Turkey, Iran, Rumania, Morocco, Northern Somalia, Croatia and the Ukraine.[31]

Such initiatives are examples of what B.S. Chimni has called "morally offensive notions of burden-sharing which would have Northern states pay for the care of refugees in exchange for being refugee-free states."[32] The idea of states already over-burdened by refugee populations adding to their numbers through a financial trade-off with the European Union is hard to credit. This is cyni-

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[27] Council of the European Union (CEU), Declaration on Principles Governing External Aspects of Migration Policy, Edinburgh European Council Conclusions, Brussels: CEC, 1992:2.

[28] Commission of the European Communities (CEC). On Immigration and Asylum Policies, Communication from the Commission to the Council and the European Parliament, COM (94) 23 Final, 23 Feb. 1994, Brussels: CEC.

[29] Council of the European Union (CEU), Vienna European Council Conclusions, Brussels: CEU, 1998b; Strategy Paper on Immigration and Asylum from the Austrian Presidency, 13 July 1998, Doc. No. 9809/98, Brussels: CEU, 1998c.

[30] Bettina Scholdan, Addressing the Root Causes: Relief and development assistance between peace-building and preventing refugee flows, The Journal of Humanitarian Assistance, 2 July 2000, www.jha.ac/articles/a058.htm.

[31] Reinhard Marx, International Protection and Reception in the Region: The Specific European Understanding of the Principle of International Co-operation, www.proasyl.de, August 2003, p. 14.

[32] B.S. Chimni, From resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems, New Issues in Refugee Research, Working paper No. 2, p. 12.

cally turning the burden-sharing principle on its head. An internationally recognized principle, short of legally binding nature, yet imperfectly implemented, has been turned into a tool with damaging consequences for the spirit of the 1951 Convention.

At the same time, in view of the latest restrictive developments in the European Union regarding asylum-seekers, UNHCR seems to keep its frustration in check, while still trying to remind Western countries of their obligations under the terms of their freely accepted refugee engagements.

3. Defining Burden-sharing

The two notions of International Solidarity and Burden-sharing seemed at first to imply a comprehensive international approach towards lightening the burdens of countries overwhelmed by refugee claims, with international solidarity defining the rationale, and burden-sharing the means, of collective problem-solving. It is therefore essentially different from the provision of assistance as a gesture of good will.

Today, the two notions have become a threesome, joined by the equally hard to define concept of "responsibility". In some cases, the words seem to mean strictly the same thing. In others, burden seems to refer more to the material aspects of hosting refugees, whereas responsibility is to be understood rather in terms of parcelling out potential refugees among several countries. As for "international solidarity", the term used in current EU state practice in preference to "burden-sharing", the voluntary implications of the former must have struck the legal framers in Brussels as being more palatable than the slight element of compulsion contained in the latter.

In this regard, ExCom Conclusion 22 of 1981 provides a working definition of some substance. Providing asylum, facilitating voluntary repatriation, promoting local settlement in receiving countries or resettlement opportunities in these countries all fall within the scope of burden-sharing. Further clarification brings: "Measures in the context of burden-sharing should also include, as necessary, the provision of emergency, financial and technical assistance, assistance in kind and advance pledging of future financial assistance or other assistance beyond the emergency phase until durable solutions could be found for countries most affected by refugee flows . . ."[33]

[33] ExCom Conclusion No. 22, (XXXII), 1981, op. cit.

As to how solidarity mechanisms can be envisaged the questions are:

- Which benchmark triggers burden-sharing?
- Would burden-sharing involve funding UNHCR generously?
- Or would it entail hosting large number of refugees?
- How would the money and facilities be distributed?

None of the answers satisfy all parties. Could a commitment to burden-sharing combining relief, in the case of the financial burden on countries of first asylum, and an offer to resettle willing refugees to a third country, as Kathleen Newland suggests,[34] be the remedy? According to her, countries of first asylum have occasionally gone beyond direct burden-sharing arrangements, using refugees as bargaining chips to negotiate promises of foreign investment, debt relief and other concessions.[35]

Be that as it may, the question of systematising burden-sharing or leaving it to function as an *ad hoc* response continues to be posed. There is general agreement that systematisation would bring equity, efficiency and predictability to the process. Nonetheless, advocates of the *ad hoc* response seem to share the feeling that systematisation "would represent a significant leap" from current state practice,[36] thus jeopardising the whole present framework of action.

4. Should Burden-sharing be an Obligation?

The need to establish a formalised system of burden-sharing in refugee law as a reliable, self-regulatory mechanism in order to maintain and enlarge the global refugee protection regime requires little demonstration. There are the overall figures for refugees on the one hand, estimated at 20.556.700 for the year 2002.[37] On the other, we have gross inequalities in their distribution. At a regional level, the examples of Iran and Pakistan are instructive in this

[34] Kathleen Newland, Refugee Protection and Assistance, in: Managing Global Issues, Lessons Learned, P.J. Simmons & Chantal de Jonge Oudraat (eds.), Carnegie Endowment for International Peace, 2001, p. 528.
[35] Ibid.
[36] Discussion paper on Mass Exoduses for the Global Consultations of the UNHCR, Feb. 2001, pp. 5–6.
[37] UNHCR, Refugees by Numbers, 2003, p. 2.

regard, with both countries still topping reception statistics because of the millions of Afghans sheltering on their territory. However shaky their economies, in the view of the Indian Government, these are "the large donors" among refugee-hosting countries.[38]

As UNHCR has pointed out, burden-sharing is as much a necessity in cases of mass influx as it is during mass return. Recognition that large refugee/returnee populations may adversely affect the development efforts of the poorer countries, by diverting important resources which might have been better invested in development projects, has grown slowly to become a part of conventional wisdom. The economic impact of a mass influx makes itself felt on several levels. To mention a few, food, energy, transportation, employment and public services might become scarce, not to mention the actual financial cost of shouldering this burden. Environmentally, sudden influxes can harm entire eco-systems. Social tensions can result from the interaction between the local population and refugees or returnees, so much so that the very peace and security of a region might be compromised.[39]

The case of Germany, another large donor country, is also instructive in showing the harmful consequences for the refugee system as a whole when burden-sharing is not given the priority it deserves. Throughout the nineties, Germany hosted more refugees than all other Western European states put together. In 1992, Germany dealt with 78.7% of all asylum applications filed in the European Union.[40] This meant coping with a record number of refugees or asylum-seekers on German soil. Since none of its neighbours showed the least willingness to help, in July 1993, Germany introduced amendments to its asylum legislation, Article 16 of which was modified to contain a "safe third country" clause. According to Kumin, Germany saw "no prospect of a European burden-sharing arrangement in sight",[41] hence the harsh stance now taken by German legislation and the *non entrée*, temporary protection and containment measures currently characterising Europe's refugee policies.

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[38] Ismat Jehan, The Politics of Dis-Harmonization, in: On the Record, UNHCR, Vol. 2, Issue 4 (Part 2), Newsletters, 10.10.1998.

[39] Burden-Sharing – Discussion Paper Submitted by UNHCR Fifth Annual Plenary, Meeting of the APC, in: ISIL Year Book of International Humanitarian and Refugee Law, 2001.

[40] J. Kumin, Asylum in Europe: Sharing or Shifting the Burden, World Refugee Survey, 1995, p. 29.

[41] Ibid.

National and regional considerations apart, it must be borne in mind that burden-sharing transcends simple assistance. It is not an end in itself, but a means, the end being "to make maximum use of the world's protection capacities".[42] A state will open its borders more willingly to refugees if it feels it can rely on other states to help carry the load. What better way to build up trust than through assistance seen as a right and not just as non-binding-charity?

Human rights law, in its association with international refugee law, has brought new arguments to strengthen the case of the developing world. Their right to development, in particular, whose hard law substance is drawn from various instruments such as the UN Charter and The International Covenant of Economic, Social and Cultural Rights, requires all state parties "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means."[43] Burden-sharing to make up for the damage caused by a mass influx of refugees would appear to be yet another international obligation on developed state parties to grant assistance to developing countries in order to help achieve their right to development.[44]

Countries in the developed world might well object to the idea that hard law obligations already exist making it incumbent on states to provide burden-sharing assistance to all their less fortunate partners in the international community affected by incoming refugees. The principle therefore has fallen short of attaining status in the field of customary international refugee law. Current state practice is that the developed countries participate in the burden-sharing schemes of UNHCR but maintain their discretion in determining how much and to whom their assistance should be channelled.

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[42] Ismat Jehan, op. cit.

[43] International Covenant of Economic Social and Cultural Rights, 1966 (IC SCR), Article 2(1).

[44] B.S. Chimni, Development and Migration, in: Migration and International Legal Norms, T.A. Aleinikoff & V. Chetal (eds.), Cambridge University Press, 2003, p. 382, Part V, Chap. 15; Internet www.B.S.Chimni p. 2.

4.1. *The Chimni Model*

A whole list of international instruments and resolutions consider burden-sharing an inevitable framework for assisting refugees but all stop short of prescribing a well-defined binding mechanism for it. Numerous legal instruments from which it is derived, chief among them being the 1951 Refugee Convention, the 1969 OAU Convention and the 1984 Cartegena Declaration, can be mentioned. To these basic sources is added the weight of a whole body of soft laws made up of the Conclusions adopted by the Executive Committee of the UNHCR and the countless resolutions of the UN General Assembly and ECOSOC asserting the importance of burden-sharing in meeting any new refugee flow.

Finally, the texts of various plans and programmes of action adopted by the international community, which are counted among the more successful examples of international burden-sharing, can be invoked as being relevant in this context. Reference is made here, in particular, to the Declaration and Program of Action of the First and Second International Conference on Assistance to Refugees in Africa (ICARA I and II),[45] the Comprehensive Plan of Action on Indo-Chinese Refugees, 1989 (CPA),[46] and the International Conference on Central American Refugees, Returnees and Displaced Persons, 1989 (CIREFCA).[47]

State practice so far, relating the evacuation, resettlement and local integration of refugees, and financial assistance to host states of first asylum and institutions such as the UNHCR, is also an integral part of the evidence that the principle of burden-sharing is far from being simply a moral demand.

Seen in this light, burden-sharing goes far beyond providing modest assistance to some poor countries, trembling at the thought of coping with the latest arrival of refugees fleeing ethnic conflict or civil strife. Respect for the principle, according to Professor Chimni,[48] presupposes:

a) the phased dismantling of the *non entrée* regime currently put into place by Europe;
b) the obligation to respond positively to third-country resettlement requests;

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[45] Declaration and Program of Action of the First and Second International Conference on Assistance to Refugees in Africa, l980 and 1982.
[46] Comprehensive Plan of Action on Indo-Chinese Refugees, 1989.
[47] International Conference on Central American Refugees, Returnees and Displaced Persons, 1989.
[48] B.S. Chimni, Development and Migration, op. cit., p. 9.

c) increased funding for the UNHCR;
d) greater material and financial assistance to first asylum host countries; and
e) "eschewing burden-escaping practices such as deducting from ODA (the UN's target figures for Official Development Assistance) money expended on the first year of taking care of asylum seekers/refugees".[49]

4.2. *The Hathaway Model*

If B.S. Chimni's discourse is standards-oriented, Professor Hathaway's model[50] concentrates more on solutions. It is based on the undeniable fact that, as far as refugee protection goes, the developed world takes in only about 20% of the world's uprooted, the rest being the sole concern of struggling countries, some of them to be found at the lowest end of the global development scale. In addition, fiscal resources available for refugee protection are allocated in such a way that much of it goes to evaluating and processing the claims of the 20% minority of refugees in the North, leaving the other 80% in the South with very little to get by on.[51]

Any assistance received by such countries is a matter of charity, not obligation, he points out. There is therefore a desperate need in the refugee regime to share burdens and responsibilities meaningfully. Hathaway predicts that: "The present system of unilateral, undifferentiated state obligations is unfair, inadequate, and, ultimately, unsustainable."[52] Hathaway has called for a universal system of burden-sharing, spreading costs of providing asylum to the largest number of states, without any one particular state being singled out for unacceptably high financial contributions.

In his view, the time has come "to generate a formal, binding commitment to collectivise the costs of refugee protection".[53] While waiting for universal application to be made possible, a depend-

[49] UN Inter-Agency Standing Committee (IASC), Global Humanitarian Assistance 2000, An Independent Report Commissioned by the IASC from Development Initiatives Geneva, 2000, p. 105.
[50] James Hathaway, Toward the Reformulation of International Refugee Law; A Model for Collectivized and Solution-Orientated Protection, Refuge, Vol. 15, No. 1, Jan. 1996.
[51] Ibid., p. 2.
[52] Ibid.
[53] Ibid.

able regime of shared responsibility could be started, based on five key principles:

1) Interstate convergence groups to which states have already made a binding commitment (i.e. the Commonwealth, the Organization of American States, the Council of Europe, the Organization of African Unity, ASEAN, or OIC) would be most effective for the regional design and delivery of mechanisms of common but differentiated responsibility for refugee protection.
2) Common but Differentiated Responsibility: Beyond the duty of physical protection placed on all states of first asylum, differentiation would cover major fiscal support from some, permanent resettlement opportunities from others, and clear-cut criteria, established in advance, for all to observe.
3) Solution-Oriented Temporary Protection which would emphasize the development of the skills and abilities of refugees enabling them to assume a productive role on their return home once the period of temporary protection has come to an end.
4) An effective and consistent intervention by the international community in response to human rights abuses in a given country would pave the way for voluntary or mandated repatriation.
5) Mandated return under conditions safeguarding the rights of returnees is not only not against refugee law, it is the only way to ensure that much-needed "asylum capacity is continually regenerated to accommodate future individuals in need of protection abroad."[54]

Hathaway's paradigm of temporary protection has had widespread influence on proposals for changes to national legislation in many Western countries. A critic of Hathaway's model, Bill Frelick notes how "states have accepted only the temporary protection aspect of Hathaway's 're-conceiving international refugee law' . . . and rejected the rest."[55]

5. Burden-sharing in UNHCR's Global Consultations

In order to address the generalised critique of the 1951 Refugee Convention, charged with being too restrictive in its definition of

[54] Ibid.
[55] Bill Frelick, Secure and Durable Asylum: Article 34 of the Refugee Convention, World Refugee Survey, 2001, pp. 42–55.

those in need of protection, UNHCR sought ways to extend international protection to persons fleeing from war or civil strife and add other necessary legal tools to the basic refugee regime. UNHCR began by launching the three-track Global Consultations on International Protection in 2000, the end result of which was the Agenda for Protection, a series of guidelines for the use of governments seeking to strengthen both dialogue with UNHCR and their own national protection system.

Through special agreements between groups of states and UNHCR, Convention Plus aims, *inter alia*, at achieving "improved provisions for burden-sharing between host countries and countries of origin, requiring that host countries are ready to participate with UNHCR to enhance the Convention."[56] UNHCR's mandate for the procedure is derived, among others, from paragraph 8(b) of its Statute, enabling it to undertake the "execution of any measures calculated to improve the situation of refugees falling within the competence of the Office and to reduce the number requiring protection."[57]

In our particular context, UNHCR's Informal Consultations of 1997 focusing on Temporary Protection and Burden-sharing, and the major legal components of any new extended protection protocol that UNHCR might be able to negotiate someday, require closer examination.

In the new Convention, as far as burden-sharing in the event of a mass influx is concerned, UNHCR proposed that the new draft Convention should be based on Conclusion No. 15 (XXX), item g[58] in the following formulation: "other States shall take measures individually, jointly or through the UNHCR or other international bodies [actions specified] to ensure that the burden of first asylum country is equitably shared." As for individual asylum-seekers, in the UNHCR version, States might clarify (iv) "where a person before requesting asylum already has close links with another State [such as a close family members in proceedings or residing temporarily there] . . . may if it appears fair and reasonable be called upon first to request asylum by that State and that State will not unreasonably deny such a request and the UNHCR is invited to use his or her good offices to mediate any disagreements."[59]

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[56] The "Convention" and the "Plus" in Convention Plus, Migration Policy Institute, Washington D.C., Sept. 23, 2003, p. 2.
[57] UNHCR Statute of 14 Dec. 1950, UNGA Res. 428(V), para. 8 (b).
[58] ExCom Conclusion No. 15 (XXX), 1979, Refugees without an Asylum Country, para. g.
[59] Ibid.

In connection with burden-sharing, UNHCR further specified that agreement needed to be found to include longer term larger minimum commitments to UNHCR programs, especially from G8 countries and other well endowed States in the OPEC group.[60]

6. Burden-sharing in the Context of Iraq

In the context of Iraq and its refugee-producing potential, a system of burden-sharing incentives, firmly in place involving the countries neighbouring Iraq, could only mean enhanced protection for future refugees. Such a system would prove of equal or greater value than any pre-positioning of assistance goods by international and non-governmental relief agencies, or funding allocated to contingency planning and preparedness measures. The past has shown that the failure of any reliable enforcement mechanism for burden-sharing, triggered off automatically as the successive Iraqi crises occurred, condemned refugees to undergo unequal treatment on the part of the international community and international organisations, leaving them to the national discretion of states, at times with disastrous consequences as deaths in the region, especially in the mountains leading to the borders, reached emergency proportions.

Once the acute phase was over, burden-sharing funds, had they been readily available, would have made life much easier for both long-term refugees and the country hosting them. In the case of Iran, for instance, which by 1983[61] did finally make up its mind to ask for international assistance in caring for its many refugees, both from Afghanistan and Iraq, thus fulfilling the "at the request of the state concerned" pre-condition with which burden-sharing is associated, what it got in return was as little as two dollars per year per refugee.

The unregulated system of financing refugee commitments is another aspect of the inequities contained in the present situation, and concerns the way money was channelled to some countries in the region regarded as more friendly to the interests of donor countries, leaving others with minimum assistance.[62] The result of such

[60] Discussion paper on Mass Exoduses for the Global Consultations of the UNHCR, Feb. 2001, p. 2.
[61] See above, Chapter II, Part B.
[62] Ibid., p. 31.

actions has been, of course, to penalize refugees twice over, the second time round on grounds of geographical and political preference in the minds of the large donors.

7. Conclusion

A large number of international instruments, resolutions and decisions have been referred to, all of which emphasize the necessity and importance of the principle of burden-sharing as a tool in the hands of the international community for the protection of refugees, particularly in cases of mass-influx. Although there exists a rich literature of international law supporting such a principle, international law stops short of codifying binding provisions on the obligation of states in cases where burden-sharing is needed. In addition, no benchmark is defined as to when burden-sharing should be triggered and by whom.

