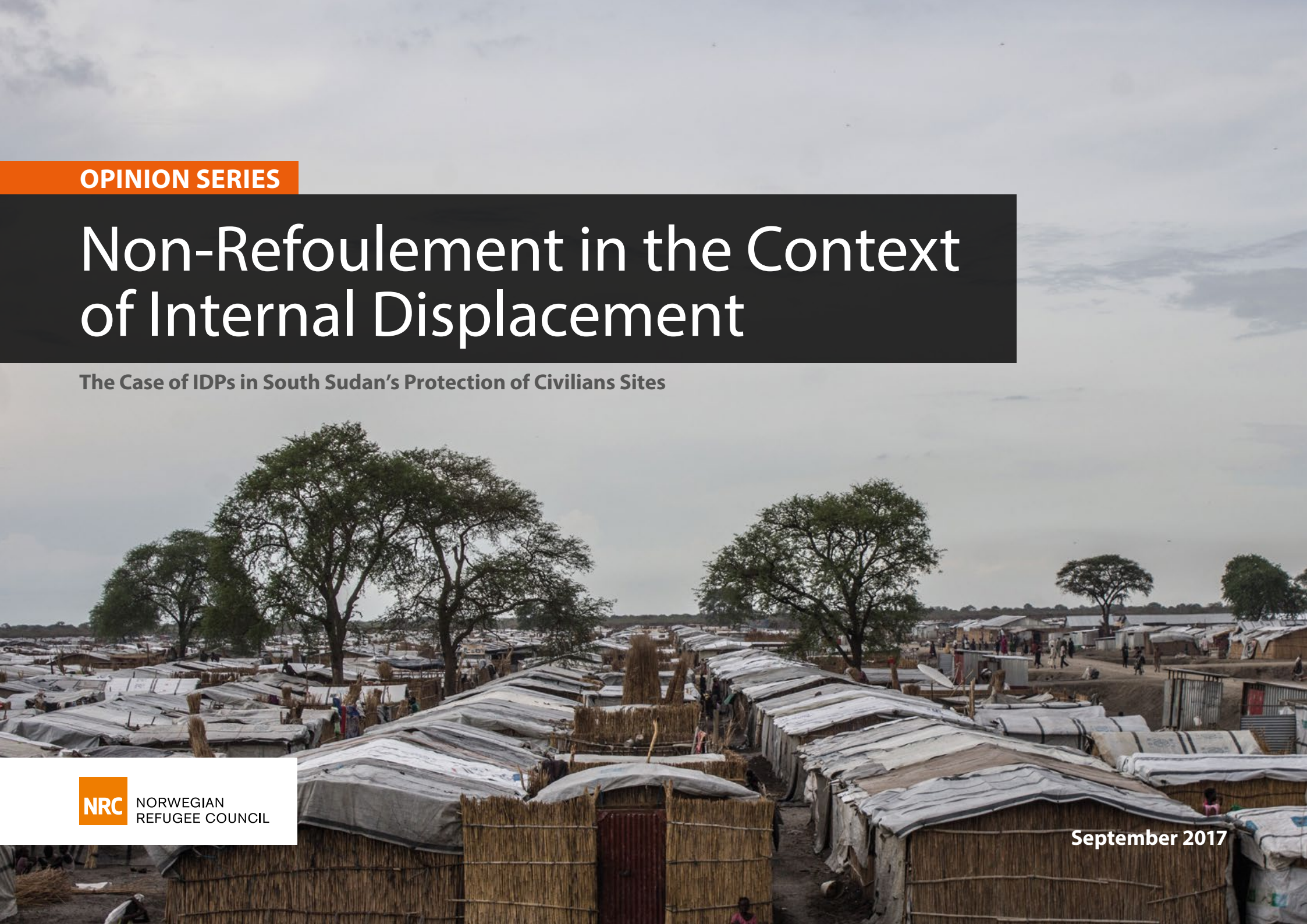
OPINION SERIES

Non-Refoulement in the Context of Internal Displacement

The Case of IDPs in South Sudan's Protection of Civilians Sites



NRC NORWEGIAN REFUGEE COUNCIL

September 2017

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Date of publication: **4 September 2017**
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This independent opinion piece was commissioned by the Norwegian Refugee Council (NRC), with funding from the Swiss Agency for Development and Cooperation (SDC). The views in this publication do not necessarily reflect those of NRC or SDC.

