The UNHCR's Involvement with IDPs – 'Protection of that Country' for the Purposes of Precluding Refugee Status?

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Abstract

The absence of protection from persecution is a precondition to qualifying as a refugee. Nowadays, however, protection is not solely provided by states and may stem from Non-State Actors ('NSAs') such as international organizations. This study will examine whether, and if so, under which circumstances, such protection may be substituted for 'protection of that country' and may thus preclude the application of the Refugee Convention. The focus will be on the United Nations High Commissioner for Refugees ('UNHCR') owing to its significant role in the protection of Internally Displaced Persons ('IDPs'), persons who often go on make a refugee claim upon fleeing the state. The former half of this paper will put forward an interpretation of the term 'protection of that country'. This will be done first, by examining the refugee definition, in particular the meaning of the terms 'that country' and 'protection'; secondly, by analysing relevant principles of EU law; and thirdly, by outlining how these concepts have been elaborated by relevant jurisprudence on international organizations. The latter half of this study will analyse the legal basis and scope of UNHCR's mandate with IDPs and will conclude by illustrating the reasons for which the activities of the UNHCR cannot constitute 'protection of that country' for the purposes of precluding the application of the refugee definition.

1. Introduction

The drafters of the 1951 Convention relating to the Status of Refugees ('Refugee Convention') were responding to the fact that at that time, states were the sole repositories of power in international law, international relations, and political theory. Modern scholarship, however, has challenged this view and it is no longer presumed that states have exclusive control of their territories. Non-state actors ('NSAs') such as international organizations, NGOs, and quasi-states are now seen to have roles to play in both the domestic and international legal spheres.[1]

In recent years, the move away from a state-centric notion of international law has resulted in a progressive interpretation of the refugee definition.[2] An example of this may be seen in the interpretation of the term 'persecution' by domestic courts. A growing number of states now subscribe to the 'protection' theory, which maintains that persecution is not confined to actions of state authorities, but may also emanate from NSAs where the state is unable, or able but unwilling, to protect the individual from such persecution.[3] This stems from the conception of international refugee protection as surrogate to national protection, in the sense that refugee protection is only applicable where protection is not available in the country of origin.[4] The 'protection' theory may be contrasted to the 'accountability' theory, which posits that only actions that are attributable to the state may constitute 'persecution' for the purposes of the refugee definition.[5]

In recent years, the acceptance by domestic courts that NSAs may be actors of persecution has been mirrored by the factual reality of NSAs providing protection to persons within their countries of origin. In addition, since the emergence of the doctrine of

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[1] 'The Changing Role of the State Reflected in the Growing Importance of Non-State Actors', in G Folke Schuppert (ed), *Global Governance and the Role of Non-State Actors* (1. Aufl. edn, Nomos 2006) 203-244.

[2] M O'Sullivan, 'Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?' (2012) 24 IJRL 85-110, 88; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5; [2006] 2 AC 426, para 66; E Feller, 'International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future' (2001) 83 International Review of the Red Cross 581-606, 594.

[3] See eg 'Moving Beyond the State: Refugees, Accountability and Protection' in S Kneebone, *The Refugees Convention 50 Years on : Globalisation and International Law* (Ashgate 2003) 279-312; V Türk, 'Non-State Actors of Persecution' in V Chetail and others (eds), *Switzerland and the International Protection of Refugees : a Colloquium of the Graduate Institute of International Studies, Geneva, in collaboration with the Office of the United Nations High Commissioner for Refugees = La Suisse et la Protection Internationale des Réfugiés : Colloque de l'Institut Universitaire de Hautes Études Internationales, Géneve, en Collaboration avec le Haut Commissariat des Nations Unies pour les Réfugiés* (Kluwer Law International 2002) 93-106; W Kälin, 'Non State Agents of Persecution and the Inability of the State to Protect' (2000-2001) 15 Georgetown Immigration Law Journal 415-432.

[4] *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson* [1998] QB 929 Court of Appeal (Civil Division), para 16; J Hathaway, *The Law of Refugee Status* (Butterworths 1991) 135; *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437; 124 ALR 265, 441.

[5] Kneebone, above n 3.

'Responsibility to Protect' in the last decade,[6] there has been an increasing acceptance that protection is not solely the responsibility of the state. One of the dangers associated with such developments, however, is that states may attempt to evade their obligations under international law by passing them on to a third party, be it another state, a private actor, or an international organization.

A discussion on NSAs in general is beyond the scope of this study, and thus the focus will be on the United Nations High Commissioner for Refugees ('UNHCR') owing to its significant role in the protection of Internally Displaced Persons ('IDPs'). In 2005 the UNHCR was appointed lead role within the 'cluster approach' for overseeing the protection, emergency shelter and camp management of IDPs. Although the increased focus on IDP protection is a welcome step, the UNHCR has expressed some concern at this development:

> There can be both positive and negative fall-out of the UNHCR's involvement. Countries of asylum may be more inclined to maintain their asylum policies if something is done to alleviate the suffering of the internally displaced, reduce their compulsion to seek asylum and create conditions conductive to return. On the other hand, UNHCR's activities for the internally displaced may be (mis)interpreted as obviating the need for international protection and asylum.[7]

Put simply, the UNHCR's activities on behalf of IDPs could be undermining the institution of asylum. This study will test the legality of this concern by examining whether, and if so, under which circumstances, internal protection afforded by the UNHCR to IDPs constitutes 'protection' under the Refugee Convention and may thus be used by states as a reason to deny refugee status. In light of the fact that IDPs are the largest group receiving the UNHCR's protection and assistance – as many as 15.5 million at the end of 2012 - there are significant issues at stake in this analysis.[8]

In addressing this issue, this study will be formed of two parts. The first part will put forward an interpretation of the term 'protection of that country'. This will be done first, by examining the textual definition of 'that country' and 'protection' as set out in the refugee definition; secondly, by analysing relevant principles of EU law; and thirdly, by outlining how

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[6] I Winkelmann, *Responsibility to Protect* (Max Planck Encyclopedia of Public International Law 2012).
[7] UNHCR, 'Internally Displaced Persons – The Role of the United Nations High Commissioner for Refugees', UN doc EC/50/SC/INF2, 20 June 2000, 7.
[8] UNHCR, 'Internally Displaced People Figures' <http://www.unhcr.org/pages/49c3646c23.html> accessed 4 Jan 2014.

these concepts have been elaborated by relevant jurisprudence on international organizations. The second part of this study will analyse whether the UNHCR's activities on behalf of IDPs engage these principles, and this study will conclude by illustrating the reasons for which the activities of the UNHCR cannot constitute 'protection of that country' for the purposes of precluding the application of the refugee definition.