At present, the funding mechanisms of large-scale or extended refugee crises continue to be rusty, both in the eyes of the law and in practice. The binding obligations of countries-of-first-asylum meet international donor apathy and partiality. For less prosperous to poor countries, a reliable provision for international burden-sharing, firmly anchored in law, is a vital necessity. Without such a legal device, their own future development risks being compromised. Thus the formulation of clear-cut legal provisions on equitable burden-sharing in such a way that the principle acquires a binding nature and becomes finally enforceable must become a primary aim of refugee law.

While discussions go on and binding measures on international burden-sharing appear as much out of reach as they were in the past, a look at Iraq today confirms to us that concrete responsibility-sharing arrangements established now would be a timely way to resolve problems and identify durable situations in the region for possible refugees flow in the future.

E. Relevance of Human Rights

1. Human Rights vs. Humanitarian Law and Refugee Law

Refugees are generally covered and protected by refugee law, and international humanitarian law can offer them further vital safeguards whenever armed conflict, between warring states or of an intrastate nature, breaks out. It has also been argued that human rights can be invoked for the complementary effect it produces in guaranteeing the minimum required protection in cases where shortcomings of refugee law exist (internally displaced persons, for instance, are considered to be one such group of the under-protected) or where lack of adherence to legal principles by states involved fails to provide satisfactory coverage of protection and assistance.

"The three legal pillars of international protection", in the words of one scholar, are built on the foundations of refugee law, international humanitarian law, as well as human rights law.[1] Refugee law came under examination in earlier sections. From this discipline our main arguments and assessments were drawn. A brief review of humanitarian law and human rights law would now be in order, before the relevance of the latter to its sister disciplines and the refugee question takes up our attention fully.

Humanitarian law, the oldest of the three branches, also known under the names of the law of war or the law of armed conflict, originated in the "just war" doctrine of the monotheistic religions, and the practice of belligerence in the Middle Ages. A first codification was provided by Hugo Grotius in his *De Jure Belli ac Pacis*, published in 1625.[2] Later, the body of customary law which had grown out of warfare was codified in the American Civil War Lieber Code (1863).[3] In 1864, thanks to the exertions of Henri Dunant, the Geneva Convention for the Amelioration of the Condition of the

[1] K. Tomasevski, Human rights and wars of starvation, in: J. Macrae and A. Zwi (eds.), War and Hunger: Rethinking International Responses to Complex Emergencies, London, Zed Book, 1994, p. 82.

[2] J. Pictet, Development and Principles of International Humanitarian Law 6, 1985, p. 209.

[3] Francis Lieber, Instruments for the Government of Armies in the Field, 24 April 1863, reproduced in: Schindler and Toman (eds.), The Laws of Armed Conflicts, Martinus Nijhoff Publishers, Henry Dunant Institute, Geneva, 1988.

Wounded in Armies in the Field,[4] comprising ten articles, was adopted. All these earlier codification efforts led to the development of the Hague Conventions of 1899 and 1907 and the legal instruments that followed.

The most important of the treaties are the four 1949 Geneva Conventions on the protection of war victims and their two 1977 Additional Protocols. Together these six instruments of international law number more than six hundred provisions. Other related instruments include the 1925 Geneva Protocol for the Prohibition of Gas Warfare, the 1948 Genocide Convention, the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and various universal and regional human rights instruments, as far as they are applicable in situations of armed conflicts.[5]

Humanitarian law also has the particularity of being more than simply a by-product of the United Nations bureaucratic system. By way of reminder, the other two branches of international protection, both UN-devised, were more or less simultaneous in formulation. The first treaties and arrangements focusing on the refugee question, as we mentioned earlier, were connected with the appointment by the League of Nations of the first High Commissioner for Russian Refugees in 1921.[6] 1950 saw the establishment of the UNHCR and 1951 the promulgation of the Refugee Convention. Human rights standards, though long present in philosophical discourse under the concept of natural rights, entered international law with the enactment of the 1926 Covenant to Suppress the Slave Trade and Slavery. The far-reaching Charter of the United Nations came next, in 1945,[7] whereas the founding document of human rights law, The Universal Declaration of Human Rights, which does not constitute in itself an international treaty, followed in 1948.

Human rights are commonly understood to be those rights that are inherent to the human being. The concept acknowledges that every single human being is entitled to enjoy his or her human rights without distinction as to race, colour, gender, language, religion, political or other opinion. Or, put in slightly different terms:

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[4] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, signed at Geneva Aug. 22, 1864, in: Schindler and Toman (eds.), The Laws of Armed Conflicts 3, 1988, p. 279.

[5] Michel Veuthey, Assessing Humanitarian Law, in: Humanitarianism Across Borders. Sustaining Civilians in Times of War, Lynne Rienner Publishers, 1993, p. 209, p. 126.

[6] See above, Chapter IV, Part A.

[7] United Nations Charter, 1945, Articles 55, 56.

"Human rights are not liberties, powers or immunities granted by governments or bestowed by condescending humanitarians; they are claims to prior entitlement."[8]

Claims or rights are sometimes divided into three sets: first-generation civil and political rights, second-generation economic, social and cultural rights, and third-generation solidarity rights.[9] Legally, these rights are guaranteed by human rights law whose main purpose is to protect individuals and groups against actions that violate their fundamental freedoms and human dignity both at national and international levels. Obligations are placed on states to act in a specific manner or to refrain from doing so in order to enable rights-holders, their nationals or alien residents, to enjoy their human rights to the full.

The most important characteristics of human rights are their universality, and inalienability. Furthermore, they are indivisible, interrelated and interdependent, that is to say, all human rights are of equal importance and must be respected with the same application and significance, although certain rights may be restricted in emergency situations. Among those, however, described as basic or fundamental rights, non-derogable even in times of national emergency, are to be found the right to life, freedom from torture, freedom from enslavement or servitude, and freedom of thought, conscience and religion.[10] More recent human rights treaties like the Convention on the Rights of the Child of 1989 no longer contain derogability clauses.

International humanitarian law, like refugee law, increasingly refers to and acknowledges its foundation in an international human rights paradigm, the constituents parts of which have long since generated an imposing body of law.[11]

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[8] Oliver Ramsbotham and Tom Woodhouse, Humanitarian Intervention in Contemporary Conflict. A Reconceptualization, Polity Press, 1996, p. 264, p. 19.

[9] K. Vasak, A thirty-year struggle. UNESCO Courrier, 1977, pp. 29–32; Conclusions, UNESCO, 1988, pp. 297–299.

[10] International Covenant on Civil and Political Rights (ICCPR), 1966, article 4, Para. 3.

[11] 1926 Covenant to Suppress the Slave Trade and Slavery.
1945 United Nations Charter.
1948 Convention on the Prevention and Punishment of the Crime of Genocide.
1948 Charter of the Organization of American States.
1948 The Universal Declaration of Human Rights (not an international treaty.)
1950 European Convention on Human Rights and Fundamental Freedoms.
1966 International Convention on the Elimination of All Forms of Racial Discrimination (CERD).
1966 International Covenant on Civil and Political Rights (CCPR).
1966 Optional Protocol to the above.
1966 International Covenant on Economic, Social and Cultural Rights (CESCR)

The function of the international human rights regime (and its voluminous legislation) is nothing less than "to judge whether states are fulfilling their duties under internationally agreed upon human rights norms and, through monitoring and publicizing, to deter future abuse: in short to change the behaviour of states."[12] The regime institutions happen to be international monitoring bodies, such as the Commission on Human Rights, the UN High Commissioner's Office for Human Rights, and designated Rapporteurs and other mandate holders. But they have no significant enforcement mechanisms of their own. So, in theory there is no legal mechanism against states that do not respect their undertakings, other than the political pressure they may feel, through such fora that individuals have direct access to. However, in the words of jurist Philip Alston, existing mechanisms are "seriously flawed."[13] Refugee law in experienced UNHCR hands, and international humanitarian law monitored by the highly competent ICRC, are better endowed in this respect.

From the eighties onwards, attempts were multiplied to develop a new approach to the refugee problem based on human rights. G.J.L. Coles, for one, argued that "Human rights should be recognised as central to the entire refugee issue."[14] He insisted that "the goals of separation and alienation, which animated so much of the approach of the past, should be recognised as contrary to both individual human interest and the well-being of societies, particularly in today's conditions,"[15]

For the refugee body itself, this temptation to inter-relate with human rights law began seriously to take shape in the nineties as

1969 Vienna Convention on the Law of Treaties.
1969 American Convention on Human Rights.
1973 International Convention on the Suppression and Punishment of Apartheid.
1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
1981 African Charter on Human and Peoples' Rights (Banjul Charter).
1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment (CAT).
1989 UN Convention on the Rights of the Child (CRC).

[12] Deborah E. Anker, Refugee Law, Gender and the Human Rights Paradigm, in: Harvard Human Rights Journal. Vol. 15, Spring 2002, p. 134.

[13] Philip Alston, Beyond 'them' and 'us': putting treaty body reform into perspective, in: Alston and Crawford (eds.), The future of UN human rights treaty monitoring, Cambridge University Press, 2000, p. 516.

[14] G.J.L. Coles, Refugees and Human Rights, Bulletin of Human Rights 1, 1991, p. 63.

[15] G.J.L. Coles, The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry", pp. 216–17, in: A.E. Nash, ed., Human Rights and the Protection of Refugees under International Law, Nova Scotia Institute for Research, 1988.

Cold War conditions no longer existed. To quote the then High Commissioner for Refugees, Mrs Ogata: "not until 1990 did a High Commissioner for Refugees ever address the Human Rights Commission such was the perceived divide between human rights and humanitarianism."[16] Having agreed to change its perspective regarding human rights violations on its own territory of refugee protection (the Division of International Protection in recent years has had less and less to say in internal decision-making),[17] UNHCR also found no trouble in renouncing the distinctiveness and specificity of the refugee mandate in favour of developing a closer relationship with international humanitarian law, a relationship which bloomed at the same time as the compilation of legal standards relevant to internally displaced persons was taking place, leading to the publication of the Guiding Principles on Internal Displacement in 1998.[18]

For humanitarian law and its adoption of a rights-based approach, the turning point came in 1968. When the Universal Declaration of Human Rights was enacted in 1948, human rights and humanitarian law were regarded as two completely separate fields. This was a deliberate choice on the part of the United Nations at the time, the argument being that in view of the general restraint on the use of force contained in Article 2(4) of the UN Charter, there was no need to codify the rules governing armed conflict.[19] This perception began to change after the 1968 Tehran International Conference on Human Rights which gave rise to a resolution requesting the General Assembly to invite its Secretary General to study "Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts."[20]

The UN thus updated its views on the law of war by first recognizing human rights in armed conflicts, before making it habitual practice to declare the relevance and applicability of international

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[16] S. Ogata, Human Rights, Humanitarian Law and Refugee Protection, pp. 135–143, p. 135, in: D. Warner, ed., Human Rights and Humanitarian Law: The Quest for Universality, The Hague, Martinus Nijhoff, 1997.

[17] D. Warner, Refugees, UNHCR and Human Rights: Current Dilemmas of Conflicting Mandates, Refuge 17, 6 Dec 1998, pp. 12–15, p. 14.

[18] Rachel Brett and Eve Lester, Refugee law and international humanitarian law: parallels, lessons and looking ahead, op. cit., p. 714.

[19] Edward Kwakwa, The International Law of Armed Conflict: Personal and Material Fields of Application, Kluwer Academic Publishers, 1992, p. 208, pp. 2–3.

[20] Human Rights in Armed Conflicts. Res. XXIII adopted by the International Conference on Human Rights, Tehran, 12 May 1968, Para. 1.

humanitarian law in all situations of such conflicts. The United Nations General Assembly, the Security Council, the Commission on Human Rights and the Sub-Commission regularly mention international humanitarian law in their resolutions and deliberations.

However separate in origin, the distinctions are not clear cut between international humanitarian law, conceived and developed to limit the suffering of civilians and prisoners of war in armed conflict, and international human rights law, formulated by the United Nations as a set of rights and freedoms inherent in human nature whose respect ensures the protection of human dignity.

A division of labour was respected in the past, with human rights law being presented as the law primarily applicable in peacetime, while humanitarian law was reserved for situations of international armed conflicts. The overlapping nature of these two branches of law – and this applies also to the interface between refugee and humanitarian law – became visible as internal armed conflicts between state and non-state actors increased dramatically in various parts of the world. Human rights, no respecter of sovereignty as such, was the best legal master key to enter areas which might otherwise have been out of bounds. By now erosion of legal categories has proceeded to such an extent that international humanitarian law and human rights law are treated as different branches of the same discipline. So much so, that some academic writers have even spoken of a merger between the two.[21]

This latest trend simply translates the new orientation in international law itself. In the past, states and their sovereignty, were the most protected area of international law, but this attitude has eroded and the concept of human dignity and the concern for human rights have become pre-eminent in international relations today.[22] International humanitarian law and human rights were discovered to share a common underlying philosophy regarding standards of humanity – as enshrined in article 3 common to all four Geneva Conventions of August 12, 1949, or set out in the European Convention on Human Rights, to name only one such instrument. The general feeling on the part of war law specialists therefore came to be that human rights norms could compensate for deficiencies in international humanitarian law, especially as regards enforcement of its provisions.[23]

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[21] John Dugard, Bridging the gap between human rights and humanitarian law: The punishment of offenders, International Review of the Red Cross, 30.9.1998, pp. 445–453, p. 445.

[22] Edward Kwakwa, op. cit., p. 180.

[23] Hans-Joachim Heintze, Human Rights Standards, International Humanitarian

This shift in emphasis no doubt accounts for the unending enthusiasm human rights arouse in various humanitarian practitioners, even if the concept itself sometimes strikes one as being a house without doors and windows, open to each passing draft and lacking perhaps in the legal finesse of its sister branches of international law.

Yet differences continue to exist and should not be swept out of sight. The law of Geneva aims to protect individuals, by ensuring that those who do not take part in hostilities are treated in a humane manner, and to limit the use of force in warfare. It is the legal instrument *par excellence* to regulate the conduct of armed conflict. Like international refugee law, with which it shares a conceptual similarity, the law of war addresses the need to provide protection for persons in the hands of a state of which they are not nationals.[24] By contrast, international human rights law was developed to protect persons against abuses by their own state. The former lays the burden of duties upon states, the latter gives the individual a whole series of rights which are his or hers from birth, and the respect or violation of which should condition his or her relation with the state.

2. Human Rights as Applied to Refugees

The question arises as to whether human rights law was able to step in and fill in the gaps that the stricter provisions of international refugee law could not address. In the case of the individual Iraqi asylum-seeker, refugee law has till now required little outside backing to provide full protection, in spite of the *non entrée* policies prevalent in present-day Europe. In 2002, 59,000 Iraqi nationals, faithfully reflecting global political and military realities, as UNHCR diplomatically puts it, constituted the biggest national group to approach various countries in search of asylum.[25] Though, in tricky cases, an occasional reference to human rights clauses has been made, on the whole, refugee law provisions have been enough to cover such cases.

Law and Refugee Law – Issues of Implementation, University of Bochum, 2002, pp. 1–5.

[24] Rachel Brett and Eve Lester, Refugee law and international humanitarian law: parallels, lessons and looking ahead. A non-governmental organization's view, IRRC, Sept. 2001, vol. 83, No. 843, p. 713.

[25] UNHCR, Refugees by Numbers, 2003 ed., Sept. 2003, p. 10.

Incidents of mass exodus, however, in 1988 or in 1991, strained the protection capacity of refugee law provisions. Even in its updated version of the broadened definition of the refugee and taking into account the new tendency to subordinate *non-refoulement* to temporary protection, resettlement, or integration to repatriation and its theoretical support for burden-sharing with effective implementation still to come, refugee law was found wanting in many respects. The post-exodus returnee situation in Iraq could draw on all three branches of international law to make its case. Legal standards determining the status of internally displaced persons owed as much to international human rights law, as to international humanitarian law and refugee law.

In 1989, the Convention on the Rights of the Child, the international treaty with the most number of adherents, became the first human rights treaty to explicitly include international humanitarian law and refugee law.[26] The 1998 Guiding Principles on Internal Displacement, in turn, heralded a new inter-disciplinary approach to refugee problems, underlining the relationship between the three branches of international law, and drawing on the various strengths each had to offer.

Human rights mechanisms in favour of refugees are seen to apply especially in the case of internally displaced persons who "have been forced from their homes by armed conflicts, internal strife, systematic violations of human rights, and other causes traditionally associated with refuge across international borders."[27] Such people must turn to human rights for the legal or institutional bases enabling them to receive protection. IDPs are regarded as people deprived of a broad range of needs: needs for equality and non-discrimination, life and security, personal liberty, subsistence needs, needs related to freedom of movement and ownership of property. Needs such as these require legal protection if displacement is not to contradict basic human rights guarantees.

Three different situations are recognized in which international law enforces IDP legal protection: "1) situations of tensions and disturbances, or disasters in which human rights law is applicable; 2) situations of non-international armed conflicts governed by the central principles of international humanitarian law . . . and by many human rights guarantees; and 3) situations of interstate armed conflict in which the detailed provisions of humanitarian

[26] Rachel Brett and Eve Lester, op. cit., p. 714.
[27] Roberta Cohen and Francis M. Deng, Masses in Flight, The Global Crisis of Internal Displacement, Brookings Institution Press, 1998, p. 414, p. 1.

law become primarily operative, although many important human rights guarantees remain applicable."[28]

An individual right against forced displacement can be inferred from the freedom of movement and residence clause contained in Article 13 of the Universal Declaration of Human Rights, and Article 12 of the Covenant on Civil and Political Rights (CCPR). The argument runs that since these articles both permit free movement and guarantee free choice of residence, it follows that they contain a right to remain and therefore a right not to be displaced. Other applications of human rights law to the protection of the internally displaced have already been discussed in an earlier part of this work.[29] To complete the enumeration, the following human rights prohibitions and entitlements contained in the Covenant on Civil and Political Rights (CCPR) also deserve a mention for their special relevance to the internally displaced situation:

- Prohibition of racial and other types of discrimination contained in Article 26 of the Covenant on Civil and Political Rights (CCPR);
- Freedom of movement and choice of residence as set forth in Article 12(1) of the CCPR;
- Privacy provisions and non-interference in the home as formulated in Article 17 of the CCPR;
- Right to housing under Article 11(1) of the Covenant on Economic, Social and Cultural Rights (CESCR);
- Prohibition of forced removal in emergencies: derogable under human rights law; here international humanitarian law applies, in particular Article 17 of Protocol II to the Geneva Conventions (internal armed conflict), and Article 49 of the Fourth Geneva Convention (international armed conflict)
- Prohibition of genocide and certain forms of forced removal, henceforth assimilated with mass killings, prohibited by Article 1 of the Genocide Convention;
- Subsistence needs: Article 11 of the CESCR recognising "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing", whereas Article 12 of the same instrument focuses on the health needs of the individual.