The author would like to extend sincerest thanks to the following individuals for taking the time to provide comments and feedback on this paper. In alphabetical order: **Martina Caterina**, Legal Advisor to the UN Special Rapporteur on the Human Rights of IDPs; **David Deng**, Director of Research at the South Sudan Law Society; **Jenny McAvoy**, Director of Protection at InterAction; **Isabelle Scherer**, former acting Head of Policy and Research at the Internal Displacement Monitoring Center (IDMC).

Layout & Design: BakOS DESIGN

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EXECUTIVE SUMMARY

The principle of *non-refoulement* is often regarded as being exclusively applicable in contexts of international cross-border displacement. But while the term *refoulement* did indeed gain recognition through its inclusion in the 1951 Convention Relating to the Status of Refugees, similar concepts can be found in a far more diverse set of legal frameworks whose protection extends well beyond the refugee sphere.

This paper explores the principle of *non-refoulement* in the context of internal displacement, and draws on aspects of international and regional law that address the principle of "no-return." It examines the territorial dimensions associated with *non-refoulement* under the relevant bodies of law, and uses the experience of South Sudan (where over 200,000 internally displaced persons are currently seeking protection in UN peacekeeping bases) as a case study. The South Sudan example adds a further complexity of a situation in which the *de facto* duty-bearer for upholding *non-refoulement* in the so-called Protection of Civilians (POC) sites is an international organization – the United Nations Mission in South Sudan (UNMISS) – rather than a state.

After reviewing the relevant bodies of law, the paper comes to the following general conclusions:

- The principle of *non-refoulement* forms an integral part of International Human Rights, Humanitarian, and Refugee Law, as well as numerous regional laws.
- *Non-refoulement* is increasingly understood to refer to returns or transfers of persons between authorities rather than between countries – and can thereby be applicable to transfers that occur between authorities within a single state.
- The UN has committed itself to uphold the principle of *non-refoulement* through its internal policies, and is also responsible for upholding the right as an entity with an international legal personality, and as an actor with *de facto* (if not *de jure*) authority over a civilian population. Personnel of individual troop and police contributing countries also continue to be bound by the laws applicable to their home countries.

To establish the applicability of *non-refoulement* to IDPs in South Sudan's POC Sites, it is then necessary to determine whether 1) the IDPs are under the effective authority of an entity other than the state, and 2) whether there are reasonable grounds to believe that IDPs may be exposed to persecution or cruel, inhuman, or degrading treatment if they were forced to leave the sites and be rendered back into Government jurisdiction. These two points can be established by the following:

1. The Status of Forces Agreement between UNMISS and the Government of South Sudan establishes UN bases as inviolable territories under the "exclusive control and authority" of the UN, and states that no person (including members of the Government of South Sudan) may enter the base without the explicit permission of the UN. Given that the POC Sites are within UN bases, IDPs seeking refuge within them are thereby under the "exclusive control and authority" of the UN.

2. Human rights reports have repeatedly documented widespread human rights violations and targeted persecution in South Sudan. In this context, there are reasonable grounds to believe that in returning a person to an area outside of the exclusive control and authority of the UN, an IDP could be exposed to persecution or violence.

In sum, IDPs in the South Sudan POC Sites are protected under international law by the principle of *non-refoulement*, and have the right to not be forced to leave POC Sites while a well-founded fear of persecution, or cruel, inhuman, or degrading treatment still remains. IDPs in the sites likewise have the right to protection from other more discrete actions that would have the same effect of forcing people to leave the POC Sites or that would result in a *de facto* transfer of authority. As the entity holding "exclusive control and authority" over these inviolable sites, UNMISS is responsible for upholding these protections.

In considering how to support exit strategies or solutions for IDPs living in the sites, UNMISS should commit to upholding the same minimum standards as would be applied to refugees or detainees – namely, that prior to closing the inviolable sites or returning or transferring anyone to a different authority, there should be an individual case assessment of their persecution claims. While voluntary returns can and should be supported, it is not only unethical, but arguably a violation of international law, for the UN to require someone to leave an inviolable POC site without first ensuring that they could do so safely. As is the case with refugees, individual persecution can still exist even once widespread hostilities have ceased and as such, claims need to be evaluated at an individual level.