2. The meaning of 'protection of that country'

2.1 Textual interpretation of the refugee definition

Although increased IDP protection is a welcome development, it is unclear whether, and if so, how it will impact refugee protection. As the granting of refugee status is dependent on, *inter alia*, lack of available protection in the country of origin, one must consider whether protection provided internally to IDPs will be interpreted by states as precluding the application of the refugee definition. According to the Refugee Convention, a refugee is a person who:

> … Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of 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 bring 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.[9]

The *travaux préparatoires* of the refugee definition make no reference to the possibility of 'protection' being provided by an international organization.[10] This is not surprising, considering that at the time of drafting of the Refugee Convention, the general understanding was that states had exclusive control over their territories and NSAs had little or no role to play in international law and international relations. Nonetheless, a contemporary reading of the Refugee Convention may lead to a different result.

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[9] 1951 Convention Relating to the Status of Refugees, 189 UNTS 137, art 1A.

[10] Article 1D of the Refugee Convention does however refer to the provision of protection by international organizations other than the UNHCR. This provision is directed at the provision of protection by UNRWA to Palestinian refugees, rather than being of general applicability.

The starting point for any exercise in treaty interpretation is article 31(1) of the 1969 Vienna Convention on the Law of Treaties 1969 ('VCLT'):

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[11]

This rule contains separate principles which must be applied together in order to close in on the true meaning of a phrase in a treaty.[12] By applying this rule, the following paragraphs will examine the two possible angles by which protection by the UNHCR may be relevant to the refugee definition, namely in the interpretation of the phrase 'that country', and; (ii) in the interpretation of the phrase 'protection'.

2.1.1 'That country'

2.1.1.1 '…in accordance with the ordinary meaning to be given to the terms of the treaty…'

In order to determine the meaning of 'that country', primary recourse must be had to the ordinary meaning of the term. The difficulty with this approach is that the term 'that country' has various meanings. If 'country' is synonymous with the concept of 'state', then only the authorities of the state can provide protection for the purposes of precluding application of the refugee definition. If, on the other hand, 'country' is to be understood in its geographical sense, protection provided by NSAs could potentially satisfy this requirement. One must therefore look to the other components of article 31(1) of the VCLT to discover the true meaning of 'that country.'

2.1.1.2 '…in their context…'

Numerous arguments have been put forward in favouring a geographical interpretation of the term 'that country'. First, in the broader context of the treaty as a whole, various provisions explicitly refer to the 'authorities of the country' where the role of the state is concerned.[13] According to this argument, the employment of 'that country' in the refugee definition therefore implies that the actor of protection need not exclusively be the authorities of the state.

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[11] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.
[12] RK Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 142.
[13] See, for example, arts 1E, 19, 24, 25, 31, 35, 41.

Secondly, article 1D of the Refugee Convention supports the fact that protection may be provided by an international organization:

> This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.[14]

Thirdly, the wording of the Refugee Convention may be contrasted to that of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment 1984 ('CAT'), which specifies that the ill-treatment in question must be attributable to the state in order to engage the state's responsibility under the CAT.[15]

The arguments supporting the former interpretation of the term 'that country', however, are more convincing. Since 'that country' forms part of a phrase, that is, the refugee definition, that phrase is the obvious initial contextual assessment that must be made. In the context of the refugee definition, 'that country' refers to the earlier term 'country of nationality' which implies that protection can only be granted by an entity which is capable of granting nationality, that is, a state.[16]

An examination of the broader contextual picture leads to the same result, as evidence for interpreting 'that country' as the state may be found elsewhere in the Refugee Convention. First, the cessation clauses also speak of re-availment of the protection of the country of nationality.[17] Secondly, the Refugee Convention's accountability mechanisms and the obligations set out in articles 2-33, are specifically addressed to 'states'.[18] According to Mathew, Hathaway and Foster, the very structure of the Refugee Convention arguably requires that protection will be by a government which may be held accountable under international law for its actions, and not by some legally unaccountable entity with *de facto* control.[19]

Thirdly, the 'article 1D' argument outlined above is quite weak. This argument maintains that because article 1D refers to the possibility of protection being provided by an

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[14] 1951 Convention Relating to the Status of Refugees, 189 UNTS 137, art 1D.
[15] 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85, art 1(1).
[16] P Mathew, J Hathaway and M Foster, 'The Role of State Protection in Refugee Analysis: Discussion Paper No.2: Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002' (2003) 15 IJRL 444-460, 457.
[17] Arts 1C (1), 1C(2), 1C(5).
[18] Mathew, Hathaway and Foster, above n 16, 457.
[19] ibid, 457.

international organization, such a meaning may be inferred to the term 'that county' in the refugee definition. This argument may be turned on its head by stating that the reference to protection provided by an international organization in article 1D excludes this possibility from other provisions of the Refugee Convention.

Fourthly, the Refugee Convention uses the term 'territory' where referring to a geographic area. This terminology appears in 19 of the Convention's 46 articles[20] and is thus strong evidence in favour of the argument that the terminology 'protection within the territory of that country' would have been used if the term 'that state' were to be interpreted in its geographic sense.[21]

Fifthly, the meaning of the word 'protection' as used in the refugee definition informs the interpretation of the term 'that country'. At the time the Refugee Convention was concluded, the term 'protection' in the refugee definition referred to diplomatic protection rather than protection within the refugee's country of origin, in the sense that a refugee, being outside the country of his nationality, was unable to avail of his country's protection abroad.[22] Diplomatic protection can only be provided by a state, which further supports the fact that 'that country' refers to protection provided by a state.

In line of the arguments outlined above, this study strongly supports interpreting 'that country' as the state. Although domestic courts have accepted that NSAs may be a source of persecution where the state is unable or unwilling to provide protection, the same cannot be said for the source of protection from the persecution feared. The refugee definition does not refer to whom or what may qualify as an actor of persecution. In contrast, the refugee definition does make reference to the source of protection, that is, a 'country'. Accordingly, the range of possible actors of protection needs to be interpreted more strictly than possible actors of persecution.

2.1.1.3 '...in light of its object and purpose.'