As for state obligation, it inheres in Articles 55 and 56 of the Charter of the United Nations, whereby all UN member states are obliged "to promote universal respect for, and observance of, human rights

[28] Ibid., p. 77.
[29] See above, Chapter IV, Part B.

and fundamental freedoms for all."[30] Adherence to further human rights instruments has a cumulative effect on this basic obligation.

Norms applicable to refugee situations are numerous. Can we conclude from them that IDPs and, by extension, refugees are sufficiently protected? How relevant, effective and binding are human rights when it comes to refugee protection? No easy answer to this question can be formulated. Human rights could be both relevant and effective in dealing with refugees, if all states were scrupulous in living up to their provisions. As things stand, however, grey areas exist between promoting better implementation and furthering legal prescription. Gaps have been noted in several areas, as follows:

a) Normative gaps, such as, for instance, the absence of a right to restitution of property lost as a consequence of displacement.
b) Applicability gaps when derogation occurs or non-state actors are involved.
c) Ratification gaps resulting from the refusal by some states to ratify refugee law instruments, key human rights treaties, or the Additional Protocols to the Geneva Conventions.

To sum up, an analysis of present substantive law reveals that with respect to the right to life, subsistence, or religious rights, and the prohibition of torture, the human rights regime covers many of the needs of refugees and those in refugee-like situations. Violations when they occur cannot be put down to inadequate legal protection, but rather to the unwillingness of states or other actors to abide by their international legal obligations in this respect.[31]

3. Adherence of States in the Region

States which have not ratified key human rights treaties or the Refugee Convention and the Geneva Conventions and their Additional Protocols are not formally bound by their provisions, except inasmuch as they reflect customary law. This more or less describes how the situation of Iraqi refugees was dealt with from the point of view of international law. Neither Iraq nor Iran was a party to the Protocols Additional to the Geneva Conventions, the legal instruments best suited to deal with the intrastate Iraqi conflicts which

[30] Roberta Cohen and Francis M. Deng, op. cit., p. 79.
[31] Ibid., pp. 122–123.

led to refugee production. Kuwait and Jordan were the only regional countries to have ratified these instruments.

Iraq and Iran, both monarchies at the time, were among the 51 founding members of the United Nations and were party to its 1945 Charter,[32] the embodiment of the political and moral code of the international community following World War II. They were also among the 58 member states of the United Nations which adopted, with eight abstentions and two country representatives absent,[33] the thirty concise articles of the 1948 Universal Declaration of Human Rights.[34]

The Declaration was not a binding document. As regards the principal international human rights treaties that built on the Declaration, the status of ratification for the region presents the following picture:[35]

The International Covenant on Economic, Social and Cultural Rights (CESCR)[36]

– Iran	03 Jan 1976
– Iraq	03 Jan 1976
– Jordan	03 Jan 1976
– Kuwait	21 Aug 1996
– Saudi Arabia	not a party
– Syrian Arab Rep.	03 Jan 1976
– Turkey	23 Dec 2003

The International Covenant on Civil and Political Rights (CCPR)[37]

– Iran	23 Mar 1976
– Iraq	23 Mar 1976
– Jordan	23 Mar 1976
– Kuwait	21 Aug 1996
– Saudi Arabia	not a party
– Syrian Arab Rep.	23 Mar 1976
– Turkey	23 Dec 2003

[32] Charter of the United Nations, signed at San Francisco, 26 June 1945 (entry into force 24 Oct., 1945).
[33] The Universal Declaration of Human Rights, A Magna Carta for all humanity, UN doc. DPI/1937/A, Dec. 1997, p. 1.
[34] G.A. Res. 217A (III) of 10 Dec. 1948, U.N. Doc. A/810 at 71 (1948).
[35] Status of Ratifications of the Principal Int. Human Rights Treaties, OHCHR, 3 Nov 2003.
[36] G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).
[37] G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316, (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[38]

– Iran	04 Jan 1969
– Iraq	13 Feb 1970
– Jordan	29 Jun 1974
– Kuwait	4 Jan 1969
– Saudi Arabia	23 Oct 1997
– Syrian Arab Rep.	21 May 1969
– Turkey	16 Oct 2002

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[39]

– Iran	not a party
– Iraq	12 Sep 1986
– Jordan	31 Jul 1992
– Kuwait	02 Oct 1994
– Saudi Arabia	07 Oct 2000
– Syrian Arab Rep.	27 Apr 2003
– Turkey	19 Jan 1986

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[40]

– Iran	not a party
– Iraq	not a party
– Jordan	13 Dec 1991
– Kuwait	06 Apr 1996
– Saudi Arabia	23 Oct 1997
– Syrian Arab Rep.	not a party
– Turkey	01 Sep 1988

The Convention on the Rights of the Child (CRC)[41]

– Iran	12 Aug 1994
– Iraq	15 Jul 1994
– Jordan	23 Jun 1991
– Kuwait	20 Nov 1991
– Saudi Arabia	25 Feb 1996
– Syrian Arab Rep.	14 Aug 1993
– Turkey	04 May 1995

[38] G.A. Res. 2106 (XX), Annex,20 U.N: GAOR, Supp. No. 14 at 47, U.N.: Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force 4 Jan., 1969).
[39] G.A. Res. 34/180, 18 Dec., 1979, 34 U.N. GAOR Supp. No. 46. at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13 (entered into force 3 Sept. 1981).
[40] G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (entered into force 26 June 1987).
[41] G.A. Res. 42/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (entered into force 2 Sept. 1990).

Further international obligations, based on a rights approach, were placed on Iraqi authorities by the UN Security Council in its resolution 688, Article 3 of which states that the Security Council "Insists Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations."[42] Iraq was thus made to recognise both its duty to accept humanitarian assistance in times of emergency and to cooperate with international and non-governmental organisations willing to provide such assistance. It is also noteworthy that, in this particular case at least, Iraqi refugees and internally displaced persons were put on the same footing and granted identical treatment.[43]

It is a fact that the rights to receive and provide humanitarian assistance are less fully developed or respected than individual civil and political rights.[44] Yet, in emergencies, such assistance must be readily available, if deaths are to be avoided. The safety of relief workers and their organizations is essential so that the displaced can be protected and assisted. Relief personnel derived legal protection for their activities in Iraq (and elsewhere) directly from human rights law. As for the obligation to accept international humanitarian assistance, under Article 11 of the CESCR, for instance, state parties recognize the "essential importance of international co-operation based on free consent" for the realization of "the right to an adequate standard of living, including adequate food, clothing and housing."[45] From this and similar provisions it can be inferred "that state parties to the CESCR have a duty to at least refrain from unreasonably denying offers of international assistance in cases of imminent humanitarian problems"[46] involving refugees and their subsistence needs.

The 1951 Refugee Convention, as we may recall, had been acceded to by Iraq, Iran and Turkey, the last named only to the extent that refugee status remained restricted to people of European origin, since it was not a party to the broadened 1969 refugee Protocol. So, in the case of two neighbours of Iraq, only one took its duties towards refugees seriously, while the other invoked security concerns and legal restraints to block passage to protection on its territory.

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[42] UN S/RES/688, 5 April 1991, art. 3.
[43] Luke T. Lee, Internally Displaced Persons and Refugees: Towards a Legal Synthesis, Journal of Refugee Studies, Vol. 9, No. 1, 1996, p. 37.
[44] David P. Forsythe, The Internationalization of Human Rights, Lexington Books, 1991, p. 209.
[45] The International Covenant on Economic, Social and Cultural Rights (CESCR), op. cit., Art. 11.
[46] Roberta Cohen and Francis M. Deng, op. cit. p. 114.

However, in the case of Turkey, one could have argued that the Turkish government was required to extend protection to individuals threatened with serious violations of their human rights because of its accession to the European Convention on Human Rights. Nevertheless, no resort to human rights clauses at that time would have unsealed borders and made the situation less dangerous for asylum candidates. In the final analysis, the example of Turkey's rejection of Kurdish refugees was less a question of deficiencies in the law and more one of weak enforcement mechanisms and a weaker political will. And whenever, interestingly enough, Turkey has since been criticised for the insensitivity it showed in the 1988 or 1991 Kurdish outflow, on the question of which body of law had first priority, the grounds chosen have had less to do with human rights violations than with non-compliance with the core principles of the 1951 Refugee Convention.

Although non-signatories of the Refugee Convention and therefore bound by no special contractual obligations to refugees, the other neighbours of Iraq – Jordan, Kuwait, Saudi Arabia and Syria were nonetheless required by international law to provide basic safeguards, that is to say temporary admission to their territory, to those fleeing war and persecution under human rights law and customary international law.[47]

4. Legal Relevance of Human Rights

Political rhetoric and so-called declaratory international law have endorsed the value of human rights in glowing terms.[48] Its spread in the past half century is a matter of common knowledge.[49] Our present era has been described as the "age of rights".[50] Political philosophy has made the idea of human rights the subject of special study. Jeremy Waldon calls it "the new criterion of political legitimacy",[51] whereas John Rawls finds the fulfilment of human

[47] The Parties to the War in Iraq and Governments of Neighbouring Countries Must Protect Refugees and the Internally Displaced, Lawyers Committee for Human Rights, www.lchr.org/iraq/iraq_03.htm, p. 3.

[48] A. Cassese, Human Rights in a Changing World, Cambridge: Polity Press, 1990; N. Bobbio, The Age of Rights, Cambridge, Polity Press, 1996; J. Donnelly, International Human Rights, Boulder: Westview, 1998.

[49] D. Forsythe, op. cit.

[50] N. Bobbio, The Age of Rights, trans. A. Cameron, Cambridge, Polity Press, 1996, p. 32.

[51] J. Waldron, ed., Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man, London, Methuen, 1987, p. 1.

rights is now "a necessary condition of a regime's legitimacy."[52]

Legal experts, too, figure prominently among rights theorists, seeking to develop cogent arguments in defence of what has sometimes been termed the "new faith".[53] Among the whole range of possible justifications, the following come in for special mention: A. Swidler has spoken of religious revelation;[54] for J. Finnis, natural law determines human rights;[55] Jack Donnelly sees humanism as the justifying basis of human rights;[56] whereas Peter Singer places human rights in an utilitarian setting.[57] Thus, the doctrine of individual rights, however humanitarians choose to interpret the matter, is still in search of a firm theoretical foundation from which to meet the many objections it needs to overcome.[58]

Turning from theoretical foundations to what human rights have legally managed to accomplish to date, David Kennedy, summed up the achievements which, in his view, the international human rights movement can justly be proud of: "There is no question that the international human rights movement has done a great deal of good, freeing individuals from great harm, providing an emancipatory vocabulary and institutional machinery for people across the globe, raising the standards by which governments judge one another, and by which they are judged, both by their own people, and by the elites we refer to collectively as the 'international community'."[59]

As for H. Lauterpacht, his stance on human rights is no less radical, allowing him to refer to "substantial developments in international law in which, notwithstanding traditional dogma, the individual is in fact treated as a subject of international rights" and "the acknowledgement of the worth of human personality as the ultimate unit of all law."[60]

From theory to practice, and starting with the non-binding Universal Declaration, a bulk of specialised human rights instruments

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[52] J. Rawls, "The Laws of Peoples", Critical Inquiry 20/1, Autumn 1993, pp. 36–68, p. 59.

[53] J.J. Shestack, The Jurisprudence of Human Rights, in: T. Meron, ed., Human Rights in International Law: Legal and Policy Issues, Oxford, Clarendon Press, 1984, pp. 65–113.

[54] A. Swidler, ed., Human Rights in Religious Traditions, New York, Pilgrim, 1982.

[55] J. Finnis, Natural Law and Natural Rights, Oxford Univ. Press, 1980 p. 442.

[56] J. Donnelly, Universal Human Rights in Theory and Practice, Cornell Univ. Press, 1989, ch. 3.

[57] P. Singer, Practical Ethics, Cambridge Univ. Press, p. 411, 1993.

[58] H.L.A. Hart, Between Utility and Rights, in M. Cohen, ed., Ronald Dworkin and Contemporary Jurisprudence, London, Duckworth, 1983, p. 214.

[59] David Kennedy, The International Human Rights Movement Part of the Problem?, Harvard Human Rights Journal, Vol. 15, Spring 2002, p. 101.

[60] Hersch Lauterpacht, International Law and Human Rights, Archen, 1968, p. 61.

and judgements have expanded the scope of human rights law, extending rights-based activism to many domains, including refugee protection. Defining the parameters of the Refugee Convention, with its many open questions connected with what exactly constitutes persecution, and the reasons prompting persecution to take place, have often demanded answers difficult to formulate in human rights law.

The usefulness of human rights standards became evident, for instance, when they were applied to clarify a concept central to the refugee definition, namely that of the term "persecution". Unlike other legal entities known to international law, such as "torture" or "cruel, inhuman or degrading treatment or punishment", "persecution" seemed to be lacking in legal substance. James Hathaway, chose a broad rights-based interpretation, writing; ". . . persecution may be defined as the sustained or systematic violation of basic human rights demonstrative of a failure of state protection."[61] Although acknowledging the potential for political distortion contained in the definition, Hathaway warned that without a serious reformulation, the Refugee Convention ran the risk of "becoming a mere anachronism"[62] Hathaway's definition proved widely influential: "advocates, judges, even governments, seized on it and it has now become an orthodoxy within refugee jurisprudence."[63]

Thus has the refugee regime turned to human rights law – and the same holds true for international humanitarian law – to clarify terms and broaden the mandate it had received at the time of initial drafting. This tendency to mainstream human rights in many aspects of international law has accelerated all the more, since widespread claims are heard from many sides that the provisions of several international human rights law documents have become rules of customary international law[64] or even norms of *jus cogens*.[65]

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[61] James C. Hathaway, The Law of Refugee Status, Butterworths, 1991, p. 252, pp. 104–105.

[62] Ibid.

[63] Jacqueline Bhabha, Internationalist Gatekeepers?: The Tension between Asylum advocacy and Human Rights, Harvard Human Rights Journal, Vol. 15, Spring 2002, pp. 155–156–185, p. 168.

[64] The International Court of Justice has referred to this concept repeatedly: in one instance in its famous *obiter dictum* in the *Barcelona Traction* case, characterized obligations *erga omnes* as commitments towards the international community as a whole. See: Barcelona Traction, Light and Power Company, Limited, Second Phase ICJ Reports (1970), at 32. For more see also: Reports on Responsibility of States for Internationally Wrongful Acts By Prof. James Crawford, ILC.

[65] M.N. Shaw, International Law, 4th ed., Cambridge University Press, 1997, p. 204; R.J. Vincent, Human Rights and International Relations, Cambridge Univ. Press, 1986, p. 46.

It is important to note in the context of human rights advocacy in refugee situations that, if human rights considerations are undisputedly relevant and of help within the mostly individual refugee asylum system in the West as it has developed since the end of the Second World War, its legal and practical relevance breaks down as soon as the vast displacement movements experienced in other parts of the world come into play, where the question of individual rights must necessarily be subordinated to the survival of the group.

However honourable its record in many fields. and notwithstanding its host of advocates, human rights activism in the context of humanitarian and refugee law, has also attracted harsh words from a wide spectrum of critics. Political analysts such as Alex de Waal, Michael Maren, Bernard Hours, Peter Uvin or, most recently, David Rieff have criticized the internal mechanisms of the contemporary humanitarian machine, and its Western socio-political basis.[66] Rieff, in particular, urges humanitarian agencies to stick to relief work and drop their advocacy campaigns, awareness raising measures, and concern for human rights violations.

Human rights concerns have also been seriously challenged on the grounds that they have readily lent themselves to an alibi-function role in international law. It is argued that in modern human rights activism in favour of victims of armed conflicts or refugee situations, and in utilizing Bernard Kouchner's *devoir d'ingérence* type of theory,[67] the defence of the human rights of refugees is taken as a point of departure to justify armed interventions and other wars, on the basis of a high degree of selectivity,[68] dictated by the politics of the moment.

Selectivity and double-standards extend beyond simply determining which countries deserve forcible humanitarian interventions and which do not. They have become the very norm in humanitarian relations and, in particular, in the area of refugee production and hosting.

A human rights bias has also distorted some of the basic provisions of refugee law. Emphasis placed on human rights instead of protection principles has led to a shift away from the UNHCR to the Security Council or NATO as the best-suited forum to decide refugee issues. Blurred institutional roles and blurred legal categories, it

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[66] Edward Rackley, David Rieff, A Bed for the Night, Multitudes 12, Spring 2003, p. 1.
[67] M. Bettati and B. Kouchner (eds.), Le Devoir d'ingérence, Paris, Denoël, p. 300.
[68] A. Roberts, Humanitarian Action in War: Aid, Protection and Impartiality in a Policy Vacuum, Adelphi Paper 305, 1996, p. 25.

is felt, have provoked a systematic erosion of the principles of protection and the rights of refugees. Refugees are now defined as threats to a nation's security and therefore fitting subjects for a policy of containment. Engaging directly with human rights law, refugee law now finds itself, contrary to its original purpose, pursuing a policy of preventive protection vis-à-vis refugees. Thus, the overall effect of the language of human rights on the legal framework through which the refugee and humanitarian regimes deploy their efforts in their mandated areas may have been to weaken their foundations.

5. Human Right of Refugees and Sanctions in Iraq

The overview above shows that the relevance of human rights to Iraq past, present and future, still leaves open questions as to whether the application of human rights language in Iraq benefited the people of that country and prevented the flow of refugees. In 1991, Iraqi refugees met with closed borders, in spite of rights and instruments in their favour. That they managed to return to "safe havens" in the North within record time, thanks to armed intervention on the part of Western forces, had partly to do with protection of their basic human rights and more to do with their being declared by the UN Security Council a threat to international peace and security in the region.[69] Iraqi Shiites, it must also be recalled, did not benefit from the same measures of armed protection as the Kurdish people of Iraq, and their human and political rights played no role in determining the course of events.

Following the August 6, 1990 Security Council ban on practically all imports to and exports from Iraq,[70] and the destruction of much of the country's key civilian infrastructure through bombings by "The Security Council and cooperating States",[71] Iraq was exposed to a sanctions regime. Many of the Iraqi IDPs that humanitarians now express concern about might well have been rendered homeless during the long years of daily humanitarian disaster and the utter economic collapse that the country underwent between 1990

[69] UN SC Res. 688 (1991), op. cit., art. 1.
[70] UN SC Res. 661, August 6, 1990.
[71] Roger Normand, Iraqi Sanctions, Human Rights and Humanitarian Law, Middle East Report, Middle East Research and Information Project, Summer 1996, p. 1.

and 2003. Not only ethnic cleansing, but also the economic sanctions might have been the cause of displacement.