INTRODUCTION

In 1951, the Convention Relating to the Status of Refugees[1] brought the concept of *non-refoulement* into public discourse.[2] Over the subsequent 65 years, the principle has become recognized as a cornerstone of International Refugee Law, and has achieved the status of a non-derogable right of persons who have fled persecution across an international border.[3] But while *non-refoulement* is often understood to be synonymous with refugee protection, the principle is also firmly embedded in other international legal frameworks whose jurisdiction extends far beyond the refugee sphere. Indeed, in recent years, scholars have argued that the principle of *non-refoulement* can and does apply within a country in cases where a person fearing persecution is under the protection of an authority other than the state.

In the context of today's global displacement trends, the application of *non-refoulement* to situations of internal displacement has taken on an added significance. In 2016, 64 percent of the world's conflict-displaced persons remained within their countries of origin.[4] While the majority of these individuals found shelter in host communities or in traditional internal displacement camps, a smaller number sought refuge in the compounds of the United Nations (UN) and of other international organizations and entities. One such case was in South Sudan, where at the end of 2016 over 200,000 internally displaced persons (IDPs) lived under UN protection inside the bases of the UN peacekeeping mission.

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1 Hereinafter "the Refugee Convention."

2 The 1951 Refugee Convention states that "No Contracting State shall expel or return ("*refouler*") 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."

3 Office of the United Nations High Commissioner for Refugees (UNHCR) Executive Committee, *General Conclusion on International Protection No. 79 (XLVII)*, 1996, http://goo.gl/XHWuPW.

4 UNHCR, *Global Trends: Forced Displacement in 2016*, June 2015, http://www.unhcr.org/5943e8a34.

Situations like the one in South Sudan raise questions regarding the applicable bodies of law and rights of IDPs residing with an entity whose premises have inviolable status. Looking forward, there is no sign that these questions will become any less relevant in the future: in April 2015, it became policy of the United Nations Department of Peacekeeping Operations (DPKO) that all UN missions with a protection of civilians mandate must be prepared to house and protect displaced persons within their bases in *in extremis situations*, including when civilians are at risk "due to a lack of preparedness or where the mission has insufficient military or police capacity to secure a site outside the mission compound."[5] This clause, combined with the precedent set by the experiences in South Sudan, make it possible that such sites may emerge in the future.

Over the three years between since these so-called Protection of Civilians (POC) sites first emerged, the leadership of the United Nations Mission in South Sudan (UNMISS) has become increasingly determined to find solutions for the internally displaced persons living in the sites. Given the humanitarian, security, and legal challenges the sites create, this objective is not unwarranted. But while humanitarians largely agree that the POC sites are unsustainable, there is nevertheless concern among some humanitarians that the Mission's eagerness to close the sites could lead to IDPs being driven to leave prematurely while a well-founded fear of persecution still remains. Indeed, not only does the conflict persist in South Sudan, but visiting UN experts have noted that "there is already a steady process of ethnic cleansing underway"[6] and a "potential for genocide."[7] It is in this context in South Sudan that the discussion on the applicability of *non-refoulement* to situations of internal displacement took on an added urgency.

This paper explores the principle of *non-refoulement* in situations of internal displacement, drawing on aspects of international and regional law that address the principle of "no-return." It examines the territorial dimensions associated with *non-refoulement* under the relevant bodies of law, and will use the experience of South Sudan as a case study. The South Sudan example adds a further complexity of a context in which the *de facto* duty-bearer for upholding *non-refoulement* within the POC sites is an international organization – UNMISS – rather than a state.

Discussions about the potential legal responsibility of the United Nations or other international entities in such contexts in no way undermine the primary responsibility of the state for protecting its citizens, but rather recognizes that in certain unique circumstances, international organizations such as the UN may have legal obligations that exist concurrently and in addition to those of the host government.

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5 United Nations (UN) Department of Peacekeeping Operations (DPKO) Policy, Ref 2015/7, *The Protection of Civilians in United Nations Peacekeeping*, April 1, 2015, http://goo.gl/0bGPXy, 12.

6 Office of the UN High Commissioner for Human Rights, Media Advisory: UN human rights experts says international community has an obligation to prevent ethnic cleansing in South Sudan, November 30, 2016, http://goo.gl/lCj98X.

7 Adama Dieng, UN Special Advisor on the Prevention of Genocide, *Statement to the Security Council*, November 17, 2016, https://goo.gl/D6ydlW.