Further support for this position may be found by examining the meaning of 'that country' in light of the object and purpose of the Refugee Convention. The preamble makes reference to the 'widest possible exercise' of fundamental rights and freedoms for refugees,

[20] Arts. 7, 10, 11, 14, 15, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, 30, 31, 32, 44.
[21] H Battjes, *European Asylum Law and International Law* (Martinus Nijhoff 2006), 248.
[22] A Fortin, 'The Meaning of 'Protection' in the Refugee Definition' (2000) 12 IJRL 548-576.

and the desire to extend the scope of protection afforded to refugees. It may be stated therefore that the primary aim of the Refugee Convention is to further the protection of refugees.

The obligation to interpret a treaty in good faith is set out in article 31 of the VCLT and has been said to be an extension of the obligation to interpret a treaty 'in light of its object and purpose.' It is submitted that the good faith interpretative principle can be applied in the context of this study in two respects. First, as outlined above, the term 'protection of that country' refers to protection provided by the authorities of the country of origin, thus to exclude protection provided by international organizations as constituting 'protection of that country' is in conformity with the text and represents a good faith interpretation of the treaty. Secondly, as the primary aim of the Refugee Convention is to further the protection of refugees, actions carried out which defeat the aim of refugee protection cannot be said to be performed in good faith. On a cynical view, any state which cites the availability of protection by international organizations - without inquiring as to its effectiveness - as a basis for turning away refugee applicants would seem to be stretching the refugee definition beyond its parameters in order to have further excuse to limit the category of those eligible for international protection. This would fall foul of the requirement to interpret the Refugee Convention in good faith, and thus would represent an incorrect interpretation of the treaty.

2.1.1.4 Article 31(4) of the Vienna Convention on the Law of Treaties 1969

This study has argued that 'protection of that country' in the refugee definition is to be interpreted as protection by the authorities of that country, rather than protection provided on the territory of that country. There is one final means by which the latter interpretation may be valid, however. Article 31(4) of the VCLT provides that 'a special meaning shall be given to a term if it is established that the parties so intended.' Did the parties to the Refugee Convention intend that a 'special meaning' be given to the term 'that country', so that it is to be interpreted in its broader geographical sense? In the ***Conditions of Admission*** Advisory Opinion, the International Court of Justice stated that 'a decisive reason would be required' to displace the natural meaning of the terms used.[23] Such a special meaning is therefore very difficult to prove.

Beyond referring to a definition article in a treaty, that there is little practice showing clearly what would amount to the necessary evidence showing the existence of a special meaning of a term. If no definition is provided it is a matter of assessing the intent of the parties

[23] *Admission of a State to the United Nations (Charter, Art. 4)* (Advisory Opinion), ICJ Rep 1948, 63.

in light of the available evidence. Regarding the meaning of 'that country', the refugee definition's *travaux préparatoires* do not shed light on the relevance of NSAs. The practice of interpreting this term in its geographical sense has only emerged in the last decade or so, and thus the evidence supporting this interpretation is weak, at best. It is therefore submitted that there does not exist a 'decisive reason' to consider that the interpretation of 'that country' as the authorities of a state should be displaced by a special meaning of the term.

2.1.1.5 'That country' - conclusions

This study has argued that the term 'protection of that country' in the refugee definition refers to protection provided by the state authorities. It must be noted, however, that there is state practice and developments in EU law which support an interpretation to the effect that 'protection' may be provided by international organizations. Whether this is the correct interpretation as a matter of international law is of little practical relevance owing to the fact that the interpretation of the Refugee Convention is left to domestic courts, not an international body, and it is their interpretation that will decide the fate of the individual asylum-seeker.[24] In the words of Leo Gross:

> [We] may never know, or, in some cases, we may not know for a time, which autointerpretation was correct ... This is, for better or worse, the situation resulting from the organizational insufficiency of international law.[25]

Generally speaking, therefore, a domestic court will have the last word on the interpretation of the Refugee Convention, and this may very well be that protection provided by an international organization may preclude refugee status. Thus while this study supports a more restricted meaning of the term 'that country', it is accepted that this presumption may be displaceable. Therefore, the jurisprudence of domestic courts which supports a contrary interpretation will be considered below.

2.1.2 The concept of 'protection'

[24] On this topic generally, see GS Goodwin-Gill, 'The Search for the One True Meaning...', in GS Goodwin-Gill and H Lambert (eds), *The Limits of Transnational Law : Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press 2010) 204–241.
[25] L Gross, 'States as Organs of International Law and the Problem of Autointerpretation', *Essays on International Law and Organization: Volume I* (Transnational Publishers 1984) 367-398, 386.

So far, this study has argued that the term 'that country' as set out in the refugee definition, refers to the authorities of the state. However, two caveats must be borne in mind: (i) there exist domestic court decisions which interpret NSA protection as country protection for the purposes of the refugee definition; and (ii) the availability of UNHCR protection in the place of origin, or potentially in another area of the home country, may negate the 'well-founded fear' element of the refugee definition. In addition, even by interpreting 'that country' as the authorities of the state, an international organization could perhaps be acting formally in place of 'that country', backed by Security Council authorization for example as is the case in Kosovo. Thus the issue of international organizations as possible actors of protection must be explored further. Regardless of the meaning of the term 'that country', the most important consideration for the purposes of this study is whether the protection provided by an international organization could actually satisfy the protection standard envisaged by the Refugee Convention. If the protection is ineffective, then a well-founded fear of persecution may very well exist and the refugee definition appropriately satisfied.

The meaning of the term 'protection' is not elaborated upon in the Refugee Convention and therefore it is unclear what exactly will satisfy the protection element of the refugee definition. In the case of ***Horvath v. Secretary of State for the Home Department (2001),***[26] the House of Lords held that it was not possible to devise any complete or comprehensive exposition which would exhaustively define the relevant level of protection required by the Refugee Convention. There must, however, have been laws in force in the country which made violent attacks by perpetrators punishable by sentences commensurate with the gravity of the offences. Furthermore, there must have been a reasonable willingness by law enforcement agencies to prosecute and punish offenders and the victim must not have been exempt from the protection of the law. A similar standard protection is found in the EC Qualification Directive,[27] which will be elaborated upon in more detail below.

The drafters of the Qualification Directive and the above judgment of the House of Lords were correct in indicating that it is impossible to definitively set out what is meant by 'protection' in the context of the refugee definition. This is because protection is inextricably linked to the content and form of persecution, and thus the method of protection required

[26] *Horvath (A.P.) v Secretary of State for the Home Department* [2001] 1 AC 489.
[27] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

depends on the persecution feared. This is supported by the obligation to interpret a treaty according to the principle of effectiveness, as outlined above, which provides that the objective of treaty interpretation is to produce an outcome which advances the aim of the treaty.[28] Thus it is not possible to definitively state whether an international organization may provide protection which would satisfy that envisaged by the Refugee Convention, as the level of protection required will vary in each individual case according to the nature of the persecution feared. It is tentatively suggested, however, that respect for the rule of law, as set out in the Qualification Directive and by the House of Lords, is a good indication of whether the protection from persecution is actually effective.