The socio-economic fragility of Iraq during the sanctions years no doubt played an instrumental role in what Loescher and Helton aptly termed "a global Iraqi refugee crisis".[72] According to their calculations, Iraq's internally displaced population numbered over one million. In addition, even without a war, Iraqi nationals represented the largest group of asylum-seekers in Europe. Taken together, the size of Iraq's IDPs, refugees and asylum-seekers could only be described as "alarming".[73]

Journalist Chris Smith confirmed Loescher's and Helton's pre-2003 war findings, writing: The stampede of refugees out of Iraq, whether to Jordan, Syria and Turkey, or to the West, has only increased."[74] According to Smith, most of the refugees he interviewed, put the blame for their plight as much on economic sanctions as on Saddam Hussein, the two having become inseparable in their mind.

The immense harm done to Iraqi civilians through the sanctions regime, of which the stream of refugees leaving the country is one undeniable aspect, inevitably raises the question of the legal provisions governing such a situation, and the principle of accountability in connection with Security Council action in the context of the human rights of Iraqis. Since the end of the Cold War, the Council has signalled out eight different states on which to impose its sanctions, each time with no reference to external legal standards.[75]

Article 24 of the UN Charter explicitly directs the Security Council "to act in accordance with the Purposes and Principles of the United Nations" when exercising its authority to maintain peace and security.[76] The defence of human rights is a fundamental purpose that the UN is called upon to uphold. As we have seen, the entire human rights regime is based on the premise that the inherent dignity of every individual must be given due respect. The rights of individuals cannot be forfeited, even if their government, for some reason or other, is held to be guilty of misconduct. In Iraq, the actions of the Security Council had the result of imposing collective punishment

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[72] Gil Loescher and Arthur Helton, War in Iraq: An Impending Refugee Crisis, www.opendemocracy.com, Dec. 17, 2002.
[73] Ibid.
[74] Chris Smith, Down and Out in Jordan, Cairo Times Magazine and the Jordan Times, March 2001.
[75] Cortright & Lopez, eds., Economic Sanctions: Panacea or Peace-building in a Post-Cold War World?, 1995, p. 5.
[76] Charter of the United Nations, op. cit., Preamble.

on the Iraqi people in violation of fundamental human rights, while they did little to harm the government or the ruling privileged class, if not to make them even richer.

The prohibition to arbitrarily deprive individuals of their lives, a peremptory norm of international law,[77] was not respected. The survival and development of the child, a major demand of the Convention of the Rights of the Child, ratified by all the permanent members of the Security Council, was not respected. And "sanctions also contributed to violations of other human rights, including the rights to health, education, food and an adequate standard of living, all guaranteed by the Universal Declaration of Human Rights, the International Covenant of Economic Social and Cultural Rights and other international treaties."[78]

Violations of human rights (and humanitarian law standards) in Iraq, be it by the former regime or as a collateral of decisions and actions by the UN Security Council, may well have made the refugees of Iraq feel wary and decide that their best hope of safety lay in fleeing from Iraq, trusting to a stronger, reinforced refugee law regime, based on an extended mandate and dedicated to enhanced refugee protection, rather than to the pursuit of standards whose honest application might once again fail to materialise in their case.

6. Conclusion

Interaction of human rights law with international humanitarian law and refugee law is a well established fact to the extent that their borders sometimes become blurred. Standards of human rights provide relevant provisions in the application of refugee law, just as they are in filling in the gaps where refugee law seems insufficient. They guarantee a minimum required protection to refugees and displaced people before and during the application of refugee law. They are also relevant after the termination of protection by refugee law, and following voluntary repatriation. One should however be cautious in condoning the boundless application of human rights in the refugee law domain, since this can have undesired implications making refugee law too interventionist for states to be able or willing to enforce.

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[77] Parker and Neylon, Jus Cogens: Compelling the Law of Human Rights, 12 Hastings Int'l & Comp. Law Review, 1989, p. 411, 431.

[78] R. Normand, op. cit., p. 3.

In the Iraqi context, disregard of human rights is proven to have caused movements of population and refugee flows as a result of actions by the former regime and the international community. In the absence of ratified provisions of refugee law, human rights instruments which are adhered to by refugee-receiving neighbours, have represented the minimum guarantees for the protection of Iraqi refugees, even though they are feebly applied.

F. Soft Laws and Precedents: Efforts to Redress Shortcomings

1. Brief Review of the Shortcomings of International Refugee Law

The vital question highlighted throughout the preceding sections of this paper has been to determine whether the basic instruments shaping international refugee law can still be effectively applied today, keeping the situation of Iraqi refugees foremost in mind. A closer look was taken at the 1951 Convention relating to the Status of Refugees, the 1950 UNHCR Statute, the 1967 Protocol and other documents of primary importance. From this examination, it emerged that the Refugee Convention no longer seemed to contain an acceptable working definition of the word "refugee". The concept of the refugee enshrined in the original instrument, however much it may have been promoted by simultaneous or successive updates such as those contained in the UNHCR Statute, the 1967 Protocol, the OAS Convention or the Cartagena Declaration of Refugees, was, nonetheless, too closely linked with World War II imperatives to meet the needs of people in a state of displacement over half a century later.

We also noted that various substantial categories of uprooted people were conspicuous by their absence in the Convention, apart from the seeming irrelevance in today's greatly altered conditions of the original refugee concept, based on a narrow set of political criteria and with its emphasis on individual persecution as the hallmark of the person in need of asylum. Thus, definitional deficiencies occurred as much in the case of mass exoduses, as in that of the internally displaced. Furthermore, no mention was made either of the asylum seekers, or the migrants driven by economic and social forces.

If the refugee definition has failed to stand the test of time, the basic instrument for providing protection to refugees, the principle of *non-refoulement* – now established in customary international law has also been affected as it loses more and more ground to the notion of "temporary protection" and "repatriation", as a means of taking in refugees without the necessity of making any long-lasting commitments towards them. The *non-refoulement* principle has been blamed for being the starting point of the obligation-heavy

asylum system, reserved for the few, and practised in the West, with its time-consuming and costly process of individual refugee-status determination. It has also not made it any easier for poorer countries to carry the burden of supporting huge refugee populations spilling over on to their territory without their having much say in the matter beyond the acceptance of the legal obligation they are placed under to refrain from expelling refugees.

We ended our discussion of the lacunae in the Convention by citing various scholars who hold that the time has come to submit the basic refugee instruments to a thorough overhaul if they are not simply to be considered obsolete, redundant or superseded by other treaties and conventions.

Analysing the existing situation as regards internally displaced persons in section II of this chapter, two issues became clear. On the one hand, we found IDPs were a heterogeneous group which have come to absorb much of the international interest and funding that refugee situations still manage to command. On the other, we observed that, although the IDP issue was not integrated as such into the extant body of refugee law, some provisions of international humanitarian law or human rights law were available to cover different aspect of IDP protection.

The collective need to apply for and obtain refuge from a third party country did not figure in the basic refugee instruments as was the case of the IDPs. As a result, no group can hope to gain admittance to another country on purely Convention grounds. Our conclusion to part C, bearing in mind the special conditions obtaining in present-day Iraq, diagnosed the shortcomings of the system and stressed the need to devise some kind of a binding legal instrument for the protection of people caught up in situations of mass influx.

We pointed out that the 1951 Refugee Convention, already showed foresight in recommending a collective approach to refugee problems which were beyond the capacity of any one single country to solve. Under the high-sounding name of burden-sharing, this principle has been left in legal texts without ever being given the undisputed legal formulation it so richly deserves. In our conclusion, we insisted on the injustice involved in forcing poorer countries to shelter refugees they had no hand in creating, while receiving in return politically motivated handouts from the richer states, by way of charity rather than as a matter of entitlement. And we made it clear that the formulation of clear-cut legal provisions on equitable burden-sharing could no longer be put off indefinitely.

2. Why Soft Laws?

In the absence of any new treaty or additional protocol for which most of the parties involved in the refugee system seem to agree that the climate is far from right at the present time, the world community has sought to take other measures to enhance the effectiveness of international refugee and humanitarian law. It would obviously have been easier for the UNHCR and other international organizations to work with a modern and updated legal system where the obligations of states were clearly stipulated and – through the due process of ratification – turned into an integral part of national municipal law. But as the UNHCR Working Group on International Protection advised the High Commissioner in 1992: "It was also felt that the time was not yet appropriate for UNHCR to promote new universal instruments outside the 1951 Convention and 1967 Protocol for the protection of refugees by States."[1]

Significant resistance on the part of governments to accepting more obligations in favour of refugees has grown over time, although they have shown little or no reservation about accepting non-binding guidelines in order to overcome the lacunae existing between the international legal framework and actual protection needs. To quote from another UN document summing up the general attitude of states: "While it was agreed that the time for a new Convention was not ripe," delegations expressed interest "in the possible elaboration of guiding principles based on past and current experience and practice" with UNHCR acting as "a catalyst in this connection." UNHCR Director of International Protection at the time, Mr Franco, went on to add that all delegations present viewed all such guidelines as being non-binding in character.[2]

In 1995, the High Commissioner once again referred to the fact that "States do not appear prepared currently to undertake additional binding obligations towards refugees,"[3] going on to say his Office would have to do with regional development of standards and guiding principles instead. Nonetheless, this has not deterred UNHCR from making further attempts at reaching international

[1] UNHCR, Note on International Protection, A/AC.96/799, 1992, para. 24.
[2] Report of the Sub-Committee of the Whole on International Protection, UN doc. A/AC.96/837, 4 Oct. 1994, p. 17, p. 11.
[3] Note on International Protection: International Protection in Mass Influx, UN doc. A/AC.96/850, 1 Sep. 1995, para. 8.

consensus. The Convention Plus initiative launched by the High Commissioner for refugees in 2003 with the evolving EU asylum legislation as a special target, was a step in this direction. Convention Plus, which builds on UNHCR's previous Agenda for Protection,[4] endorsed by ExCom in October 2002, is composed of three strands: "the strategic use of resettlement, addressing irregular secondary movements of refugees and asylum-seekers, and targeting development assistance to achieve durable solutions".[5] The strands themselves grew out of UNHCR's "tools of protection" taking the form of multilateral special agreements aimed at complementing the 1951 Refugee Convention and its 1967 Protocol.[6]

The result of such governmental conservativeness has been to leave refugee law behind, while other branches of international law have made tremendous strides over the past few years. Countries view refugees as a burden that hampers economic and social development and eats up national resources. On the one hand, they find no national interest or international incentives for the promotion of an open-door practice, while on the other, there is no-one to chastise closed-door policies. When there is no compelling reason to shoulder more contractual obligations, countries simply prefer soft laws which are easier to deal with and to ignore if the need so arises.

For this reason the international community has had no choice but to develop and modernize the protection regime for refugees by resorting to resolutions and decisions emanating as a rule from four specific bodies: The United Nations General Assembly, the UN Economic and Social Council ECOSOC,[7] the Executive Committee of the Programme of the High Commissioner for Refugees and UNHCR itself. To this must also be added the category containing various regional arrangements concerning refugees.

Humanitarian law expert Stéphane Jaquemet says: "the 1951 Refugee Convention and its 1967 Protocol, taken together, contain less than 60 articles."[8] If the formal codification process has since

[4] UNHCR doc. A/AC/96/965/Add.1, 26 June 2002.
[5] UNHCR, Progress Report: Convention Plus, Doc. FORUM/2004/2, 20 Feb. 2004, p. 1.
[6] Alexander Betts, The political economy of extra-territorial processing: separating 'purchaser' from 'provider' in asylum policy, UNHCR, New Issues in Refugee Research, Working Paper No. 91, June 2003, p. 2.
[7] A Thematic Compilation of General Assembly and Economic and Social Council Resolutions, UNHCR, Department of International Protection, Feb. 2003.
[8] Stéphane Jaquemet, The Cross-Fertilization of International Humanitarian Law and International Refugee Law, IRRC September 2001, vol. 82, No. 843, p. 651.

then failed to move forward, non-treaty legal expansion to match the growing scope and complexity of the refugee problem has taken the form of the "creation of soft law (through United Nations General Assembly Resolutions and the Conclusions of the United Nations High Commissioner's Executive Committee)".[9]

Lacunae arising from the non-ratification by all States of the relevant international instruments include: those to do with an over-restrictive interpretation of legal provisions contained therein; or the refugee instrument provisions themselves are deficient in some respects; or there are lacunae in the competence of the UNHCR as set out in its original mandate. All these have been addressed through the production of so-called soft laws. Non-Conventional refugees have found some degree of recognition thanks to their provisions.

However, States, bent on devising ways of respecting the letter rather than the spirit of the 1951 Refugee Convention, can also use this method to innovate in the field of protection to safeguard their own interests. This new mode of seemingly legal response to the refugee problem is usually presented as being in keeping with the 1951 Convention provisions. But, as Kathleen Newland asserts: "Few of the innovations are codified in international law. The public face of international protection of refugees is still the 1951 Convention relating to the Status of Refugees, but by default."[10]

By hard law is meant instruments such as treaties or customary laws which state parties implement through transferring their provisions into their own national legal systems.[11] Some element of enforcement is usually associated with hard law, which may make them appear more valuable than soft laws. However, it can be argued that in today's world reliance on hard law alone might well prove to be inadequate, soft laws offering the inestimable advantage of being vague enough in formulation and non-binding enough in effect to find acceptance easily and pass without too much opposition. The process of practice and repetition that then follows serves later as the basis for hard law which in turn will become an integral part of international law.

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[9] Ibid.

[10] Kathleen Newland, Refugee Protection and Assistance, in: Managing Global Issues, Lessons Learned, Carnegie Endowment for International Peace, 2001, p. 531.

[11] W.F. Felice, Taking Suffering Seriously, State Univ. of New York Press, 1996, pp. 76, 107.

Soft laws can be defined as follows: "Legal instruments that are not legally binding, but act more as guides to policy."[12] They are not treaties in the usual sense of the term, but guidelines and standards put forward in resolutions and declarations. In time, such soft law provisions can turn "into international customary law which could be a basis for new formulations of hard law provisions."[13] A further characteristic of soft laws contained in the recommendations formulated by international organizations is that they are the result of negotiations with States. So, soft-law definition can also be expanded to mean "recommendations that rest on the consensus of States and thereby assume some authority that may be taken into account in legal proceedings, but whose breach does not constitute a violation of international law in the strict sense, and thus does not entail State responsibility."[14] UNHCR's definition of soft laws in the context of refugees has the merit of brevity. They are simply "vital tools for the protection of refugees."[15]

3. Soft Laws Formulated to Redress Shortcomings

3.1. *The Conventional Refugee Definition*

The 1951 Refugee Convention Definition, the most basic of protection tools, was felt to require amendment even from the very beginning. The earliest means to bring about such amendment predated the Convention itself and was to be found in the 1950 UNHCR Statute, a soft-law instrument allowing the High Commissioner to recognize any individual as a "mandate" refugee, that is to say falling "within the competence of UNHCR according to its Statute, according to specific General Assembly resolutions, or according to general resolutions on displaced persons."[16]

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[12] McKinney Interactive Glossary, Internet Site.
[13] Gilbert Jaeger and Dennis McNamara, The Lacunae in the international protection of refugees and internally displaced persons, victims of conflict, San Remo International Conference, 6–9 Sept. 1994, p. 3.
[14] Walter Kälin, Walter Kälin, How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework, Roundtable Meeting, CUNY Graduate centre, 19 Dec. 2001, p. 6.
[15] Note on International Protection, UN doc. A/AC.96/830, 7 Sep. 1994, para. 15.
[16] Guy S. Goodwin-Gill, The Refugee in International Law, Clarendon Press, 1990, p. 20, note 3.

a. UN General Assembly Soft Laws on the Refugee Definition
Starting with UNGA Res. 1167 (XII) of 26 Nov. 1957, the General Assembly devised the "good offices" approach, giving the UNHCR express authorization "to use his good offices to encourage arrangements for contributions" in the case of mainland Chinese stranded in Hong Kong. Thereafter, according to the political needs of the moment, General Assembly calls upon UNHCR "good offices" assistance for refugees not within the "immediate competence"[17] of the world body became standard United Nations practice.

Another source liberally drawn upon to broaden the refugee definition, freeing it from the "persecution" standard and linking it to "situations of conflict" in general, has been the 1969 OAU Convention, as endorsed by the UN General Assembly in the following wording: "Recognizing that the task of caring for refugees is a matter of international concern and solidarity, in keeping with the Charter of the United Nations, international and regional instruments, in particular the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, as well as the 1969 Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa."[18]

b. UNHCR ExCom Soft Laws on the Refugee Definition
In UNHCR soft-law terminology, a refugee is described either as a Convention refugee or a mandate refugee. The latter term covers both a person who is also recognised as a Convention refugee and someone who does not fulfil Convention criteria. Over time, UNHCR status determination has tilted more and more in favour of non-Convention refugees, henceforth known under the name of "persons of concern to the UNHCR" or "others in need of international protection".

The need to give some kind of legal standing to people with claims on international protection in a large-scale influx explains the bias of ExCom Conclusion No. 22 which provides the following expanded refugee definition: "The asylum seekers forming part of these large-scale influxes include persons who are refugees within the meaning of the 1951 United Nations Convention and the 1967 Protocol relating to the Status of Refugees or who, owing to external aggression, occupation, foreign domination or events seriously disturbing

[17] UNGA Res. 1499(XV), 5 Dec. 1960.
[18] UNGA Res. 42/106, 7 Dec. 1987, para. 8.

public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country."[19]

In response to the massive Kurdish-Shiite outflow from Iraq in 1991, UNHCR thought it fit to broaden the refugee definition in the following terms:

"Looking forward, there is a need for States on their own and in concert, as well as for UNHCR, to apply themselves actively to the progressive development of both the law and existing international machinery so that the response capability of the international community is reinforced to meet the new complexities of today's population movements. The 1951 Convention reflects the classical approach to the protection of refugees which conceptualizes a refugee as an individual victim of persecution and assumes implicitly that the main obligations to refugees are those of asylum States. Refugees so defined are, however, only one part of modern movements of persons in search of asylum. Refugees in the broader sense, meaning persons fleeing generalized violence, external aggression, internal conflict, massive violation of human rights and other phenomena seriously disturbing public order are also a significant part."[20]

By 1994, ExCom Conclusion 74 "Notes that a large number of those persons in need of international protection have been forced to flee or to remain outside their countries of origin as a result of danger to their life or freedom owing to situations of conflict."[21] It further "Recalls that UNHCR has often been requested by the United Nations General Assembly to extend protection and assistance to persons who have been forced to seek refuge outside their countries of origin as a result of situations of conflict",[22] and "Recognizes that in Africa and Latin America, regional instruments provide for the protection of refugees fleeing armed conflict and civil strife, as well as those fearing persecution", whereas "in other regions, persons who require international protection, but who either are not considered refugees within the scope of the 1951 Convention and 1967 Protocol or are in countries that have not acceded to these instruments"[23] generally receive protection through specific measures agreed upon by States and UNHCR.