1 *NON-REFOULEMENT* UNDER INTERNATIONAL LAW

Although *refoulement* is commonly associated with International Refugee Law (IRL), protection from *refoulement* is also firmly embedded in International Human Rights Law (IHRL) and International Humanitarian Law (IHL). The following section looks at the inclusion of *non-refoulement* under these three bodies of law, with the aim of establishing that the principle applies not only to refugees, but also to persecuted, conflict-affected, and internally displaced persons more generally who find themselves outside the jurisdiction of their home government.[8]

Non-refoulement in International Human Rights Law

Non-refoulement forms an integral part of the human right to be protected from torture and cruel, inhuman, or degrading treatment. Article 3 of the Convention on the Prohibition of Torture 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."[9] Courts have repeatedly upheld rulings consistent with Article 3, arguing that the right to be protected from torture and cruel treatment extends not only to being protected from the act itself, but also to be protected from extradition or *refoulement* to any territory or authority where there are reasonable grounds to believe that a person may be subjected to said treatment.[10]

Although the shorthand use of "the right to be protected from torture" may initially appear to make this less applicable to the displaced persons fearing general persecution or ill-treatment, the equal emphasis given to protection from "cruel, inhuman, and degrading treatment" in the relevant Conventions has extended the scope of this protection to cover many of the threats that could be experienced by displaced persons if forced to return to places of persecution.

The prohibition of torture and cruel, inhuman, and degrading treatment has been accepted into so many national and regional legal frameworks that it has achieved the status of both a right under customary international law and a non-derogable norm of *jus cogens*.[11] Given that rulings on protection from torture and cruel, inhuman, and degrading treatment have consistently upheld the right to be protected from extradition to territories where a person could be subjected to said treatment, it could be argued that the non-derogable status extends equally to protection from transfers to such locations.[12]

If the human right to protection from torture and cruel, inhuman, or degrading treatment is accepted as a norm of customary international law, and if protection from *refoulement* is recognized as a core component therein (which jurisprudence suggests should be the case), protection from *refoulement* would thereby apply equally to all persons, regardless of their status, location, or country of origin. Internally displaced persons would benefit from this protection as much as any other civilian group, provided they are in a location that is outside the control or jurisdiction of the government (for example, in a diplomatic mission or other premise with inviolable status). The customary nature of the law likewise means that both state and non-state actors are obligated to uphold the right, and the non-derogable nature would prevent any actor from passing a law or act which contravenes the principle.

8 The territorial dimensions of the relevant conventions and treaties will be discussed in greater detail in Section 3 of this paper.

9 UN General Assembly, *Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment*, December 10, 1984, http://www.refworld.org/docid/3ae6b3a94.html.

10 See for example the first major ruling on this in *Soering v. United Kingdom* (1989), as well as subsequent European Court of Human Rights cases that extended the scope of the protection, including *inter alia*: *Cruz Vargas v. Sweden* (1991), *Vilvarajah and others v. United Kingdom* (1991), *HLR v. France* (1995), and *Ahmed v. Austria* (1997).

11 *Jus cogens*, also known as a peremptory norm or non-derogable right, refers to principles and norms from which no derogation is permitted – laws that are so fundamental that no state may override them even in times of emergencies.

12 See for example the UN Human Rights Committee's General Comments number 20 (1992) and 31 (2004).

Non-refoulement under International Humanitarian Law

Non-refoulement also forms a core element of International Humanitarian Law. Article 45 of the Fourth Geneva Convention states that "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."[13] The 1958 Commentary on the Fourth Geneva Convention further articulated that "The prohibition in this paragraph is absolute, covering all cases of transfer, whatever the country of destination may be and whatever the date."[14] It also specifically clarifies that transfer "may mean internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition."[15]

Article 45 of the Convention also prohibits transferring a person to a state that is unable or unwilling to uphold the Geneva Conventions, including the contents of Common Article 3, which protects civilians in both international and internal conflicts from, *inter alia*:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Outrages upon personal dignity, in particular humiliating and degrading treatment;[16]

Prior to transferring any person, the transferring authority is required to "make sure that the Power which has agreed to receive them is both willing and able to apply the Convention."[17] Although not framed in the language of *refoulement*, the principle described is objectively the same.

If IHRL establishes the right to protection from *refoulement* during times of peace, its inclusion in IHL goes one step further by reinforcing that this protection continues to apply even during times of war. Although the Fourth Geneva Convention specifically addresses the protection civilians in situations of international armed conflict, it is nevertheless significant to discussions of internal displacement in that it demonstrates that the protection from transfers or *refoulement* included in IHRL does not cease to exist in the presence of armed conflict.