2.2 EU asylum law

The term 'actors of protection' has also woven its way into EU asylum law, purportedly in response to international developments in peacekeeping.[29] Of relevance to this study are the measures adopted in the area of minimum standards with respect to the qualification of nationals of third countries as refugees. Article 7(1) of Council Directive 2004/83/EC ('Qualification Directive'), which has been described as 'unquestionably the most important instrument in the new legal order in European asylum',[30] provides that '[p]rotection can be provided by ... parties or organizations, including international organizations, controlling the State or a substantial part of the territory of the State.'[31] Part (2) of the article states:

> Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.[32]

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[28] Gardiner, above n 12, 190.
[29] Select Committee on the European Union, 'Defining Refugee Status and those in Need of International Protection' HL (2001-02), para 78.
[30] H Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom And International Law' (2006) 55 ICLQ 161-192, 161.
[31] Council Directive (EC) 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L304/12.
[32] ibid.

The Qualification Directive was recast in 2011,[33] with two substantive amendments made to article 7. Parties or organizations controlling the state or a substantial part of it can only qualify as actors of protection under paragraph 1 'provided they are willing and able to offer protection in accordance with paragraph 2.'[34] Paragraph 2 has been modified so that 'protection against persecution or serious harm must be effective and of a non-temporary nature.'[35]

The drafting history of this article is of interest. The Council's proposed Directive included two further qualifications, notably, that the territory controlled was clearly defined and of significant size and stability, and also that the international organizations in question must be 'willing and able to give effect to rights and to protect an individual from harm in a manner similar to an internationally recognised State.'[36] The 'willing and able' criterion was re-introduced in the Recast Directive,[37] however the requirement that international organizations must protect in a manner similar to a state was not included in either the original Qualification Directive or its recast version. Nonetheless, Peers and Rogers argue that such a principle can be inferred from the final article 7(2) of the original Qualification Directive, which does not differentiate between state and non-state protection in articulating the meaning of effective protection.[38]

The classification of international organizations as actors of protection in the Qualification Directive is worrying for various reasons. First, this study has illustrated that in applying the rules of the VCLT to the Refugee Convention, it is clear that interpreting 'that country' as an international organization is not compatible with the wording of the Refugee Convention. Thus the inclusion of international organizations as actors of protection in the Qualification Directive is not in line with the refugee definition. The Qualification Directive

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[33] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

[34] ibid, art. 7(1).

[35] ibid, art. 7(2).

[36] Commission of the European Communities, Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection, COM (2001) 510 final, 12 September 2001, art. 9.

[37] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art. 7(1).

[38] 'Refugee Definition and Subsidiary Protection' in S Peers and N Rogers, *EU Immigration and Asylum Law : Text and Commentary* (Martinus Nijhoff Publishers 2006) 323-366, 329.

sets a minimum standard only, however and states that 'Member States ... have the power to introduce or maintain more favourable provisions' than the standard laid down in the Qualification Directive.[39] In addition, the Qualification Directive indicates that the Refugee Convention is the primary binding instrument on Member States.[40] Thus the Qualification Directive must be interpreted in a manner that is harmonious to the obligations set out in the Refugee Convention. To interpret protection provided by an international organization as precluding the granting of refugee status would be in compliance with the Qualification Directive, but as this study argues, such an interpretation would in all likelihood breach the Refugee Convention and would therefore contravene international law.

There are additional reasons why the inclusion in the Qualification Directive of international organizations as actors of protection is cause for concern. It has been suggested that this decision reflected the desire of Member States to reject an influx of asylum seekers from Kosovo, which was at that time, and still is, overseen by the United Nations Interim Administration Mission in Kosovo ('UNMIK') and the Kosovo Force ('KFOR').[41] At the time the Directive was agreed, violence of a significant scale broke out in Kosovo, which illustrated the incapability of the UN force to protect the population. A further criticism is that the EU has combined asylum with immigration, in the sense that immigration law is about controlling entry, whereas asylum is concerned with providing international protection.[42] In objecting to the inclusion of international organizations as actors of protection under EC law, NGOs have referred to numerous examples of the inadequacy of protection of international organizations, including Rwanda, Sierra Leone, and Kosovo.[43] According to Gilbert, 'actors of protection' cannot include a safe haven or a refugee camp under the auspices of UNHCR, the UN or another international organization as such examples would not amount to adequate protection.[44]

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[39] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, Recital 14.

[40] ibid, Recital 3.

[41] M Garlick, 'UNHCR and the Implementation of Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted (The EC 'Qualification Directive')' in K Zwaan (ed), *The Qualification Directive : Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2007) 59-69, 65.

[42] G Gilbert, 'Is Europe Living up to its Obligations to Refugees?' (2005) 15 EJIL 963-987, 963.

[43] Select Committee on the European Union, above n 29, paras 73, 75.

[44] Gilbert, above n 42, 976.

The main objections to article 7(2) are centred primarily on the fact that international organizations do not have the attributes of states and cannot enforce the rule of law.[45] Furthermore, the traditional view is that international organizations are not parties to human rights treaties and cannot be held accountable as a matter of international law.[46] In addition, the absence of state authority is often an indication of political instability and thus it is unlikely that an NSA could be regarded as enjoying sufficient, durable stability and as having the political, military and civil police capacity that would enable it to offer a level of protection required by the Refugee Convention.[47]

Another objection lies with the requirement that the actor of protection takes 'reasonable steps' to prevent the persecution. Although this is a requirement of conduct, which merely obliges a state to do all in its power to achieve a result, rather than to actually achieve that result, [48] it could nevertheless be argued that article 7(2) which outlines that protection incorporates operating an 'effective legal system' sets a required standard of protection.[49]

2.3 Jurisprudence

2.3.1 Introduction

There is limited jurisprudence on the role of international organizations as actors of protection, most of which stems from England and Wales and deals with protection provided by international organizations in Kosovo. Nonetheless, the following paragraphs will engage in an examination of the case-law which sheds light on this issue, with particular reference to whether the jurisprudence may be applicable to UNHCR's IDP operations. Although these cases found that UNMIK and KFOR could constitute actors of protection for the purposes of the Refugee Convention, it should be noted that these cases were decided prior to the introduction of the 2011 recast Qualification Directive, which specifies that such protection should be non-temporary in nature. As UNMIK and KFOR are not permanent bodies, it is

[45] European Council on Refugees and Exiles, 'ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and others in need of International Protection', 1 October 2004, 7; Select Committee on the European Union, above n 29, paras 72, 74, 76.
[46] European Council on Refugees and Exiles, above n 45, 7; Select Committee on the European Union, above n 29, paras 73, 79.
[47] Select Committee on the European Union, above n 29, para 73.
[48] J Crawford, 'Second Report on State Responsibility', UN doc A/CN.4/498/Add. 2, 30 April 1999, para 57.
[49] Peers and Rogers, above n 38, 329.

submitted that they would no longer constitute actors of protection in light of the recast Qualification Directive.