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[19] ExCom Conclusion no. 22 (XXXII) – 1981, Protection of Asylum-Seekers in Situations of Large-Scale Influx, para. I.1.
[20] Note on International Protection, UN doc. A/AC.96/777, 9 Sep. 1991, para. 4.
[21] ExCom General Conclusion on International Protection, No. 74 (XLV), 1994, para. (k).
[22] Ibid., para. (m).
[23] Ibid., para. (n).

Another ExCom conclusion encouraged UNHCR to ensure "international protection to all who need it," a sweeping statement, vague enough to allow all categories to apply for protection. It also urged the agency to develop "guiding principles to this end".[24]

c. Focus on Iraqi Refugees

To match law to context, in the 1991 exodus of Iraqis, many of the people involved might have been denied refugee status under the provisions of the Convention or its Protocol alone. The soft laws noted above carried with them a certain guarantee of international protection. The individual Iraqi asylum-seeker has sometimes been recognised as falling within the definition of the 1951 Convention – and, in fact, one Amnesty International commentator went so far as to assert that in Australia "97% of the Iraqi . . . refugee claimants were found to meet the definition of a Convention refugee"[25] and, similarly, in Britain, "40% of those whose claims were decided in 2002, including appeals, were officially recognised as being in need of protection and allowed to stay".[26] However, the majority of the Iraqis considered in the foregoing pages were often involved in massive flows. They would have made a poor showing as claimants to refugee status on grounds of individual persecution. They could, however, qualify for soft-law refugee status and thereby legitimately avail themselves of the protection of the international community.

3.2. *Non-Accession and/or States Reservations*

The 1951 Convention and its subsequent Protocol bind only those States that are a party to one or both of these instruments. Accession by State parties is therefore the condition *sine qua non* of the sound functioning of the provisions of international refugee law. As we saw earlier, non-accession of regional states or their substantive reservations on the provisions of the body of refugee law were considered as an important blow to the effective application of the law to the Iraqi refugees. It is therefore relevant to examine how soft laws could redress this shortcoming.

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[24] ExCom General Conclusion on International Protection, No. 77, 1995, para. (f).
[25] Carolyn Graydon calls for Australia to do more for refugees, on line opinion, 15 Dec. 1999, p. 2.
[26] Alan Travis, 20% rise in asylum applications fuelled by increased numbers from Iraq and Zimbabwe, The Guardian, 1 Mar. 2003.

a. General Assembly Soft Laws on Non-Accession and/or States Reservation

Aware of the need to expand the number of contracting parties to the legal instruments of refugee protection, the UN General Assembly has repeatedly launched appeals for accession, couched in more or less similar language, to its various member countries. A typically worded resolution would be, for instance: The UN General Assembly "Appeals to all States that have not yet become parties to the 1951 Convention and 1967 Protocol relating to the Status of Refugees to consider acceding to these instruments in order to enhance their universal character."[27] A variation of the appeal consists of reaffirming the need for States to strengthen cooperation with UNHCR and facilitate international protection by acceding to the basic legal instruments.[28] It can be counted among the successes of General Assembly promotion that to date 145 countries have acceded to the Convention and/or Protocol.

b. UNHCR ExCom Soft Laws on Non-Accession and/or States Reservations

Since 1977[29] and in numerous conclusions, the Executive Committee of the High Commissioner's Programme has reiterated its recommendation that States accede to international instruments of benefit to refugees. UNHCR's main argument in seeking wide ranging accession has been that it would thus be in a better position to extend international protection to refugees and ensure their treatment according to recognized minimum standards. UNHCR has also sought actively to bring about the withdrawal of State reservations, often in connection with the full exercise of economic and social rights, as well as the removal of the geographical limitation allowed by the 1951 Convention,[30] to which a few States still cling.

The problem of States' reservations in their accession to the refugee instruments was the object, *inter alia*, of a 1985 ExCom Conclusion in which the Executive Committee "recommended consideration of the withdrawal of the geographical limitation by those States which still maintain it."[31] Deploring the limitations found

[27] UNGA Res. 43/177 of 8 Dec. 1988, para. OP1.
[28] Ibid., para. OP4.
[29] ExCom Conclusion 4 (XXVIII) 12 Oct. 1977, International Instruments, paras. a, b, c, & d.
[30] UNHCR, Note on Accession to International Instruments and the Detention of Refugees and Asylum-Seekers, EC/SCP/44, 19 Aug. 1986, para. 3.
[31] ExCom General Conclusion on International Protection, 36 (XXXVI) 1985, para. e.

in the existing tools of international protection, the UNHCR 1994 Note on International Protection stated that serious problems had arisen as much from the wrong application of the Convention and the Protocol as from the fact of non-accession to one or the other of the basic legal instruments.[32] And in yet another document on mass influx, emphasis was placed on the fact that "limitations in legal protection due to States' non-accession to the Convention or Protocol, or maintenance of a geographical reservation, will continue to be addressed as part of UNHCR's ongoing promotional activities."[33]

But the question of accession, however important, also reveals the restrictions facing UNHCR's powers of implementation. In spite of the obligation on States to cooperate with the refugee agency under article 35 of the Convention or, in the case of non-contracting States, to show respect for the customary law norm of *non-refoulement*, UNHCR is not usually in a position to force compliance on non-compliant States.

c. Focus on Iraqi Refugees

The answer here, too, has been to resort to special soft law instruments, limited in time and effect, such as the ones signed with some of the countries neighbouring Iraq, or the one agreed to with Iraq itself before a safe haven could be set up for Kurds in northern Iraq.[34] The memorandum of understanding, in the Iraqi context, ensured that UNHCR could gain access to refugees within a legal framework. Similar arrangements can no doubt be made with neighbouring countries not a party to the 1951 Convention, Jordan, Syria, Saudi Arabia and Kuwait, if the future holds any mass exodus out of Iraq, with the ever-present risk that non-accession and reservations to the Refugee Convention can continue to be invoked at any time, thereby allowing States unwilling to offer assistance in an emergency to use legal arguments to justify their attitude to their international obligations.

[32] Note on International Protection, UN doc. A/AC.96/830, 1994, para. 21.
[33] The Scope of International Protection in mass influx, UNHCR doc. EC/1995/SCP/CRP.3, 2 June 1995, para. 3.
[34] The State of the World's Refugees, 2000, p. 213.

3.3. *Mass Influx*

a. UN General Assembly Soft Laws on Mass Influx

From a soft-law point of view, General Assembly resolutions on mass influxes are noteworthy on several counts. They established the human rights-refugee law nexus which has dominated the whole course of refugee law development over the past decade. Furthermore, they have set out several concepts – root causes, temporary protection, burden-sharing – without which the theoretical scope of refugee law would be even more restricted than it is today.

In this respect, a 1990 UNGA resolution is particularly instructive, endorsing: "the conclusion on the note on international protection adopted by the Executive Committee of the Programme of the High Commissioner at its forty-first session, in which, in particular, the Executive Committee underlined the importance of human rights and humanitarian principles and recognized that the current size and characteristics of the refugee and asylum problem necessitate appropriate reassessment of international responses to the problem to date, with a view to developing comprehensive approaches to meet present realities".[35] The text goes on to note "the difference between refugees and persons seeking to migrate for economic and related reasons",[36] something totally missing from the original Refugee Convention.

As for mass influxes, of particular interest when considering the specific case of refugees generated by conditions in Iraq, following the Study of Human Rights and Mass Exoduses drafted and presented to the United Nations by Prince Sadruddin Agha Khan in 1981,[37] UNGA resolutions gave full recognition to the phenomenon and began emphasizing the need to intensify international protection and coordination in addressing situations of large-scale influx, citing the negative impact of such movements on host countries and the occurrence of human rights violations during mass exoduses.[38]

b. UNHCR ExCom Soft Laws on Mass Influx

ExCom's Conclusions Specific to Mass Influx not only broadened the application of the word refugee, it redefined *non-refoulement*

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[35] UNGA Res. 45/140, 14 Dec. 1990, OP15.
[36] Ibid.
[37] See above, Chapter IV, Part C.
[38] UNGA Res. 36/125, 14 Dec. 1981, para. OP5(a), Res. 38/103, 16 Dec. 1983, para. PP7, Res. 39/117, 14 Dec. 1984, para. OP2, Res. 40/149, 13 Dec. 1985, para. OP2, Res. 41/148, 4 Dec. 1986, para. OP2, 43/154, Res. 8 Dec. 1988, para. OP2.

and admission – introducing the notion of admission on a temporary basis – set out standards of minimum treatment for asylum seekers admitted temporarily, insisted on the absolute necessity of burden-sharing and examined possibilities of finding durable solutions.[39]

Two other UNHCR reports are of special importance in connection with mass influxes, namely the Scope of International Protection in Mass Influx[40] and The Note on International Protection in Mass Influx.[41] It can be said that together these two documents, along with the ExCom Conclusion, provide a solid basis for most of the essential aspects of protection in mass influx, in particular a broad refugee definition, the prohibition of *refoulement* and non-admission at the frontier, non-discrimination, the non-penalization of arrivals, fundamental civil rights and the provision of basic necessities, the safe location of settlements and UNHCR's role in exercising its international protection function.[42]

c. Security Council Contribution

Security Council resolutions do not usually deal directly with refugee matters and can therefore be discounted as a regular source of renewal for refugee law. Exceptionally, however, UN Security Council Resolutions 678[43] and 688[44] were interpreted in such a way that they could be made to serve as a legal basis for the creation of a safe haven in northern Iraq and a no-fly zone area above the 36th parallel and below the 32nd parallel for the use of Iraqi Kurds caught up in an influx which caused a humanitarian crisis on the closed borders of Turkey in 1991.

Resolution 678, of course, authorized the use of force against Iraq under Chapter VII of the United Nations Charter. It "authorised member states to use all necessary means" to force Iraq to comply with UN demands. Resolution 688 then condemned "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace."[45] The resolution's main pur-

[39] ExCom Conclusions Specific to Mass Influx 22 (XXXII) 1981.
[40] UNHCR, The Scope of International Protection in Mass Influx, EC/1995/SCP/CRP.3, 2 June 1995.
[41] UNHCR, Note on International Protection in Mass Influx, A/AC.96/850, 1 Sept. 1995.
[42] UNHCR, The Scope of International Protection, op. cit., para. 21.
[43] UN Resolution S/RES/678 of 29 Nov. 1990.
[44] UN Resolution S/RES/688 of 5 April 1991.
[45] Ibid., para. 1.

pose turned out to be, as one commentator points out, to transform the victims of the outrage into a threat to international peace and security in the region,[46] a deviation which has continued to affect the perception of the refugee in today's world. Resolution 688 made no explicit reference to safe havens, sending international troops into Iraq, or no-fly zones. It did however ask Iraq to allow immediate access by humanitarian organizations to all those in need of assistance in all parts of Iraq and to ensure the respect of the human and political rights of all Iraqi citizens.

Resolution 688, therefore, was more a document of operational value, allowing relief efforts to be carried out in Iraq rather than a soft law whose provisions could be refined over time to cover grey areas in protection needs. The safe haven concept, which was not to the liking of many UN officials at the time, actually originated from the then President of Turkey Turgut Ozal who, on April 7, 1991, urged his allies to return the Kurds massed on his borders to their point of departure in Iraq. The idea was seized upon by the US, France and Britain which sent in troops and organized airlifts of supplies necessary for the survival of the Kurds.[47]

d. Focus on Iraqi Refugees

The fact that such a legal framework, although of a soft-law, non-binding nature, has already been set in place, promises well for future massive outflows from Iraq. But what occurs when the gap between legal norms and their implementation cannot be bridged? In 1991, many of the provisions noted above failed to be applied. In addition to the violations of international law we have already had occasion to mention, the vulnerability of Iraqi refugees was exacerbated even further in that they were unable to benefit from such essential principles as non-discrimination or the safe location of settlements in the overall attempt of the international community to find acceptable solutions.

Regarding the safe haven concept, even if its actual function was more the protection of certain neighbours from Iraqi Kurdish refugees than vice versa, it did manage to serve its purpose and provide relative safety for the Kurds temporarily, until factional fighting broke out again in northern Iraq in 1996 and refugees once again flowed out of the country. If Security Council resolution 688 added little

[46] Bill Frelick, Safe Havens, Broken Promises, US Committee for Refugees, 1998, p. 3.

[47] Michael Rubin, Are Kurds a pariah minority? Social Research, Spring 2003, p. 4.

by way of textual enrichment to refugee soft law, it did create a precedent case which would have due effect on the management of future refugee crises.

3.4. *Non-Refoulement*

If one provision of the 1951 Convention is well established and has remained uncontested down the years, it is indeed article 33 which as a foundation stone of international protection, applicable to a broad class of refugees[48] has become part of customary international law and hence part of the legal obligations devolving on any sovereign State. With such a solid foundation, it was understood that *non-refoulement* had little need to be reinforced by soft laws. However, there have been several re-affirmations of the value of this principle by relevant international bodies.

a. General Assembly Soft Laws on Non-Refoulement

The General Assembly has reaffirmed in various resolutions that "the principle of *non-refoulement* is not subject to derogation".[49] In this connection, it has called upon States to abide by this principle, especially as regards any forcible returns or expulsions of refugees, contrary to international standards. States were urged to live up to their legal obligations "by scrupulously observing the principle of asylum and *non-refoulement*,[50] or by making it a point "to respect scrupulously the fundamental principle of *non-refoulement*, which is not subject to derogation."[51]

b. UNHCR ExCom Soft Laws on Non-Refoulement

Non-refoulement is one of the most important themes running through the UNHCR publications or the various conclusions drafted by the Executive Committee. In Conclusion 6, it recalls that "the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at universal and regional levels and is generally accepted by States."[52] In 1991, with the Iraqi Kurdish crisis slowly fading into the background, ExCom "emphasizes the primary importance of *non-refoule-*

[48] Guy S. Goodwin-Gill, The Refugee in International Law, Clarendon Press, 1990, p. 18.
[49] UNGA Res. 52/132, 12 Dec. 1997, pp. 12.
[50] UNGA Res. 43/117, 8 Dec. 1988, OP3.
[51] UNGA Res. 51/75, 12 Dec. 1996, OP3.
[52] ExCom Conclusion No. 6 (XXVIII) 1977, Non-refoulement, para. (a).

ment and asylum as cardinal principles of refugee protection."[53] By 2003, however, *non-refoulement* no longer took centre stage; it was rather diluted by "the right of States, under international law, to expel aliens while respecting obligations under international refugee and human rights law".[54]

That one principle might be in competition with the other has seemingly not yet caused trouble for ExCom members or for the UNHCR, which has expressed its "readiness, on a good offices basis, to return persons found not to be in need of international protection."[55] This undertaking has been carried out in association with the International Organisation for Migration (IOM). In the words of ExCom, it "welcomes the expertise developed by IOM in the assisted voluntary repatriation of persons found not to be in need of international protection and notes UNHCR's cooperation with IOM in this area."[56]

c. Focus on Iraqi Refugees

The principle of *non-refoulement* has proven to be a useful tool for the protection of individual Iraqi refugees who obtained asylum mostly in the western countries. They were given the opportunity to stay in their countries of asylum until the collapse of the former Iraqi regime in 2003. In the case of mass influx Iraqi refugees who were admitted by neighbours no major incident was reported to challenge the integrity of *non-refoulement*. It was, however, argued that this principle might have played a negative role at least in the case of Turkey which rejected Kurdish refugees at its frontiers fearing that their repatriation at some point in time would cause international criticism invoking respect for *non-refoulement*.

3.5. *Internally Displaced Persons (IDPs)*

Internally displaced persons are newcomers on the refugee scene and of whose existence the international community first became aware in the latter part of the 80s. The soft laws surrounding IDPs are in the process of hardening and might become the central theme in international protection, if refugee law continues to develop along the lines it has adopted over the past few years.

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[53] ExCom Conclusion 65 (XLII) 11 Oct. 1991, General Conclusion on International Protection, para. (c).
[54] ExCom Conclusion 96 (LIV) 2003, Conclusion on the Return of Persons, Introduction.
[55] Ibid., para. (k).
[56] Ibid., para. (i).

a. General Assembly Resolutions on IDPs

The first provisions concerning IDPS go back to the years 1987–88. In a resolution dated 8 December 1988, the General Assembly notes "the absence of an operational mechanism within the U.N. system dealing specifically with the problems of assistance to internally displaced persons."[57] Another resolution recalls "the relevant norms of international human rights instruments as well as of international humanitarian law".[58] On several occasions, the world body expressed concern for the plight of IDPs, underlined the assistance they stood in need of and affirmed the relevance of the Guiding Principles on Internally Displaced Persons,[59] the document that gives them a legal profile under international law.

b. UNHCR ExCom Soft Laws on IDPs

Since IDPs are not refugees within the Convention sense of the term and their specific legal framework is based on human rights or humanitarian law, with refugee law applying to their case only analogously, UNHCR has not automatically taken responsibility for this group. ExCom Conclusion 75 gives full recognition to what it calls "the global dimensions" of the IDP problem and stresses the many similarities underlying both involuntary internal displacement and refugee movements. It further notes that often "the internally displaced are present alongside refugees, returnees or a vulnerable local population" and it would therefore be "neither reasonable nor feasible to treat the categories differently in responding to their needs for assistance and protection," thus paving the way for UNHCR involvement. Nonetheless, it makes it clear that UNHCR will only act in favour of IDPs on the basis of specific requests from the UN and with the consent of concerned States.[60] The ExCom position is also one UNHCR defends in its writings on IDP problems.

c. Focus on Iraqi Refugees

Following the 1991 return of the Kurdish refugees after their aborted attempt to find shelter in Turkey, northern Iraq contained two groups of people, one whose members were able to return to their villages and places of origin and the other, more vulnerable, estimated at some 500,000 persons, which remained internally dis-

[57] UNGA Res. 43/116, 8 Dec. 1988, PP9.
[58] UNGA Res. 48/135, PP2, 20 Dec. 1993.
[59] UNGA Res. 53/125, 9 Dec. 1998, OP16.
[60] ExCom Conclusion No. 75 (XLV) 1994, Internally Displaced Persons, para. j.

placed.[61] It is the remnants of this group, along with all the others, Shiites, Turkmen, and Sunnis, in other parts of the country who, after suffering years of neglect and being left to their own devices, might benefit from the fact that they now at least enjoy a legal status of sorts, recognised by the international community. The provisions of the Guiding Principles might help to cover to their advantage the lacunae which have existed so far regarding legal redress for IDPs. Moreover, the operational experience already gained by UNHCR and other organizations in handling the question of internal displacement might stand them in good stead.