Non-refoulement in International Refugee Law

By far the most well-known source of *non-refoulement* under international law is International Refugee Law. Although the 1951 Refugee Convention was not the first place where the issue of *refoulement* was addressed,[18] it was the first major Convention to include it after the establishment of the United Nations, and has thus served as the reference point for future discussion of the issue.

When the 1951 Refugee Convention was first drafted, the principle displacement trend of the time was that of mass cross-border movements. Europe was still recovering from the refugee outflows of the World War II, and it was in this context that the Refugee Convention was conceived: a doctrine to address the unique legal status and needs of those individuals who had been forced to cross an international border and lacked the protection of their home state. One of the most crucial components of the Convention is Article 33(1), which reads:

- No Contracting State shall expel or return ('refouler') 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.[19]

13 International Committee of the Red Cross (ICRC), *Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, August 12, 1949, http://www.refworld.org/docid/3ae6b36d2.html, Article 45.

14 ICRC, *Commentary of 1958, Article 45*, 1958, https://goo.gl/ZCu3Ah, paragraph 4.

15 Ibid, page 266.

16 Fourth Geneva Convention, Article 3, 1949.

17 Commentary of 1958, paragraph 3(a).

18 *Refoulement* had also previously been addressed in the 1933 *Convention relating to the International Status of Refugees, as well as various regional conventions*.

19 UN General Assembly, *Convention Relating to the Status of Refugees*, July 28, 1951, http://www.refworld.org/docid/3be01b964.html, Article 33(1).

Since the Convention entered into force, the principle of *non-refoulement* has become so widely accepted and has been incorporated into such a significant number of national and regional legal frameworks that in 1994, the Office of the United Nations High Commissioner for Refugees (UNHCR) issued a statement recognizing *non-refoulement* as a norm of customary international law.[20] Likewise, as highlighted in the introduction, UNHCR member states have also concluded that *non-refoulement* constitutes a non-derogable right in contexts of cross-border displacement.[21]

In the absence of an international, legally-binding framework for internally displaced persons, and given the broadly accepted customary nature of many aspects of International Refugee Law, scholars have returned to the original Refugee Convention text to examine its application in contexts of internal displacement. As will be discussed in greater detail in subsequent sections of this paper, research commissioned by UNHCR found that the specific phrasing of "frontiers of territories" suggests that this principle is not necessarily confined to returns across international borders, but rather can include the borders of independently controlled territories within one state – and can thus apply to internally displaced persons.[22]

Conclusions and application in the context of South Sudan

In considering the application of *non-refoulement* in contexts of internal displacement, IHRL arguably offers the most straightforward source of legal protection to IDPs in that it applies equally to all persons regardless of status, location, or country of origin. The territorial dimensions will be discussed in greater detail in Section 3, but given IHRL's extensive reach, one would need only demonstrate that the IDP is sufficiently outside the jurisdiction of their government, and that they have a well-founded fear of persecution or cruel, inhuman, or degrading treatment if returned. The customary nature of the right to be protected from torture or cruel, inhuman, or degrading treatment, and the protection from *refoulement* included therein, guarantees that this right must be upheld not only by states who are signatories to the relevant treaties, but also any other state or non-state actor who holds jurisdiction over a civilian group.

In considering the application in the context of South Sudan, it then becomes necessary to consider whether there are "substantial grounds for believing that [an individual] would be in danger" of being subjected to torture or cruel, inhuman, or degrading treatment if returned to the hands of the Government. Unfortunately in this regard, there is no shortage of evidence to establish a credible threat: numerous reports from the UN, African Union, human rights groups, and the Joint Monitoring and Evaluation Commission have documented ongoing acts of violence and terror against the civilian population, and there is thus reasonable grounds to believe that if IDPs were returned to territory controlled by the Government of South Sudan, they too could be subjected to said treatment.[23]

[20] Office of the UN High Commissioner for Refugees (UNHCR), The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994

[21] UNHCR Executive Committee, General Conclusion on International Protection No. 79 (XLVII), 1996.

[22] E Lauterpacht and D Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, (Cambridge University Press, 2003).

[23] See for example OHCHR Report of Office of the United Nations High Commissioner for Human Rights Assessment Mission to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan, 10 March 2016; Human Rights Watch, They Burned It All, July 2015; UNMISS, Flash Human Rights Report on the Escalation of Fighting in Greater Upper Nile, 29 June 2015.