An understanding of the role and mandate of UNMIK and KFOR is essential in before engaging in an analysis of relevant jurisprudence. From 24 March to 9 June 1999, NATO conducted military operations against the government of the Federal Republic of Yugoslavia ('FRY') in response to events in Kosovo, which was part of the FRY. These operations ceased on 10 June after the FRY government agreed to withdraw its forces from Kosovo in accordance with a set of principles which were subsequently attached to Annex 2 to the United Nations Security Council Resolution 1244 (1999).[50] The Resolution provided for the establishment and deployment in Kosovo of international and security presences (known respectively as UNMIK and KFOR).[51] The resolution did not alter the status of Kosovo as part of the FRY.

The main function of UNMIK was:

> …to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.[52]

UNMIK's further responsibilities included (i) 'maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo'; (ii) 'protection and promoting human rights'; and (iii), 'Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.'[53] In essence, the effect of Security Council Resolution 1244 was that all legislative and executive powers, including the administration of the judiciary, were transferred to UNMIK.

The responsibilities of KFOR included 'establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered'

[50] SC res 1244, 10 Jun 1999.
[51] ibid, operative para 5.
[52] ibid, operative para 10.
[53] ibid, operative para 11.

and 'ensuring public safety and order until the international civil presence can take responsibility for this task.'[54]

2.3.2 Jurisprudence of England and Wales

The jurisprudence of England and Wales has developed a number of general principles relevant to the capacity of international organizations to provide protection. The first principle is that the entity in question must be capable in law of providing protection. This question was dealt with in the case of ***Fadil Dyli v The Secretary of State for the Home Department [2000] ('Dyli')***, where the Asylum and Immigration Tribunal noted that the refugee definition did not employ the term 'authorities' and thus held that it should be interpreted in its geographical sense. [55] In ***The Queen on the Application of Altin Vallaj v. a Special Adjudicator [2002] ('Vallaj')***,[56] Dyson J accepted the submission that the agent of protection did not have to be the body which grants nationality, holding that 'the phrase "protection of that country" is capable of including protection by the authorities that have the duty to provide protection in that country.'[57]

In both of the above cases, it was held that the source of protection was irrelevant. The Court in ***Vallaj*** affirmed the opinion of Professor Christopher Greenwood:

> ... if the protection which a person is entitled to expect is in fact being provided by a United Nations administration in the territory from which that person comes, it would be unduly formalistic and contrary to common sense to hold that, since the United Nations is not a country, that person is not able to obtain protection.[58]

A second principle which has emerged from this jurisprudence is that modern circumstances must be taken into account in the interpretation of the Refugee Convention. In ***Vallaj***, Dyson J noted that because the Convention 'should be construed as a living instrument' it was necessary to take into account the fact that since 1990, the Security Council has shown

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[54] ibid, operative para 9.
[55] *Fadil Dyli v. Secretary of State for the Home Department, Appeal No: HX5171799(00TH02186)* Asylum and Immigration Tribunal, para 12.
[56] *The Queen on the Application of Altin Vallaj v A Special Adjudicator* [2002] Imm AR 16 Queen's Bench Division.
[57] ibid, para 31.
[58] ibid para 24.

'an increased willingness to intervene in the affairs of states.'[59] A note of caution should be taken at this juncture. The 'living instrument' approach, also termed the 'dynamic' or 'evolutive' approach, is an interpretive technique common to many domestic systems and has featured significantly in the jurisprudence of the European Court of Human Rights.[60] This approach is not enshrined in the VCLT however.[61] The 'living instrument' approach should therefore only be employed where its resulting interpretation does not conflict with the general rule of interpretation in the VCLT, namely the obligation set out in Article 31 to interpret a treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[62] As outlined in part 2 of this study, an application of Article 31 to the Refugee Convention leads to the conclusion that the term 'that country' refers to the authorities of the state. The conclusion reached in ***Vallaj*** that UNMIK and KFOR were capable of constituting protection of that country therefore seems to be at odds with Article 31 of the VCLT and thus represents an incorrect interpretation of the Refugee Convention. Nonetheless, for the sake of argument, the conclusion reached in ***Vallaj*** will be applied in part 3 of this study to the UNHCR's activities with IDPs owing to the fact that, as discussed above, in the absence of an international monitoring body, it is inevitably a domestic court that will have the last word on question of interpretation of the Refugee Convention and therefore the conclusion in ***Vallaj*** is highly relevant to this study.

The third principle to emerge from this jurisprudence is the relevance of consent. In ***Vallaj***, despite the argument of the appellant that there was no true consent in the case of Kosovo, since the FRY was forced to submit to the terms of the Resolution,[63] Dyson J held that consent was given, citing operative paragraphs 2 and 5 of the Resolution.[64] Dyson J did not, however, stipulate whether such consent was a necessary condition for the protection of UNMIK to preclude the granting of refugee status, although this was later implied in the case of ***Gardi v. Secretary of State for the Home Department [2002]*** **('*Gardi*')** where it was held that the protection of the KAR could not preclude application of the refuge definition because Iraq had not ceded its protection obligations to it.[65]

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[59] ibid para 25.
[60] See, eg, *Tyrer v. United Kingdom* App no 5856/72 (ECHR, 25 Apr 1978); *Loizidou v. Turkey* App no 15318/89 (ECHR, 18 Dec 1996).
[61] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.
[62] ibid, art 31.
[63] *The Queen on the Application of Altin Vallaj v A Special Adjudicator*, para 32.
[64] ibid, para 32.
[65] *Gardi v Secretary of State for the Home Department* [2002] EWCA Civ 750, [2002] WLR 2755.