The issue of Iraqi IDPs might well be the last humanitarian issue of Iraq to be settled following the collapse of the former regime and working on the supposition that new crises will not take place. The existing complications regarding properties doubly owned or ethnic disputes among the displaced would still make it difficult for the international community to help settle the issue swiftly by resorting to the existing soft laws. In addition to UNHCR and ICRC, a major player in this context would be the IOM which has enormous experience of migrants and IDPs.

3.6. *Temporary protection*

Drawing on the "safe haven" experience in Iraq, UNHCR indicated a new approach to tackling future large-scale refugee crises. As the agency wrote in a 1993 note, "local integration in the receiving country seems no longer to be a feasible solution in many situations. This is particularly the case in most mass-influx situations. Accordingly, variable approaches are being pursued with greater frequency in order to implement a more vigorous promotion of voluntary repatriation and develop such concepts as state responsibility, prevention including in-country protection and temporary protection."[62]

The potential protection gap left in the 1951 Convention regarding victims of armed conflict arriving in a massive flow found no universal answer valid for all parts of the world. Rather it was dealt with on a regional basis, the African continent applying the 1969 OAU Convention Governing Specific Aspects of the Refugee Problems

[61] UNHCR's Operational Experience with Internally Displaced Persons, Sept. 1994, p. 9.
[62] Note on International Protection, UN doc. A/AC.96/799, 25 Aug. 1992, para. 20, 21.

in Africa, Central and South America adopting the 1984 Cartagena Declaration on Refugees, and the European countries using the notion of temporary protection, now embodied in EU law through the regulatory Council Directive on Minimum Standards for Giving Temporary Protection,[63] to fulfil their international obligations towards *de facto* refugees in a situation of mass influx. However, temporary protection in the EU conception indicates, in the words of one critic, "a regime which allows states to opt out of ordinary asylum processing by leaving open the question of status or category."[64]

a. General Assembly Soft Laws on Temporary Protection

The first UNGA provision to mention temporary protection did so in the context of burden-sharing in situations of mass influx. It is worded as follows: The General Assembly "welcomes, within the context of the efforts of the international community to share the burden of caring for refugees, the work of the High Commissioner in examining the problems associated with providing refuge on a temporary basis to asylum-seekers in situations of large-scale influx with a view to finding durable solutions."[65]

In yet another resolution dealing with protection and durable solutions, the General Assembly backed up the UNHCR position by recognizing "the desirability of exploring further measures to ensure international protection to all who need it, including temporary protection and other forms of asylum oriented towards repatriation, in situations of conflict or persecution involving large-scale outflows and in which return home is considered the most appropriate durable solution."[66]

b. UNHCR ExCom Soft Laws on Temporary Protection

Temporary protection, under its original name of temporary refuge or asylum, another soft law derived from the cessation clauses contained in Article 1C of the 1951 Convention,[67] began as an attempt

[63] Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between members states in Receiving Such Persons and Bearing the Consequences thereof, COM (2000) final (Brussels 24 May 2000)
[64] G. Noll, Visions of the exceptional, Open Democracy Internet site, 27.6.2003.
[65] UNGA Res. 37/195, 18 Dec. 1982, OP4.
[66] UNGA Res. 49/169, 23 Dec. 1994, OP7.
[67] Volker Türk and Francis Nicholson, Refugee protection in international law: an overall perspective, in: Refugee Protection in International Law, UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003, p. 31.

to find a country for refugees no one wished to take in even on a temporary basis.[68] In ExCom Conclusion 15, 1979, detailed guidance was offered on various aspects of temporary asylum, with emphasis being placed on the need to ensure that "in cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge."[69]

Conclusion 19, 1980, entitled "Temporary Refuge" reiterated the principle of temporary shelter for refugees, stating "that in the case of large-scale influx, persons seeking asylum should always receive at least temporary refuge;" and "that States which, because of their geographical situation or otherwise, are faced with a large-scale influx, should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing."[70] The Conclusion ended by recognizing "the need to define the nature, function and implications of the grant of temporary refuge,"[71] a mission UNHCR would fulfil in numerous publications dealing with the subject of protection in mass influx situations.

By 1992, the terminology had taken on a modern ring, with the Executive Committee acknowledging that "the realization of solutions in a growing number of mass outflow situations is much facilitated where these are made an integral part of a comprehensive plan of action, which balances the interests of affected States and the rights and needs of individuals and, accordingly, encourages UNHCR to work together with States and other interested organizations to explore new solutions-oriented approaches, which might include temporary protection and necessary arrangements for burden-sharing, when a situation so requires."[72] In 1993, temporary protection had come to be assimilated with asylum strategies.[73] By 1994 it was presented within the context of the crisis in the Former Yugoslavia.[74]

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[68] ExCom Conclusion 5 (XXVIII) 1977, Asylum; 14 (XXX) 1979, General Conclusion on Int. Protection.
[69] ExCom Conclusion 15 (XXX) 1979, Refugees without an Asylum Country, para. f.
[70] ExCom Conclusion 19 (XXXI) 1980, Temporary Refuge, paras. (i) and (ii).
[71] Ibid., para. (f).
[72] ExCom Conclusion 68 (XLIII) 1992, General Conclusion on Int. Protection, para. (u).
[73] ExCom Conclusion 71 (XLIV) 1993, General Conclusion on Int. Protection, para. (m).
[74] ExCom Conclusion 74 (XLV) 1994, General Conclusion on Int. Protection, para. (r).

c. Focus on Iraqi Refugees

Temporary protection was what Iraqi mass influx refugees were granted in Iran, first in 1991 and then again in 1996 when 60,000 refugees were lodged in six camps inside Iran's western border with Iraq. Iran's top refugee official, Ahmad Hosseini, announced then that the Iraqi refugees would be accepted temporarily, until the situation in Iraq "became relatively convenient and safe."[75] Temporary forms of protection in view of the volatile situation in Iraq are also what UNHCR advised States to grant Iraqi refugees abroad, whether they be rejected asylum-seekers or newly arrived claimants.[76] Some benefit might develop to Iraqi refugees from these soft law innovations. On the whole, however, the danger persists that temporary protection might become the norm, making the idea of any permanent protection a thing of the past.

3.7. *Safe Areas*

Taking a step back in time, Turkey's behaviour in 1991, when it took measures to prevent displaced Iraqi Kurds from crossing into the country, led to the creation of a so-called "safety zone" in the crisis area. "While the concept of a 'safe area' is not recognized under international humanitarian law," writes Human Rights Watch, "such areas were created in northern Iraq in 1991 and in Bosnia-Herzegovina in 1993 with some success and much tragedy."[77] Actually, the Fourth Geneva Convention did embody in its articles 14, 15, 23 and 59 the implementation of safe zones for the protection of civilians in times of war. However, the safe haven policies of the 1990s were a new departure in that they respected neither the principle of consent, nor that of demilitarisation on which the Geneva Convention concept was based.[78]

a. Security Council Soft Laws on Safe Areas

Although no General Assembly resolutions on the subject could be traced, several Security Council resolutions endorsed the notion of safe areas in connection with the fighting in Bosnia and Herzegovina.

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[75] Safe Haven Collapses in Northern Iraq, USCR, Refugee Reports, Vol. 17, No. 9, Sept. 1996.

[76] Rupert Colville, Iraqi asylum seekers: UNHCR urges continued temporary protection until further notice, UNHCR Briefing Notes, 14 Nov. 2003.

[77] Human Rights Watch, III The Prospects for "Safe Areas" for Internally Displaced Iraqis, www.hrw.org/backgrounder/mena/iraq021203/3.htm.

[78] Sophie Haspeslagh, Safe Havens, Beyond Intractibility.org, 2003.

Thus, in April 1993, the Security Council demanded "that all parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act" and entrusted the United Nations with the task of monitoring the humanitarian situation in the said safe area.[79] Security Council Resolution 824 found the idea of safe zones in militarised areas such a good one that it recommended that "the concept of safe areas be extended to other towns in need of safety."[80]

b. UNHCR ExCom Soft Laws on Safe Areas

For refugee law, of course, the notion was very much of a novelty in search of some kind of a legal basis. Cautious endorsement of the policy by UNHCR was provided, among others, in Note A/AC. 96/799 where it was assimilated into direct protection-furthering preventive strategies: "The creation of safety zones inside countries of origin should be approached with caution, but would also benefit from rights and refugee protection principles and the national sovereignty issues involved, the modalities for ensuring security and an appropriate multilateral safety net, as well as methods for promoting durable solutions in such a framework."[81] Later however, UNHCR described safe-haven policies as "proactive, homeland-oriented and holistic",[82] linked them with the rhetorical mechanism of the "right to return"[83] and justified them on the grounds that they provided one of the best means to defend IDPs in situations of conflict.

c. Focus on Iraqi Refugees

Iraqi refugees, on the whole, benefited from their safe haven to the north of their country, although they, too, were exposed to attacks coming out of Turkey and, later on, Central Iraq. The experience in Bosnia-Herzegovina, however, has left even less positive memories making one wonder whether a repetition of past scenarios, for instance in connection with IDPs in post-conflict Iraq, will bring the world community more success than failure.

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[79] UN S/RES/819 of April 16, 1993.
[80] UN S/RES/824 of May 6 1993.
[81] Note on International Protection, UN doc. A/AC.96/799, 25 July 1992, para. 32.
[82] UNHCR State of the World Refugees: Fifty Years of Humanitarian Action, 2000, p. 4.
[83] ExCom Conclusion 85 (XLIX) 1998, para. hh.

3.8. *Burden-Sharing*

If temporary protection as standard refugee law practice is to flourish and bear fruit, it can only happen if its necessary correlative, burden-sharing, is given a legal shape which cannot be deformed at will. Burden-sharing, as we know, exists in developing form in the 1951 Convention. The substance of it must be provided with better soft-law provisions, until such time as the international community agrees to enhance predictability and approve a binding instrument functioning as a matter of law, a systematised mechanism to replace *ad hoc* responses.

a. General Assembly Soft Laws on Burden-Sharing

Since 1946, the General Assembly has continuously urged its member States to share the burden of assisting refugees. A typical example of a UN appeal to the international community takes the following form: After citing the relevant host countries, the General Assembly "urges the international community, in accordance with the principle of international solidarity and burden-sharing to assist the above-mentioned countries in order to enable them to cope with the additional burden that care for refugees and asylum seekers represents."[84]

b. UNHCR ExCom Soft Laws on Burden-Sharing

The link between temporary protection and solidarity in the form of burden sharing has also been recognised in various ExCom resolutions, the latest of them being framed in the following terms: The Executive Committee "Recognizes that countries of asylum often carry a heavy burden, in particular developing countries, countries in transition, and countries with limited resources which host large numbers of refugees and asylum-seekers, especially those who have hosted refugees for a long period of time; reiterates in this regard its strong commitment to international solidarity, burden and responsibility sharing; and reaffirms UNHCR's catalytic role in assisting and supporting countries receiving refugees, particularly developing countries, and in mobilizing assistance from the international community to address the impact of large-scale refugee populations."[85]

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[84] UNGA Res. 43/117, OP14.
[85] ExCom Conclusion on International Protection 95 (LIV), 2003, para. g.

UNHCR has examined the complexities of burden-sharing in several documents.[86] The 3rd Track of the Global Consultations has also sought to define mechanisms of international responsibility-sharing in mass influx situations,[87] without really achieving either consensus or some form of majority agreement.

c. Focus on Iraqi Refugees

If ExCom conclusions on burden-sharing, in spite of the considerable persuasive authority they carry, do not finally lead to the implementation of automatic mechanisms of assistance involving the entire international community, then future refugees – out of Iraq, as elsewhere – will pay the price, namely borders that fail to open however acute the emergency. As a representative of the host country, Iran pointed out recently in connection with mass exoduses: "The government and the people of Iran have encountered a lot of social, economic, cultural, political and security problems . . . it is certainly not fair for host countries to be left alone to cope with the repercussions and consequences of this problem."[88]

As we indicated earlier, the international response to assist the neighbours of Iraq – and in particular Iran as the host of the majority Iraqi refugees- was in fact not qualified as adequate. The principle of burden-sharing in the case of the Iraqi refugees happened to be superseded by a strong political inclination on the part of donors to keep their share down to a minimum.

3.9. *Voluntary Repatriation*

One solution to the problems facing host countries seriously affected by refugee flows is to reduce their refugee load by if possible, returning people to their country of origin through voluntary repatriation. The legal and protection framework supporting this concept of repatriation owes more to the UNHCR Statute and subsequent soft laws than to the 1951 Convention. In fact voluntary repatriation as such is not at all addressed in the 1951 Refugee Convention, though it has been argued that this particular solution to refugee

[86] UNHCR, International Solidarity and Burden-Sharing in all its aspects: National, regional and international responsibilities for refugees, Doc. A/AC.96/)05, 7 Sept. 1998.
[87] UNHCR, Global Consultations Update, 1 Aug. 2002, p. 5.
[88] Statement made by Mr M.R. Behzadian, Deputy Interior Minister for Planning and Programme to the 52nd Session of ExCom, Geneva, 1 Oct. 2001.

problems can be said to be implicit in the temporary nature accorded to the refugee status, the emphasis put on permanent solutions, and the voluntariness underlying Article 1C providing for cessation of refugee status.[89] Elsewhere, however, it is acknowledged by the same body that "it is clear that the Convention is predicated on the philosophy that durable asylum, rather than return, is the principal solution."[90]

a. General Assembly Soft Laws on Voluntary Repatriation

In 1946 the UN General Assembly's first attempt to give expression to how the refugee problem could be solved was formulated as follows: "The main task concerning displaced persons is to encourage and assist in every way possible their return to their countries of origin."[91] By 1949, the term "voluntary repatriation" had made its first appearance in UNGA texts. Over the years, it would be firmly coupled with "permanent solution to the refugee problem",[92] until permanent itself was dropped in favour of "durable"[93] Reference to returnees and resettlement activities on their behalf in countries of origin became common in UNGA terminology as of 1982.[94] Later, the repatriation of refugees would be linked with the terms "in safety and with dignity",[95] as the soft-law concept of the "right to return"[96] began to acquire considerable weight in refugee law discussions. Returnees were also credited with playing a positive role in reconstruction and reconciliation activities in their home country.

b. UNHCR ExCom Soft Laws on Voluntary Repatriation

As we mentioned above, the 1951 Convention does not refer to voluntary repatriation. UNHCR's Statute, on the other hand, speaks explicitly of "assisting governmental and private efforts to promote voluntary repatriation."[97] Executive Committee guidance in the matter as set out in Conclusions 18[98] and 40[99] reiterates the right of refugees to return voluntarily to their country, calls for inter-

[89] Discussion Note on Protection Aspects of Voluntary Repatriation, UNHCR doc EC/1992/SCP/CRP.3, para. 6.
[90] Protection of persons of concern to UNHCR who fall outside the 1951 Convention: a discussion note, UNHCR doc. EC/1992/SCP/CRP.5, para. 7.
[91] UNGA Res. 8(1), 12 Feb. 1946, OP (c) (iii).
[92] UNGA Res. 2789 (XXVI), 8 Dec. 1971, PP5.
[93] UNGA Res. 47/105, 16 Dec. 1992, OP9.
[94] UNGA Res. 37/197, 18 Dec. 1982, PP7.
[95] UNGA Res. 53/125, 9 Dec. 1998, OP12.
[96] UNGA Res. 49/169, 23 Dec. 1994, OP9.
[97] UNHCR Statute, 1950, para. 1.
[98] ExCom Conclusion 18 (XXXI) 1980, Voluntary Repatriation, para. (a) to (e).
[99] ExCom Conclusion 40 (XXXVI) 1985, Voluntary Repatriation, para. e.

national action in favour of voluntary repatriation and establishes UNHCR's mandate for direct involvement in monitoring and assisting returnees.

c. Focus on Iraqi Refugees

It was on the basis of this soft-law principle that UNHCR took over the supervision of the return of Kurds to northern Iraq in 1991, an operation carried out with a fair degree of success. In UNHCR practice, a leading prerequisite for proper voluntary return has been to ensure that the basic terms and conditions of return are consolidated in a formal document. In the case of Iraq, this was achieved through an *ad hoc* Memorandum of Understanding, signed between the Iraqi authorities and the UN representative in 1991.[100]

Today's Iraqi refugees, involved in ongoing return or awaiting voluntary (or involuntary, as the case may be) repatriation to Iraq at some future date, will no doubt also mark refugee practice for the future. Already Iraq's "Ministry of Displacement and Migration" launched a donor conference in Doha to turn burden-sharing into a fact before the event. According to the figures presented at this conference some 500,000 refugees and asylum seekers are expected to return to Iraq. Even higher figures were put forward for IDPs, whereas the stateless are estimated at hundreds of thousands. Donors were asked for 83 million dollars just to cover the ministry's operational budget for 2004 where some 75,000 Iraqis are expected to repatriate.[101] If such sums do materialize and are indeed used to help the refugees, one can say that the voluntary repatriation system is not devoid of merit.

Another outcome of the repatriation principle, clearly involuntary this time, the Internal Flight Alternative (IFA) has generally done disservice to Iraqi refugees as individuals seeking international protection in one of the Western countries. The so-called IFA principle, which States have begun to increasingly apply, has often been invoked in recent times to deny Iraqi asylum-seekers refugee status in the West. The IFA notion is said to be derived from the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, which states with some ambiguity: "The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality."[102]

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[100] See above, Chapter III, Part A.

[101] Iraq urges donors to ease plight of hundreds of thousands of refugees, AFP World News, 26.5.04.

[102] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva, 1979, re-edited 1992), at para. 91.

According to James Hathaway and Michelle Foster, the IFA notion remained largely dormant until the mid-eighties.[103] Thereafter, it was retrieved by Western countries looking for legal arguments to restrict the scope and application of the Refugee Convention. It was applied, for instance in The Netherlands, to refuse asylum to Iraqi citizens on the grounds that the north of Iraq constituted an IFA.[104]

Until the outbreak of the 2003 war, UNHCR's recommendation to Western countries had been to refrain from returning rejected Iraqi asylum-seekers to government-controlled areas, "which had the effect of supporting the existence of the IFA in Northern Iraq."[105] The refugee agency however changed its attitude later, issuing new guidelines urging States to grant temporary protection to Iraqis and advising that asylum claims from individual Iraqi citizens should not be processed for an initial period of three months.[106] The measure was no doubt taken to counter plans being made by some EU countries such as Britain to return Iraqi refugees, under a compulsory repatriation programme, either to Northern Iraq[107] or perhaps even to eventual UN-protected so-called "safe havens".[108]

3.10. *Comprehensive Approaches*

Comprehensive approaches entered refugee literature and official documents in the 1980s in connection with the root causes theory of mass exoduses. Among the scholars to advocate a new conceptualisation of refugee protection was Gervase Coles who argued against the "exile bias", prevalent in refugee law thinking, and in favour of addressing the causes of forced displacement or migration directly in the countries of origin.[109]

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[103] James C. Hathaway & Michelle Foster, Internal protection/relocation/flight alternative as an aspect of refugee status determination, in: Refugee Protection in International Law, UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003, pp. 357–417, at p. 362.