2 *NON-REFOULEMENT* UNDER REGIONAL LEGAL FRAMEWORKS

Turning away from the international sphere, *non-refoulement* is also addressed in a number of regional legal frameworks. At a general level, regional frameworks that address *refoulement* can be grouped into four categories: those that refer broadly to the human rights of individuals in a particular region, those that relate uniquely to the protection of refugees and asylum seekers, those that focus on extradition or transfers, and those that relate specifically to the protection of internally displaced persons.

While many of these frameworks refer to international, cross-border movements, the possibility of a different state or authority holding jurisdiction over displaced persons within the country of the host state was often not considered in the *travaux preparatoires* of these frameworks, and should therefore not be seen as excluded. This will be discussed in greater detail in Section 3 of this paper.

Regional human rights laws

There are three major regional human rights frameworks whose contents are applicable to internal displacement: the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1969 American Convention on Human Rights, and the 1981 African Charter on Human and Peoples' Rights. Each of these frameworks includes provisions on the prohibition of torture and cruel, inhuman, and degrading treatment, and as discussed above, regional human rights courts (particularly the European Court of Human Rights) have consistently ruled that the prohibition of torture and cruel, inhuman, and degrading treatment includes transfers to territories and authorities where a person could be subjected to such treatment.[24] With this in mind, and following the same logic described above in regard to IHRL, the regional conventions protect individuals within the relevant countries (including IDPs) from being transferred or refouled into the hands of authorities who may subject them to such treatment.

The American Convention on Human Rights goes one step further, and specifically protects aliens from being deported or returned to a country where their "right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."[25] Although the emphasis on aliens may appear irrelevant to the discussion of internal displacement, it demonstrates an acceptance of the principle that individuals should never be transferred to an authority where they may face persecution regardless of their status or citizenship.

Regional refugee laws

The prohibition of *non-refoulement* contained in the American Convention on Human Rights was further elaborated in the region in the 1984 Cartagena Declaration, which highlighted "the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees."[26] The Declaration goes on to say that *non-refoulement* "should be acknowledged and observed as a rule of *jus cogens*" by countries in the Americas.[27] The fact that *non-refoulement* was not only highlighted so prominently, but also was acknowledged as a rule of *jus cogens* is significant and illustrative of the weight the norm carries in the Americas.

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24 As mentioned above, see for example the first major ruling on this in *Soering v. United Kingdom* (1989), as well as subsequent European Court of Human Rights cases that extended the scope of the protection, including *inter alia*: *Cruz Vargas v. Sweden* (1991), *Vilvarajah and others v. United Kingdom* (1991), *HLR v. France* (1995), and *Ahmed v. Austria* (1997).

25 Organization of American States, *American Convention on Human Rights*, November 22, 1969, http://www.refworld.org/docid/3ae6b36510.html, Article 22(8).

26 *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, November 22, 1984, http://www.refworld.org/docid/3ae6b36ec.html, Section 3 paragraph 5.

27 Ibid.

Similar language on the prohibition of *refoulement* is also included in the 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, which provides that "no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened."[28] The language in this particular sense is interesting, as although the title of the convention relates to refugees, the wording of this clause refers to any "person," potentially opening the protection to other groups of persecuted individuals.

Regional laws on the extradition and transfers of persons

In addition to the prohibition of *refoulement* included in regional refugee law and human rights laws, there are also three regional conventions on extradition that are relevant to the issue of *refoulement*. These include the 1957 European Convention on Extradition, the 1981 Inter-American Convention on Extradition, and the 2002 Southern African Development Community (SADC) Protocol on Extradition, all of which include nearly identical language stating that extraditions shall be prohibited if:

- the Requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons.[29]

Although the Conventions do not specifically use the language of *refoulement*, the prohibited act here is objectively similar: no person may be transferred or returned to a country where they could face persecution on the basis of their membership in a specific group. Although extradition typically applies to a more prosecutorial context, the rationale behind the protection is the same as in *refoulement* clauses elsewhere. Likewise, the fact that this protection is extended even in contexts where a government has specifically requested extradition indicates an even stronger protection in that it places the host government in the position of having to actively deny the request rather than simply passively allow an individual to remain (as may be the case in normal contexts where *refoulement* could apply).