The fourth principle to emerge from this jurisprudence is that the relevant entity must have assumed the international obligation to protect. In ***Vallaj*** it was held that UNMIK had accepted the protection obligation as set out in the Refugee Convention, and that such obligations had been tasked to it because such protection was not available by the host state.[66] This was later affirmed in ***Gardi***.[67]

The final issue raised by this jurisprudence is whether the question of whether the entity does, as a matter of fact, provide protection against persecution in Kosovo, and for this purpose it is irrelevant whether the FRY has granted consent, or that UNMIK is vested with the international law obligation to provide such protection.[68] This argument relied on the decision of the Immigration Appeal Tribunal in ***Dyli***[69] (outlined above), which held that the means by which protection is received, whether directly by the authorities of the state, or by another entity, is irrelevant for the purposes of the refugee definition. Although Dyson J preferred the appellant's first submission, he accepted the compelling nature of the third.[70] In his words:

> The surrogacy principle is engaged when there has been a failure in the basic duty of protection owed to the nationals of a state. The duty of protection is owed by the country of nationality, unless it is transferred, as a matter of international law, to another entity. In these circumstances, it seems to me that the better analysis is that "protection of that country" refers to the protection by the entity that is charged with the duty of protection, and that, on the true construction of article 1A(2), a person may have a well-founded fear of persecution only if there has been a failure to protect *by that entity or its agent.*[71]

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[66] *The Queen on the Application of Altin Vallaj v A Special Adjudicator*, para 29.
[67] *Gardi v Secretary of State for the Home Department* [2002] EWCA Civ 750, [2002] WLR 2755.
[68] *The Queen on the Application of Altin Vallaj v A Special Adjudicator*, para 35.
[69] *Fadil Dyli v. Secretary of State for the Home Department, Appeal No: HX5171799(00TH02186).*
[70] *The Queen on the Application of Altin Vallaj v A Special Adjudicator*, para 36.
[71] ibid, para 36.

3. Application of relevant principles to UNHCR's involvement with IDPs

3.1 UNHCR's role with IDPs

Paragraph 9 of the UNHCR's Statute recognises that the High Commissioner 'may engage in such activities … as the General Assembly may determine, within the limits of the resources placed at his disposal,'[72] and this paragraph is the main legal basis upon which UNHCR justifies its involvement with IDPs. A series of UN General Assembly resolutions has encouraged UNHCR involvement with IDPs, dating from as far back as 1972, where the Economic and Social Council called on the UNHCR to extend assistance both to refugees returning to southern Sudan and 'other displaced persons.'[73]

Before 2005, under the 'Collaborative Approach', all agencies shared the responsibility for responding to situations of internal displacement. Although activities were coordinated by the Emergency Relief Coordinator, the Collaborative Approach was criticized for lack of accountability and structure of responsibility. In addition, there was no predictability of action as the different agencies were able to pick and choose which situations to act upon. To address these concerns, in 2005 the Inter-Agency Standing Committee agreed to a division of labour amongst the UN and other humanitarian agencies. Called the 'Cluster Approach', nine different areas of humanitarian response were clustered together and each was assigned a 'cluster lead.' The role of the cluster lead is to set out the needs, organize planning, coordination, and reporting for the relevant situation.

Under the new approach, UNHCR has lead responsibility in the areas of protection, emergency shelter and camp management for conflict-induced IDPs. UNHCR also joined as a member in several other clusters, such as water/sanitation/hygiene (led by UNICEF), logistics (led by the WFP) and early recovery (led by UNDP). The UNHCR was clearly suited for this role, having vast experience with uprooted populations and a mandate encompassing protection and assistance, as well as having been involved in IDP operations since the 1960s. According to the UNHCR, it has an interest in protecting all those who, had they crossed an international border, would have had a claim to international protection. This interest arises because of the

[72] Statute of the Office of the United Nations High Commissioner for Refugees, Annex to UNGA res 428(V), 14 Dec 1950.
[73] UNECOSOC res 1705 (LIII), 27 July 1972.

similarity between such internally displaced persons and refugees, the causes and consequences of their displacement, and their humanitarian needs.[74]

The new 'Cluster Approach' was not in itself a mandate-giving mechanism, but a more clearly spelled-out role, based on the notion that governments have the primary role for protection of their citizens.[75] It is an arrangement through which the existing mandates of international organizations are brought together in a coordinated and predictable fashion.[76] Thus although it may seem that the UNHCR is being given a new responsibility under the cluster approach, in reality it is merely operating under its existing mandate of protecting IDPs. The most significant change of the new cluster approach, however, is the allocation of responsibility of protection to the UNHCR, which is the biggest gap in the safeguarding of IDPs. More generally, the UNHCR now has a much larger involvement with IDPs in the past, when it only intervened on a case-by-case basis.

3.2 Application of jurisprudence to UNHCR's protection activities for IDPs

The jurisprudence outlined in this study has created a number of general principles regarding NSAs as agents of protection which may be applied by analogy to the activities of the UNHCR in protecting IDPs. Although UNMIK and KFOR were held to qualify as actors of protection, it should be mentioned that the human rights record of both UNMIK and KFOR has been subject to significant criticism.[77] The effectiveness of UNMIK and KFOR's protection is therefore highly questionable, resulting in a dangerous precedent being set by the House of Lords. In addition, this case raises the broader issue of the responsibility of international organizations for human rights violations, and the idea that effective protection cannot be provided by an entity which cannot be held accountable for violations of international law.

The above jurisprudence outlines two reasons why the term 'that country' should be interpreted in its geographic sense. The first rests on the underlying principle of refugee law,

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[74] UNHCR, above n 7, 3.
[75] UNHCR Policy Development and Evaluation Service and Division of Operational Responsibilities, 'UNHCR's Expanded Role in Support of the Inter-Agency Response to Situations of Internal Displacement', UN doc PDES/2006/06, Nov 2006, 9.
[76] UNHCR, 'The Protection of Internally Displaced Persons and the Role of UNHCR', 27 Feb 2007, 4.
[77] Christine Chinkin, International Law Meeting Summary: The Kosovo Human Rights Advisory Panel, 26 Jan 2012 <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/260112summary.pdf> accessed 2 Jul 2014.

that of surrogacy,[78] which posits that refugee protection is a last resort owing to the lack of satisfactory protection in the country of origin. As stated by Professor Greenwood in ***The Queen on the Application of Altin Vallaj v A Special Adjudicator [2000]***, if satisfactory protection can be provided by a UN agency or body, it would it would be unduly formalistic and contrary to common sense to state that because the UN is not a country, refugee status should be recognised.[79]