[104] European Legal Network on Asylum (ELENA), The Application of the Concept of Internal Protection Alternative, Research paper, updated 2000, pp. 40–41.

[105] Monette Zand and Erin Patrick, Reconciling Refugee Protection and Security Concerns in Wartime, The Case of Iraq, MPI Policy Brief, No. 3, April 2003, p. 3.

[106] UNHCR urges states to grant temporary protection to Iraqis, UNHCR News Stories, 26 Mar. 2003.

[107] Iraqi Refugees Should Return, Says Blunkett, Daily Telegraph, 25 Nov. 2003.

[108] Alan Travis, 20% rise in asylum applications fuelled by increased numbers from Iraq and Zimbabwe, The Guardian, 1 Mar. 2003.

[109] G.J. Coles, Approaching the Refugee Problem Today, in G. Loescher and L. Mohahan (eds.), Refugees and International Relations, 1989, p. 387, 395.

a. UN General Assembly Soft Laws on Comprehensive Approaches

UN General Assembly endorsement of the comprehensive approaches concept has been a given ever since Prince Sadruddin Agha Khan's 1982 report on human rights and mass exoduses and the establishment of the UN Working Group on International Cooperation to Avert Further Mass Flows of Refugees. UNGA resolutions have reaffirmed "the need for the international community to consider comprehensive approaches for the coordination of action with regard to refugees, returnees, displaced persons and related migratory movements,"[110] just as they have called upon UNHCR "in consultation with States concerned and in coordination with relevant intergovernmental, regional and non-governmental organizations, to continue to consider and develop comprehensive regional approaches to the problems of refugees and displaced persons."[111]

b. UNHCR ExCom Soft Laws on Comprehensive Approaches

Comprehensive approaches, in UNHCR's literature, paved the way to bringing about profound changes in the agency's own attitude towards its statutory protection mandate, as it acknowledged in the following statement: "The scope of UNHCR activities has also changed from a primarily reactive approach largely focused on protection and assistance in countries of asylum to an approach in which protection, with asylum as an indispensable tool, provides the basis for a strategy of prevention, preparedness and solutions, with increasing emphasis on activities in countries of origin."[112]

UNHCR's comprehensive approaches have been implemented in various crisis situations involving large-scale influx such as in Indochina, Mozambique or Central America. Refugee protection is henceforth seen in terms of integration with human rights protection, preventive strategies and post-crisis management and reconstruction playing a central role. In its own words: "a comprehensive approach is one in which a variety of different but concerted measures are brought to bear in an effort to break the cycle of exile, return, internal displacement and exile. The ultimate goal of such an approach is to promote the overall stability of the society and respect for the rights of its citizens, including refugees and returnees, and thus remedy the factors causing displacement.(. . .) For UNHCR,

[110] UNGA A/RES/50/151, 9 Feb. 1996.
[111] Ibid., para. 3.
[112] UNHCR, Comprehensive and regional approaches to refugee problems, EC/1994/SCP/CRP.3, 3 May 1994, para. 3.

as one of the key actors in a comprehensive approach, the concept applies to the nature of the organization's action across a spectrum from protection and assistance to solutions and prevention, within a region or in response to a shared problem."[113]

c. EU Soft Laws on Comprehensive Approaches

"The EU's discourse on comprehensive approaches is similar to UNHCR's, apart from the fact that it also encompasses voluntary migration."[114] For EU purposes, the fight against the root causes of migratory movements – making no clear distinction between asylum and immigration – involves:

- conflict prevention, peace-keeping, protection of human rights and the rule of law
- protection of refugees and IDPs in the region of origin wherever possible
- support for economic and trade liberalisation
- provision of development aid
- combating illegal immigration
- conclusion of readmission agreements
- cooperation in situations of mass influx.[115]

The main problems with the EU agenda, as opposed to that of UNHCR's, for instance, are: 1. it is driven exclusively by domestic concerns; 2. control not protection is its main objective; 3. linking development cooperation aid policies and migration management is contrary to the fundamental principles of equality, solidarity and social justice, recognised under various UN human rights documents.

d. Focus on Iraqi Refugees

Iraqi refugees and asylum-seekers are among the groups specially targeted by EU comprehensive approaches and the forced return to the country of origin they imply. In concrete terms, the relevant EU authorities have already drafted and adopted a so-called action plan for Iraq comprising data on asylum and immigration, plus an analysis of the political, economic and human rights situation in

[113] UNHCR, Note on International Protection, A/AC/96/863, 1 July 1993, para. 11; ExCom Conclusion No. 80 (XLVII) 1996, Conclusion on Comprehensive Approaches within a Protection Framework.

[114] Agnès Hurwitz, The Externalisation of EU Policies on Migration and Asylum: Readmission Agreements and Comprehensive Approaches, Refugee Studies Centre, 2002, p. 12.

[115] Ibid., p. 13.

the country in view of expediting the removal of Iraqis from EU countries as soon as this can be done without encountering widespread international blame.[116]

Aside from particular European behaviour, Iraq cannot set a successful example of an international comprehensive approach in dealing with the root causes of refugee production. Repression, gross violations of human rights and resort to banned weapons by the government of Iraq against its own people were important underlying causes of refugee outflow in Iraq that did not receive adequate reaction by the international community.

4. Soft Laws Formulated to Weaken Protection

By and large, as we have seen, soft laws can have a good effect on international refugee law, strengthening protection principles, closing gaps in the system, and freeing it from a lack of appropriate legal provisions to meet modern refugee needs. Redress for some conspicuous shortcomings has been provided by provisions aimed at expanding the initial refugee definition to include victims of forced displacement, massive refugee outflows and the internally displaced. At the same time, harmful innovations have slipped in as well; including changes in the refugee system, some of which blatantly fail to serve the refugee cause.

Thus, many states which had thus far subscribed to the international refugee instruments – the European Union, as we noted above, is a case in point – are currently undertaking a radical overhaul of the protection system through legislative and inter-state arrangements which restrict access to asylum and the provision of legal rights to refugees.[117] New state practice in the refugee protection field, made possible through the regional soft-law approach, has taken on such alarming dimensions that one UNHCR high official has described it as a "pull back from the legal foundation on which effective protection rests."[118]

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[116] Council of the EU, Terms of reference of the High Level Working Group on Asylum and Migration. Doc. 5264/2/99, 22 Jan. 1999.

[117] Brian Gorlick, Refugee Protection in Troubled Times: Reflections on Institutional and Legal Developments at the Crossroads, in: Problems of Protection: The UNHCR, Refugees and Human Rights in the 21st Century, Nikllaus Steiner, Gil Loescher and Mark Gibney, (eds.), Routledge, 2003, pp. 79–100.

[118] Dennis McNamara, Statement to the Sub-Committee of the Whole on International Protection, Oct. 1995.

The refugee protection agency, does its best within the limits of its mandate. However, UNHCR often seems to be caught between bad and worse. Among the recent challenges to its most cherished principles that it has been called upon to face, have *inter alia* been:

1. The introduction of off-shore procedures for processing refugee claims as happened in 1994 with Haitian or Cuban asylum seekers, or again in 2001 in the Tampa boat incident when the Australian authorities forced several hundred Afghan and Iraqi asylum seekers on to the Island of Nauru to await processing of their claims.[119]
2. The setting up of dubious "safe zones" in Yugoslavia or Northern Iraq.[120]
3. The growing use of administrative detention for asylum-seekers in Europe and elsewhere.[121]
4. The misuse of readmission agreements.[122]
5. The application of so-called "safe third country" procedures and the recourse to first country of asylum.[123]
6. Interdiction on the high seas.[124]

UNHCR began by combating these and similar restrictive measures. Over time, however, the agency has had to give in. As B. Gorlick writes: "Realizing that the international system of refugee protection is in disarray and could possibly face "fragmentation, or worse, disintegration", UNHCR's Executive Committee gave the green light for Global Consultations aimed at revitalising "the international protection regime and to discuss measures to ensure that international protection needs are properly recognised and met, while due account is also taken of the legitimate concerns of states, host communities and the international community generally."[125]

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[119] B. Gorlick, op. cit., note 15.

[120] B.S. Chimni, The Incarceration of Victims: Deconstructing Safety Zones, in: International Legal Issues Arising under the United Nations Decade of International Law, N. Al-Naumi & R. Meese (eds.), Kluwer Law International, 1995, pp. 823–854.

[121] Detention of Asylum-Seekers in Europe, UNHCR European Series, vol. 1, No. 4, 1995, pp. 9–12.

[122] Working Paper on Readmission Agreements prepared by the secretariat of the Inter-Government Consultations on Asylum, Refugee and Migration, Geneva, August 1994.

[123] UNHCR, An Overview of Protection Issues in Western Europe. Legislative Trends and Positions Taken by UNHCR, European Series, vol. 1, no. 3, 1995, at pp. 12–14, 14–21.

[124] Sharryn Aiken, Manufacturing Terrorists, Refugees, National Security and Canadian Law, Part II. Refuge., vol. 19, No. 4, 2000, pp. 54–127.

[125] B. Gorlick, op. cit., p. 00.

In other words, UNHCR's main role in the present upheavals of the refugee system has been damage control wherever possible.

4.1. *The EU* Non Entrée *Regime*

The unravelling of the refugee regime has become the special focus of the European Union countries, with their conviction that comprehensive approaches will make up for declining standards of refugee protection. Many of the refugee-related measures contained in evolving EU treaties "test the minimum threshold of protection required by the 1951 Geneva Convention."[126] EU treaties are actually regional treaties. Yet they might over time acquire higher significance in international law. The other danger is that EU countries may well have found the way to practically give up their refugee and human rights commitments under present international law by arguing they are bound by other treaty obligations.

Since the 1980s, the European Union, along with other developed States, has implemented a *non entrée* regime based on a series of measures of varying degrees of legitimacy in international law. These included the imposition of visa requirements, carrier sanctions against transportation companies bringing illegal aliens to their territory, interdiction at sea, and re-interpretations of refugee law in order to arrive at a finding of non-responsibility, allowing States to compel asylum seekers to apply for asylum in another so-called "safe third country".

On the legislative level, the Dublin Convention was signed between member States of the EU in 1990 and came into force in September 1997. The Convention set out to determine which member was responsible for assessing an asylum claim. A regulation of the Convention was proposed by the European Council in December 2003, targeting so-called "secondary movements" of asylum seekers from one Member State to another. But the actual parameters of a common EU asylum policy were set out by the 1997 Amsterdam Treaty, Title IV (Community Law, First Pillar). Amsterdam also incorporated the 1985 border control Schengen Agreement and its subsequent decisions. In 1999, the Tampere agreement defined in greater detail a Common European Asylum System (CEAS).

Reception of asylum-seekers, asylum eligibility, complementary or subsidiary forms of protection and temporary protection represent

[126] Andrew Shacknove and Rosemary Byrne, The Safe Country Notion in European Asylum Law", Harvard Human Rights Journal, Vol. 9, Spring, 1996, p. 185.

the first significant regional codification of refugee protection standards since the 1969 OAU Convention and the 1984 Cartagena Declaration, binding EU standards on procedures for status determination.

Key EU asylum legislation includes:

– Council Directive on minimum standards for granting temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (2001/55/EC of 20 July 2001)[127]
– Council Directive laying down minimum standards on the reception of applicants for asylum in Member States – Reception Directive (27 January 2003)[128]
– Council Regulation (EC) No 343/2003 of 18 Feb 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States (18 February 2003)[129]
– Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (subject to parliamentary scrutiny) – Asylum Procedures Directive[130]
– Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection – The Qualification Directive[131]

The Asylum Procedures Directive, the latest in the EU asylum law harmonisation efforts, coincided with the EU enlargement process bringing a further ten countries into the Union to serve, in refugee issues, as buffer states shielding the core EU countries of Western Europe. UNHCR's reaction to the Directive has been reserved at best, with the agency expressing fears that this piece of legislation may lead in practice to breaches of international refugee law.[132] Chief among UNHCR concerns are rules permitting the designation of "safe third countries", deportation of asylum-seekers even

[127] OJ (Official Journal of the EC) L 212/12 of 7 August 2001, p. 12.
[128] 2003/9/EC, 27 Jan. 2003, p. 8.
[129] OJ (Official Journal of the EC) L 50/1, 25/ Feb. 2003 (Dublin II), p. 10.
[130] COM (2002) 326 final/2 of 3 July 2002, p. 59; Inter institutional File: 2000/0238 (CNS) of 29 April 2004, p. 34.
[131] COM (2001) 510 final, Brussels 12 September 2001, p. 64; Inter institutional File: 2001/0207 (CNS) of 30 March 2004, p. 41.
[132] UNHCR regrets missed opportunity to adopt high EU asylum standards, UNHCR Press Release, 30 Apr. 2004.

while their appeals are pending, and no binding commitment to satisfactory procedural standards.

The safe-third-country concept and the so-called "effective protection" it is apparently capable of providing has gradually come to dominate the European Union's approach to asylum and refugee protection issues, to the exclusion of other considerations. EU member States have all signed up to the 1951 Refugee Convention and the 1967 Protocol, under the provisions of which they are called upon to honour their international commitments, primarily the obligation of *non-refoulement*.

However, neither the Convention, nor the Protocol stipulates clearly in which state a person is entitled to seek protection. In the absence of such stipulation, protection, in the sense of physical safety, can be extended to an asylum-seeker anywhere at all, without any breach of the *non-refoulement* principle. In fact, the most appropriate place for such safety, in EU logic, would be the place closest to the country of origin of the applicant. Failing that, EU States have attributed to themselves a legal right to deport an asylum-seeker back to any state transited en route to the final destination country by means of readmission treaties negotiated and signed with buffer countries, including places such as Albania or Croatia.[133]

It must also be noted that EU has managed to do pioneer work as well in broadening both the refugee definition and the *non-refoulement* principle by combining international refugee law with international human rights law. In its Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection,[134] EU member countries divided the notion of protection into two categories; refugee protection, based on the "full and inclusive application" of the Convention, and subsidiary protection, based on international human rights with slightly lower standards of treatment.

Whatever reservations one might feel about the tightening of the European asylum system as a whole, one must acknowledge that one particular grey area in international protection has received a tentative regional response. Or, as one analyst put it, the EU Proposal "is the first supranational instrument to outline a comprehensive complementary protection regime, moving "complementary

[133] Joanne van Selm, The EU as a Global Player in the Refugee Protection Regime, AMID Working Paper Series, 35/2004, p. 14.
[134] COM (2001) 510 final (Brussels 12 Sept. 2001), p. 64, p. 4.

protection" beyond the realm of *ad hoc* and discretionary national practices to formalise it as part of EU asylum law."[135]

4.2. *Export Value of EU Soft Laws*

The significance of future EU asylum standards will go far beyond the confines of the continent. Europe's vision of an "area of freedom, security and justice" as applied to the asylum policies it decides to pursue will have a profound effect on the rest of the world, or as one UNHCR representative expressed it: "the 'export value' of asylum developments in Europe cannot be underestimated."[136] UNHCR pinned its hopes on the Tampere Summit, urging EU member-countries "to address refugee and migration issues, firmly rooted in a rights-based approach to asylum, and bringing the full range of political, economic, development and aid policies in a holistic perspective."[137]

EU countries responded by shifting their attention to migration questions, sticking to their stringent *non entrée* policies, re-admission agreements with Central European countries, and a highly restrictive interpretation of the 1951 Convention refugee definition.

Taking their signal from their European counterparts, developed and developing countries alike have begun challenging the basic refugee instruments. Asylum policy, originally meant as a tool of protection has undergone the strange transformation of becoming an instrument of border control and, therefore, of exclusion.

As an example, the unusual case of Australia, which has already adopted asylum policies for which no international precedent exists, requires brief comment. Fully adjudicated refugees in that country, recognized after a full asylum determination process as being genuinely in need of protection for 1951 Refugee Convention reasons were granted only temporary protection status.[138] Thus, a refugee mechanism devised to handle situations of mass influx has

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[135] Jane McAdam, The European Union proposal on subsidiary protection: an analysis and assessment, New Issues in Refugee Research, Working Paper No. 74, UNHCR, Dec. 2002, p. 5.

[136] Anne Willem Bijleveld, The European Migration and Refugee Policy in the Context of the Wider, Global Refugee Movements, Closing Lecture in Cicero Foundation Great Debate Seminar, Paris 10–11 June 1999, p. 1.

[137] Ibid., p. 1.

[138] Human Rights Watch, Australia's Temporary Protection Visa for Refugees, May 2003, p. 1.

been turned into an all-purpose protection principle, leaving the individual refugee in a limbo.

5. Soft Laws and Precedents for the Post War Iraq

If durable solutions are to be found for all Iraqi refugees covered by its mandate, a difficult set of tasks faces UNHCR. Apart from arranging for the repatriation of some 500,000 Iraqis from around the world, overseeing their reintegration in Iraq even while monitoring returning IDPs, UNHCR will also be called upon to deal with the question of statelessness in connection with Faili Kurds, expelled from Iraq in the 1970s, in keeping with Article 11 of the 1961 Convention on the Reduction of Statelessness[139] and ExCom Conclusion on the Reduction of Statelessness and Protection of Stateless Persons.[140] Dealing with any new massive outflows generated after the cessation of hostilities will fall within its competence, too; as will finding appropriate solutions for the more than 134,000 refugees living in Iraq at the outbreak of war, comprising some 20,300 Iranians, 13,700 Turkish Kurds and 100,000 Palestinians,[141] In addition, the spontaneous movement of over 800,000 internally displaced persons, many of whom now seem to expect that they will be able to enjoy greater rights in a post-war Iraq is another ongoing challenge.[142]

In a recent document entitled Preliminary Repatriation and Reintegration Plan for Iraq,[143] UNHCR pointed out that for the past two decades, Iraqis have constituted one of the largest refugee groups in the world, and it presented the following profile, in table form, of the current caseload of Iraqi refugees in the Middle East and beyond.[144]

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[139] Convention on the Reduction of Statelessness, 30 Aug. 1961, entry into force 13 Dec. 1975, pursuant to UNGA RES 896 (IX) of 4 Dec. 1954.
[140] ExCom Conclusion 78 (XLVI) 1995, para. (a).
[141] World Refugee Survey, US Committee for Refugees (editor), June 2003, p. 162.
[142] World Refugee Survey, US Committee for Refugees (editor, May 2004, p. 30.
[143] UNHCR, Preliminary Repatriation and Reintegration Plan for Iraq, April 2003, p. 23.
[144] Ibid., p. 7.