The second factor that influences the interpretation of this term is the fact that there exists jurisprudence to the effect that the Refugee Convention is to be interpreted as a living instrument, and its interpretation is therefore influenced by recent developments. In ***Vallaj***, the Court accepted that since the 1990s, the UN Security Council had shown an increased willingness to become involved in the affairs of states and that consequently the presence and protection by the UN within a country of origin could constitute protection for the purposes of the refugee definition.[80] As submitted above, this decision represented an incorrect interpretation of the Refugee Convention, in the sense that it privileged the 'living instrument' approach over the general rule of treaty interpretation enshrined in Article 31 of the VCLT. Nonetheless, it is appropriate to consider whether the ***Vallaj*** conclusion could be applied by analogy to UNHCR's activities with IDPs. As outlined in part 3 of this study, the UNHCR has taken the lead role in the protection, camp management and emergency shelter of IDPs since 2005 and thus the protection of IDPs is no longer solely a matter of internal affairs. Thus a 'living instrument' interpretation of the term 'protection of that country' may in fact allow for UNHCR in-country protection to constitute same. In addition, it may be argued that protection by the UNHCR would negate the 'well-founded fear' aspect of the refugee definition, so that even if protection of that country is read in its narrow sense, protection by the UNHCR would still preclude satisfaction of the refugee definition.

In deciding whether protection provided by an international organization is 'protection' for the purposes of the Refugee Convention, the two-pronged approach employed in ***Vallaj*** is a useful starting point. First, can it be stated that an international organization is capable in law of providing such protection? Secondly, is the international organization capable in fact of providing such protection? It was argued that it was irrelevant whether the international

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[78] *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson*, para 16; *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs*, 441; Hathaway, above n 4, 135.
[79] *The Queen on the Application of Altin Vallaj v A Special Adjudicator*, para 24.
[80] ibid, para 25.

organization in question had the obligation to protect under international law, provided that such protection was in fact being provided. This argument was not rejected by the Court, and thus this study will consider such a possibility.

3.2.1 Is the UNHCR capable in law of providing such protection?

In answering the first question, the above jurisprudence has revealed numerous criteria which must be satisfied before an international organization may be considered in law an actor of protection for the purposes of precluding application of the refugee definition. It must be highlighted, however, that, all of the aforementioned cases are from the United Kingdom and thus while a useful indication of how the Refugee Convention may be interpreted, the practice of one state does not international law make. Similarly, the Qualification Directive applies to EU member states only, and without, *inter alia*, supporting state practice, it cannot be stated to represent customary international law or an authoritative interpretation of the Refugee Convention.

According to the above jurisprudence and analysis, UNMIK constituted an agent of protection because all the relevant powers and functions of the state had been transferred to an international body, and that body had assumed the international obligation to protect nationals of the state. The worrying conclusion of these decisions is that, in theory, it is possible for a state to arrange for another body to take over all of its duties, including the protection of human rights. Although the relevance of the FRY's consent to UNMIK's activities was not definitely addressed by the Court, this possible criterion will also be examined by this study.[81] Finally, it should be noted that the recast Qualification Directive stipulates that the actor of protection should have control of the state or a substantial part of the territory of the state.[82]

The above principles may be applied to the UNHCR in the form of the following questions:

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[81] ibid; *Gardi v Secretary of State for the Home Department*.

[82] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art. 6(b).

3.2.1.1 Does the UNHCR act with the consent of the state concerned?

The basis of UNHCR's involvement with IDPs can be summarized in UN General Assembly Resolution 53/125 (1998), which reiterates 'support for the role of the Office of the High Commissioner in providing humanitarian assistance and protection to internally displaced persons, on the basis of specific requests from the Secretary-General or the competent organs of the United Nations and *with the consent of the State concerned*....' [emphasis added].[83] In addition, the UNHCR has stated that before it will become involved with IDP protection efforts, there must be consent from the state concerned and where applicable, other entities in a conflict.[84] If consent of the state concerned is a criterion in order to be considered an 'actor of protection' for the purposes of the refugee definition, it is satisfied by the UNHCR's activities on behalf of IDPs.

3.2.1.2 Has the UNHCR assumed the international obligation to protect nationals of the state? If the answer is in the affirmative, have all the relevant powers and functions of the state been transferred to the UNHCR?

The UNHCR,[85] the Human Rights Council,[86] the General Assembly,[87] and the Guiding Principles on Internal Displacement have all emphasised that the primary protection responsibility lies with states for persons within their territory or jurisdiction.[88] The UNHCR's protection activities on behalf of IDPs does not result in a delegation of responsibility from the state, and its purpose is 'not to substitute but to strengthen national efforts for protecting and assisting the internally displaced.'[89] The work of the UNHCR is 'aimed at capacitating States and affected societies to effectively address displacement challenges.'[90] In Somalia, for example, UNHCR's operations with IDPs in 2014 will include collaborating closely with the Ministry of the Interior in Puntland and south-central Somalia, and the Ministry of

[83] UNGA res 53/125, 9 Dec 1998.
[84] UNHCR, above n 7, 2.
[85] UNHCR, above n 76, 25; UNHCR, 'UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement: Policy Framework and Implementation Strategy', UN doc EC/58/SC/CRP, 4 Jun 2007, para 19.
[86] UN Human Rights Council res 20, 29 Jun 2012.
[87] UNGA res 62/153, 6 Mar 2008.
[88] Commission on Human Rights, 'United Nations Guiding Principles on Internal Displacement', UN doc E/CN.4/1998/53/Add.2, 11 Feb 1998, principle 3.
[89] See W Kälin, 'Report of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons, Walter Kälin, Addendum: Framework for National Responsibility', UN doc E/CN.4/2006/71/Add. 1, 23 Dec 2005, para 49.
[90] UNHCR, above n 76, para 26.

Rehabilitation, Resettlement and Reconstruction (MRRR) in Somaliland, and developing a broader partnership and coordination framework with appropriate ministries for the purpose of developing a long-term strategy to identify durable solutions for people of concern.[91] It logically follows, therefore, that the relevant powers and functions of the state have not been transferred to the UNHCR where it is involved with IDPs. To contrast this with the jurisprudence above, UNMIK constituted an agent of protection because all the relevant powers and functions of the state had been transferred to an international body, and that body had assumed the international obligation to protect nationals of the state. In its protection activities on behalf of IDPs, the UNHCR does not exercise such powers and therefore does not satisfy this criterion.

3.2.1.3 Does the UNHCR control the State or a substantial part of the territory of the State?

This criterion stems from the Qualification Directive,[92] which was drafted at a time when UNMIK and KFOR were providing protection in Kosovo. Kosovo was under the effective control of UNMIK and KFOR, and this was most likely the type of scenario envisaged by the drafters of the Directive which would constitute 'protection'. Unlike UNMIK and KFOR, UNHCR has not had any of the powers and functions of the state transferred to it, and thus nor does it control the state or a substantial part of the state. This is further underscored by the fact that often UNHCR does not have access, let alone control, of the many areas where there exist IDPs. In Afghanistan, for example, the withdrawal of the international forces this year is expected to have security implications which will negatively affect UNHCR's access to certain locations and communities.[93] The criterion of control of territory, or a significant part of territory, is therefore not satisfied by UNHCR's activities on behalf of IDPs, both in the specific case of Afghanistan and more generally in the entirety of its operations with IDPs.

[91] UNHCR, '2014 Country Profiles – Somalia'<http://www.unhcr.org/pages/49e483ad6.html> accessed 5 Jan 2014.
[92] Council Directive (EC) 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art. 7(2).
[93] UNHCR, '2014 Country Operations Profile – Afghanistan' <http://www.unhcr.org/pages/49e486eb6.html> accessed 5 Jan 2014.

3.2.2 Is the UNHCR in fact providing such protection?

As argued above, the standard of protection required is inextricably linked to the nature of persecution feared. Thus it is not possible to set out definitively the standard of protection necessary to preclude the granting of refugee status. Nonetheless, as the jurisprudence shows, the operation of effective legal system for the detection, prosecution and punishment of persecutory acts is a good indication of effective protection, and such protection must be non-temporary in nature. Is such protection being provided by the UNHCR?

3.2.2.1 Is the UNHCR operating an effective legal system for the detection, prosecution and punishment of persecutory acts, and is such protection accessible?

'Protection' in the sense of UNHCR's activities, has not been defined in its statute. Nonetheless, the UNHCR has articulated that 'the challenge of international protection is to secure admission, asylum, and respect by states for basic human rights, including the principle of non-refoulement.'[94] This also encompasses ensuring the 'physical safety and security' of refugees.[95]

This concept of protection does not encompass operating a legal system. The operation of a legal system requires the establishment of; *inter alia*, a legislative system, a police force, a court system, and detention facilities, all of which require powers and functions which are generally attributable to states. The UNHCR is not endowed with such powers and as such, does not have the capacity to operate such a system. The UNHCR's role in this respect only extends to assisting the authorities to develop national legislation and appropriate administrative support arrangements, so as to strengthen the IDP protection framework.[96] In Afghanistan, for example, the UNHCR will be supporting the implementation of the national IDP policy in 2014,[97] and in Somalia it will provide knowledge and technical support in order to enhance the capacity of the newly-constituted Commission for Refugees, Returnees and IDPs.[98] This can be contrasted to UNMIK's mandate, which has the broader duty to provide an interim administration, to maintain civil law and order, and to protect and promote human

[94] UNHCR, 'Note on International Protection', UN doc A/AC.96/930, 7 Jul 2000, para 9.
[95] ibid, para 2.
[96] UNHCR, above n 76, para 28.
[97] UNHCR, above n 93.
[98] UNHCR, above n 91.

rights. Thus the protection activities carried out by UNHCR do not indicate a standard of protection which may, in certain circumstances, preclude the granting of refugee status.

3.2.2.2 Is the UNHCR's protection non-temporary in nature?

The UNHCR recognises that '[it] can only play a limited role in addressing the issue of internal displacement.'[99] UNHCR's role with IDPs in any given situation is of a transient nature, with the long-term aim being that states themselves will be able to effectively address displacement challenges. Consequently, UNHCR's protection of IDPs is not of a 'non-temporary nature', and therefore would not come within the definition of 'actors of protection' as set out in the recast Qualification Directive.

3.2.2.3 Even if not the body with the legal duty to provide protection, can the UNHCR be considered an actor of protection if it is in fact providing protection?

It is submitted that this third possibility, as raised in ***Vallaj***, is inapplicable to UNHCR's activities with IDPs as the discussion above indicates that UNHCR is not in fact providing protection to an extent which would preclude the application of the refugee definition.

4. Conclusion

The question that this study set out to answer was whether, in providing protection to IDPs, the UNHCR could be classified as an 'actor of protection' and thus where UNHCR protection is available in the country of origin, refugee status could be denied to persons seeking asylum abroad. As outlined above, there are numerous possibilities by which the activities of the UNHCR may be linked to the refugee definition, and thus in the first instance there is a very real possibility that activities by the UNHCR could be in conflict with the institution of asylum.

Nonetheless, in considering the refugee definition in its context, and in line with the obligation to interpret a treaty in good faith to achieve its object and purpose, this study has argued that 'that country' cannot be interpreted as anything but the authorities of the state. The UNHCR therefore cannot in law be considered an actor of protection for the purposes of precluding the application of the refugee definition. Nonetheless, there exists jurisprudence supporting a contrary approach. In addition, the interpretation of 'that country' as argued by

[99] UNHCR, above n 85, para 20.

this study is not incompatible with a situation in which an international organization could be acting formally in place of the state, in particular with Security Council authorization.

This analysis in this study reveals that even if the term 'that country' is interpreted in a manner that would allow for protection to be provided by a NSA, the UNHCR is lacking certain traits that are essential for it to be considered an actor of protection in this respect. Where UNHCR provides in-country protection, the obligation to protect its nationals is not, as a matter of international law, transferred to the UNHCR and the UNHCR is not endowed with the powers and attributes of the state. In addition, the UNHCR is not in control of the state or a substantial part of the territory of the state. Put simply, the UNHCR is not capable in law as constituting an actor of protection which would preclude the application of the refugee definition.

The second question asks whether the UNHCR is capable, in fact, of providing such protection. As outlined above, it is impossible to give a definitive exposition as to the standard of protection required by the refugee definition. This is because the standard of protection required is dependent on the nature of the persecution feared. Nonetheless, the operation of a legal system for the detection, prosecution and punishment of persecutory acts is a good indication of whether protection is effective. The UNHCR does not have the capacity or legal authority to operate such a system. Furthermore, UNHCR's protection efforts are of a transient nature, designed to capacitate states in finding a long-term solution to the IDP problem.

It may be concluded therefore that the activities of the UNHCR on behalf of IDPs will not constitute 'protection of that state' so as to preclude the application of the refugee definition, and it is therefore not in conflict with the institution of asylum under international law.