PROFILE OF CURRENT CASELOAD (around 930,000 persons)

Country of Asylum	Current Locations	Data Source	Areas of Origin
IRAN (204,000)	22 camps situated along Iran/Iraq border	2001 Government census	Two main sub-groups: Kurds mainly from Erbil and Sulymania (20%)
	Spontaneously settled refugees mainly in urban areas notably in Tehran and Qom	2001 Government census	Arabs from the central and southern region (80%)
JORDAN (300,000)	Spontaneously settled refugees and asylum seekers mainly in urban areas	UNHCR Country Operation Plan 2001–2003	Some 80% of the Iraqi refugees, asylum seekers and other spontaneously settled in Jordan
	Spontaneously settled persons RSD-rejected or not registered with UNHCR in urban areas		originate from the central or southern regions of Iraq. The areas of origin of the remaining 20% are widespread throughout Iraq
OTHER COUNTRIES IN THE REGION (Kuwait, Lebanon, Libya, Saudi Arabia, Syria, UAE,Yemen, etc.) (165,000)	Spontaneously settled refugees mainly in urban areas Other unregistered refugees mainly in urban Areas Residual caseload in Saudi Arabia (Rafha camp-5000)	UNHCR Country Operation Plans 2001–2003	Most of these refugees (65%) originate from the central and southern regions and the remainder (35%) from the northern provinces of Iraq
OTHER COUNTRIES (261,000)	183,000 refugees and 78,000 asylum seekers in industrialized countries		The area of origin of these refugees and asylum seekers is not known precisely

Turning away from the Middle East, Iraqis happened to constitute the single largest group of asylum-seekers in industrialised countries in 2001, with more than 51,000 applications lodged.[145] UNHCR's

[145] Monette Zand and Erin Patrick, op. cit., p. 3.

repatriation plan to post-conflict Iraq for pre-war refugees foresees formal arrangements with the relevant authorities, followed by the safe and dignified return of as many Iraqis as are willing to go back, a return carried out under its own mandate and monitoring responsibility and in active partnership with IOM. The agency's original mandate has also been broadened to include among persons of concern to UNHCR the category of rejected Iraqi asylum-seekers.[146] During this process, it is also UNHCR's intention to undertake remedial action in favour of Iraqi IDPs, based on the Guiding Principles on Internal Displacement[147] and pursuant to ExCom Conclusion 75,[148] in what it terms a "solid collaborative UN approach".[149]

As for post-conflict refugees, if any, many countries neighbouring Iraq have already cited security considerations to justify border closures in the case of a crisis. Attempts to find protection outside the region will pose its own series of problems: visa restrictions, interception at sea, return to countries of transit, etc. Third-country resettlement, where the US used to play a major role in the past, has seemingly also been put on hold as far as the Iraqis are concerned, with only 3,554 refugees being resettled in America in 2002 as compared to 12,086 a year before.[150]

Since 1976, the UNHCR ExCom has appealed to States to offer resettlement possibilities to specific groups of refugees. Throughout the 90s, ExCom urgently noted "the links between protection and resettlement" and underlined "the need for States to provide adequate places for refugees in need of resettlement."[151] A recent ExCom Conclusion, however, takes into account the new climate, when it states that the Executive Committee "Reiterates the crucial importance of achieving durable solutions for refugees and urges States and UNHCR to continue their efforts in this regard to promote and facilitate, in conditions of safety and dignity, voluntary repatriation as the preferred solution, in addition to working on local integration and resettlement opportunities where appropriate and feasible."[152]

Yet past precedents exist, both operational and legal, regarding resettlement or a comprehensive approach, which could be put to

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[146] Anne Willem Bijleveld, op. cit., p. 3.
[147] Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add. 2.
[148] ExCom Conclusion specific to Internally Displaced Persons, 75 (XLV) 1993, para. g and j.
[149] Ibid., p. 8.
[150] Monette Zard & Erin Patrick, op. cit., p. 5.
[151] ExCom Conclusion 61 (XLI) 1990, para. t.
[152] ExCom Conclusion (LIV), 2003, para. i.

good use if ever the Iraqi refugee situation deteriorated. New solutions could then be forged to meet changed conditions, as in 1991 when the opening of a "safe haven" within Iraq created in itself a "containment-oriented" precedent, now an integral part of soft-law procedures. This was later applied to refugee situations elsewhere. That the results then obtained were mixed, had perhaps less to do with the notion of the safe haven as such, and more to do with faulty implementation.

In a political climate dominated by security concerns, the example of how the exodus of Vietnamese "boat people" to Southeast Asian countries in 1979 was handled might serve as an example of what could be done with Iraqi refugees should a new exodus take place once the conflict comes to an end. To prevent involuntary return to Vietnam, several industrialised countries worked with UNHCR to create the "Comprehensive Plan of Action" (CPA) which allowed two million Vietnamese to resettle permanently in third countries outside the region,[153] while others were returned to the home country with safety assurances monitored by UNHCR. Regional countries of first asylum received substantial help in hosting and processing refugees, along with the firm commitment that the opening of their borders would be only a temporary matter.

The reason why the CPA set such a significant precedent was because it lived up to its name and was indeed comprehensive in every sense of the term. It comprised a mix of measures which safeguarded as much the protection of refugees as it enabled the repatriation of non-refugee migrants and the controlled emigration of those with family in third countries. Refugee law norms were respected throughout as:

- temporary protection, still in its infancy then, became the mechanism applied both to boat arrival refugees and those in first asylum countries;
- refugee status determination procedures were carried out in countries of first asylum;
- a clear distinction between refugees and migrants was established from the start;
- durable solutions were found which included both resettlement and voluntary repatriation.

The Humanitarian Evacuation Plan for 90,000 Kosovo Albanians, who were airlifted from the Macedonian border to several other third countries where the Kosovars were received under a tempo-

[153] Monette Zard & Erin Patrick, op. cit., p. 8.

rary protection regime, constitutes another such precedent case which might prove useful if another Iraqi emergency broke out.

As for successful repatriation of a mixed refugee-IDP population, an example that comes to mind is that of Mozambique where the establishment of Tripartite Commissions were set up with UNHCR, the Mozambique Government and the Governments of six neighbouring countries in the region. Through the establishment of a solid legal and institutional framework and a coordinated regional approach to repatriation, millions of refugees and IDPs were successfully assisted.

UNHCR is justly proud of these and similar achievements,[154] a mixture of hard and soft law, which could conceivably be repeated in Iraq when the political situation is once again in hand. Today's historical precedents will clearly affect tomorrow's legal doctrine. In this sense then, the choices the international community finally makes in addressing the question of Iraqi refugees might well set refugee law moving down a new path.

Finally, the 26 May 2004 Doha donor conference for Iraqi refugees[155] might have turned out to establish another important refugee-related precedent, bringing burden-sharing soft law that much closer to achieving customary law status.

If, however, instead of all the above, precedents are sought in Australian municipal law which has already affected the standards and procedures of some EU directives and which in turn will have an impact on asylum states elsewhere, including the USA and traditional influx-host countries, people looking for shelter will be even more disqualified than they are at the moment.

Off-shore processing of refugee claims Australian style, temporary processing status at best for claimants or the need to re-prove refugee claims whenever changed circumstances in the home country so demand, are among the legal precedents which are being applied to the Iraqi refugees today. The logical conclusion of such treatment would be a situation in which recognized refugees are suddenly turned back into rejected asylum-seekers and then forced to return to their country of origin, whatever may be the conditions obtaining on the ground.[156]

For its part, the newly established EU legal asylum framework, will reveal in its day-to-day implementation what place, if any, has

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[154] UNHCR, Statement by Ruud Lubbers, 1st Meeting of the High Commissioner's Forum, 26 June 2003.
[155] Iraq urges donors to ease plight . . ., op. cit.
[156] Human Rights Watch, op. cit., p. 3.

been left in it for refugees fleeing Iraq in the future. Containment, readmission and return policies, all three entailing serious risks of *refoulement*, have begun to take on hard-law status in European countries as national municipal laws undergo transformation. The focus has shifted in today's political Europe from refugee protection to fighting illegal immigration. The EU's comprehensive approach to migration and asylum will inevitably lead to weakened protection for refugees. Such being the case, it is greatly to be feared that international refugee law in its current form will also figure among the victims of this soft-law process. The next refugee crisis coming out of Iraq will reveal the full extent of the weaknesses in the present normative framework when it is called upon to support operations in the field.

6. Conclusion

If the applicability of international law to refugee protection continues to retain much of its initial validity, a major reason is simply the flexibility that extensive soft-law provisions bring to the system. Progress has been made in several areas, in particular regarding internal displacement, which remains till today a wholly soft-law phenomenon, and the issue of mass influx. By developing soft laws and establishing precedents for the protection and well being of refugees, the international community has tried -with relative success- to bridge the inherent lacunae in International Refugee Law. Soft laws have been efficient in dealing with certain aspects of refugee protection where hard laws did not suffice. This amounts to relative efficiency and success of the soft laws. They should not however be regarded as substitutes to international instruments of law.

On the other hand, one should not lose sight of the fact that it is through the application of soft law that essential parts of the original legal system are presently being dismantled. Some progress has been achieved, and lacunae in existing refugee instruments have been bridged on an *ad hoc* basis, often to the benefit of the long-suffering refugees of Iraq. However, fresh endeavours must be pursued against the new trend, which is currently being adopted, of unravelling the present system. In other words, much still remains to be accomplished before it can be said with any accuracy that the world community has empowered the refugee protection regime sufficiently to act on their behalf in a spirit of equitable collective solidarity and responsibility.

Chapter 5

Evaluation and Recommendations

In the preceding pages, we discussed different aspects of international law as applied to protect Iraqi refugees who fled their country for reasons of persecution, general violence, violation of human rights and breaches of international humanitarian law by their government during the past several years. We analyzed different aspects of three branches of relevant international law, namely international refugee law, international humanitarian law and international human rights law, and their protection mechanisms in favour of refugees in general and for Iraqis in particular.

It was established that there exist serious lacunae in the international mechanism of refugee protection and that, in the absence of a modern contractual basis for an enhanced level of protection, the international community has tried innovative ways and means to bridge the gaps, although not always very successfully.

In chapter one, we elaborated on the purpose of this study and introduced the underlying questions to which our research needed to seek answers. We also introduced the main arguments and findings.

In chapter two we started with a historical review of why Iraq has maintained its potential as a major refugee producer in the world. In this context, interactions between the three main ethnic and religious groups of Iraq's inhabitants; Shiites, Sunnis and Kurds, was discussed, and the role which was played by uprisings, conflicts and wars in the contemporary history of Iraq was touched

upon. Different refugee crises of Iraq were reviewed and the role and legal standing of the neighbors of Iraq as well as relevant international organizations vis-à-vis Iraqi refugees were discussed. In the same chapter we studied the nature of the continuing humanitarian challenges that prompts the application of international law for the protection of Iraqi victims of movements of people.

Chapter three was dedicated to the architecture of refugee law and international mechanisms of protection, set up by the United Nations and international humanitarian agencies. We elaborated on the international relief system, including the role of non governmental humanitarian actors and assessed various humanitarian activities in favor of Iraqi refugees, which have turned Iraq into a melting pot of international humanitarian operations. It was argued that refugees were left more to the mercy of their neighboring countries than to the integrity of international law and the UN relief system that has, *per se*, evolved enormously over time. International refugee instruments were also reviewed and the legal basis for humanitarian intervention in Iraq was discussed. The much varied legal adherence, and behavior of regional hosts to the Iraqi refugees was illustrated.

The extent of applicability of international law in favour of refugees in general and Iraqi refugees in particular was the focus of chapter four. We discussed the shortcomings of international law as regards the definition of refugees, the evasiveness of countries in accepting treaty obligations, lack of protection for the internally displaced persons, the unresolved issue of mass influx, and international burden-sharing in dealing with the sheer numbers of refugees, especially in cases of mass exodus.

We established that the conventional definition of refugees as reflected in the existing hard-law instruments is not up-to-date and relevant. It is therefore no longer applicable to the needs of our time. The evolution of the refugee phenomenon throughout the past fifty years is sufficient to account for the gap between the provisions of the Convention and its Protocol and realities on the ground. The focus of the Convention on individuals as refugees makes it unsuitable to protect refugees in the massive shape and form the world has come to know today.

It was however clear that the Convention should be given credit for establishing an important principle of today's customary international law, namely *non-refoulement*. But it is this same principle which has also turned out to be the main obstacle to a modern contractual definition of refugees, as states show greater resistance to any broadening of its initial scope.

The protection regime for refugees as compared to IDPs was discussed at length and the insufficient recognition by international law of IDPs as a group was documented. Here we elaborated on the legal grounds for the modern concept of humanitarian intervention in favour of IDPs and evaluated it against the well established UN Charter principle of state sovereignty. The existing legal regime for the protection of this category of victims was extracted from the three branches of law as well as UN practice. Human rights law was credited as having the highest impact on the protection of the IDPs. The legal and operational dilemma for restitution of the rights of the Iraqi IDPs was also examined.

One of the major issues under consideration in refugee studies is the protection of people in mass exodus, which is largely ignored by the refugee Convention. The concept of temporary protection is designed to help this category of refugees. We argued that this concept has yet to become a tool secure in public international law. Mass influx refugees still continue to be seen more as a threat to the international community than as a group of people in need of legal protection. It was our view that, if there were to be any new outflow of refugees from Iraq, it would again be primarily in the form of mass influx. Since the level of legal and operational protection to be extended to such people has not substantially changed, it is expected that the same reactions will mark the behaviour of the neighbours of Iraq and the international community, hence the probability of yet another human catastrophe in the making, in which Iraqi civilians will once again be condemned to suffer.

We also came to the conclusion that such shortcomings could be curbed effectively through the promotion of the principle of burden-sharing, making it more binding on states. We argued that the absence of any reliable enforcement mechanism for burden-sharing, which should have triggered off automatically as the successive Iraqi crises occurred, condemned refugees to undergo unequal treatment at the hands of the international community, leaving them to the diverse national discretion of states.

We studied the interaction among international refugee law, international humanitarian law and international human rights law, establishing thereby that the provisions of human rights law have a complementary effect in filling in the gaps which exist in the other two branches. In particular, we noted that human rights concepts partially remedied some lacunae in refugee law by guaranteeing minimum standards of humane treatment and protection for refugees.

We also illustrated the importance of soft laws in the form of resolutions and decisions of the United Nations and other relevant

organizations, predominantly arrived at by consensus. In the absence of hard contractual provisions of international law, these regulations are bound to influence the response of the international community to situations where grey areas in refugee protection need to be addressed. The international community has been relatively successful in developing such instruments. It was argued that although states are reluctant to succumb to new codification of hard laws, the continued implementation of soft laws may prove to be useful in making precedents and customary rules for the future. We described the existing body of soft laws in favour of refugees and examined their application by different international agencies. It was, however, counter-argued that evasive attempts to utilize soft laws to lessen the burden of refugees on states, may well unravel the system of protection these regulations are geared to strengthen.

In addition to the above, the following conclusions could also be drawn, allowing us to reach what we believe to be a balanced approach to the way refugee law should function in the context of today's international situation:

1. The provisions of contractual international refugee law are not sufficient to properly address the needs of refugees in the modern age of protection. If International Refugee Law is to salvage its credibility, it should at least embark upon providing a modern definition of refugees through new codification efforts. Furthermore, the existing possibility for states to resort to reservations needs to be extremely limited, in particular as regards the refugee definition and other fundamental provisions of the Convention and the Protocol.
2. Contrary to the contractual international refugee law, the refugee protection regime as such has seen an enormous qualitative and quantitative development due to two reasons; first, efforts by international organizations to develop soft laws, and second, efforts by states not to accept new contractual undertakings. Endeavours should be focused on a gradual transformation of these soft laws into customary norms by continued respect for and adherence to them on the part of states, or within the framework of new treaty obligations.
3. Meanwhile, efforts are under way to limit the scope of states' obligations *vis-à-vis* refugees. Such attempts should be encouraged only to the extent that they contribute to the rationalization of the existing definition of refugees and its modernization, by leaving behind the era of the individualistic and luxurious concept of refugees in favor of the more vulnerable refugees in

massive or individual form, and also to the extent that they give assurances to states, enabling them to support more effectively the overall protection regime. Keeping in mind the general fatigue of states with regard to receiving more refugees, these efforts should nevertheless be regarded with due caution and vigilance by the international community.

4. The issue of Internally Displaced Persons (IDPs) remains a sensitive one in public international law. The notion of state sovereignty is still a cherished principle for members of the international community. Therefore, there exists little chance for the codification of new contractual rules for such a category of victims beyond what is already stipulated in the second additional protocol of 1977 on the Protection of Victims of Non-International Armed Conflicts. However, more attention can and should be accorded to IDPs from the human rights angle. Further development of soft laws in this regard is recommended and the international community can then take appropriate *ad hoc* decisions based on cases as they occur.
5. Since the issue of mass-influx represents one of the inexcusable weaknesses of international refugee law, action on this is required as a matter of urgency if credibility is to be restored to the whole system. Commendable efforts have been expended to develop soft laws in this field including those relating to temporary protection. However, they have stopped short of curbing the existing double standards in dealing with different groups of refugees. A new attempt to codify new rules for these victims should be envisaged, even if it consists of no more than codifying, in a minimalist way, the two basic concepts of temporary protection and burden-sharing.
6. Iraqi refugees have attracted a great deal of attention among international humanitarian agencies as a dynamic subject of International Refugee Law during the past decades. This occurred at a time when a large majority of these vulnerable people failed even to qualify as *bona fide* refugees under conventional law, since only a limited number of them were considered eligible to receive asylum based on the narrow definition of the Convention. This in itself illustrates the inadequacy of international law. Therefore, as far as the texts of international refugee law are concerned, it cannot be concluded that international law has been an effective means of protection and improvement of the situation for Iraqi refugees.
7. Nevertheless, we should note that two complementary phenomena have come to the help of international law and the Iraqi

refugees, namely soft laws which are developed by the United Nations and other agencies, as well as the open door policy of some of the neighbours of Iraq.

8. The treatment of Iraqi refugees by the neighbouring countries has vastly varied due to essential differences in their legal standings and political preferences. Promotion of respect for international refugee law by encouraging the accession of all of these countries to the Convention and the Protocol, as well as the lifting of their existing reservations, should be a priority for the international community.
9. Ultimately, the capacities of Iraq as a refugee producing country and society have remained almost intact. The outlook for the future of this fragile country can once again turn ominous, sending waves of refugees to its borders and beyond. The international community should prepare itself, legally and operationally, for such an undesirable eventuality.

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