Regional frameworks on the protection of internally displaced persons

Finally, there are today a number of regional frameworks that specifically address the rights of IDPs. The International Conference on the Great Lakes Region (ICGLR), comprised of 12 countries in Central Africa,[30] was among the first regional bodies to adopt a framework in this regard. The Protocol on the Protection and Assistance to Internally Displaced Persons states out that all ICGLR members shall "adhere to the principles of International Humanitarian Law and Human Rights applicable to the protection of internally displaced persons in general and as reflected in the Guiding Principles in particular."[31] The Protocol further calls for the Guiding Principles to be incorporated into domestic law of the ICGLR countries.

Equally significant, though not legally binding in its own right, is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), which states that members shall, "Respect and ensure the right to seek safety in another part of the State and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk."[32] The Convention becomes legally binding for countries that have ratified it and incorporated it into domestic legislation.

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28 Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, September 10, 1969, http://www.refworld.org/docid/3ae6b36018.html, Article 2.3.

29 Southern African Development Community, *Protocol on Extradition*, October 3, 2002, http://goo.gl/qWAbDq, Article 4(b).

30 Angola, Burundi, the Central African Republic, Democratic Republic of Congo, Kenya, Rwanda, Sudan, South Sudan, Tanzania, Uganda, Zambia

31 International Conference of the Great Lakes Region (ICGLR), *Protocol on the Protection and Assistance to Internally Displaced Persons*, November 30, 2006, http://www.refworld.org/pdfid/52384fe44.pdf, Article 4.1.

32 African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), October 22, 2009, http://www.refworld.org/docid/4ae572d82.html, Article 9.2(e).

Language reflecting the need to respect the Guiding Principles on Internal Displacement is also reflected in a number of resolutions and recommendations from other regional bodies. In 2006, the Organization of American States issued Resolution 2229, which calls on member states to adopt and implement the Guiding Principles. Similar language was also included in Recommendation (2006)6 of the Council of Europe.

Conclusions and application in the context of South Sudan

Notwithstanding the territorial considerations of the relevant regional frameworks, the regional laws and frameworks discussed above offer a substantial degree of protection from *refoulement*. IDPs in the Great Lakes Region of Africa arguably benefit from the greatest protection given that IDP-specific legislation requiring compliance with the Guiding Principles (and protection from *refoulement* offered therein) has been enacted in the region. For IDPs in other locations, the human rights conventions continue to be perhaps the most easily and widely applicable to IDPs as they make no distinction on the basis of a person's status.

As South Sudan is a member state of the ICGLR, South Sudanese citizens are protected from *refoulement* under the Protocol on the Protection and Assistance to IDPs, which requires adherence to the Guiding Principles on Internal Displacement (including the prohibition of *refoulement* addressed therein). South Sudan is also a signatory to the Kampala Convention, though it has not yet finished the ratification process that would make the Convention legally binding. In this sense, IDPs in South Sudan are comparatively more protected from *refoulement* under regional laws than may be the case for IDPs in other regions.[33]

[33] It is perhaps also interesting to note that the drafter of the Guiding Principles on Internal Displacement and the first Representative of the UN Secretary General on the Human Rights of IDPs, Mr. Francis Deng, is South Sudanese. In his time as Representative, Mr. Deng was instrumental in establishing the global legal and normative frameworks that protect the rights of internally displaced persons. As a prominent member of South Sudanese society, Mr. Deng's work on internal displacement has also taken on added significance in South Sudan.

3 TERRITORIAL DIMENSIONS OF *NON-REFOULEMENT*

Compared to many international legal norms and principles, the concept *non-refoulement* is often described in uniquely territorial terms. Because *refoulement* inherently addresses the return of individuals from one power to another, it was perhaps a natural progression for treaty drafters to focus primarily on returns across international borders – the clearest delineation of state authority and jurisdiction. This geographic emphasis is evident in many of the international and regional legal frameworks discussed above, which rely on terminology such as returns and transfers to "states," "countries," and "territories." Nevertheless, today there is a growing body of analysis indicating that the territorial limitations of the principle are perhaps less straightforward than the original treaty wording suggests.

In 2001, UNHCR commissioned a study to examine the scope and content of the principle of *non-refoulement* in international law. Among the areas of analysis was the territorial dimension of Article 33(1) on *non-refoulement* in the 1951 Refugee Convention. The authors of the study found that:

- it must be noted that the word used is 'territories' as opposed to 'countries' or 'States'. The implication of this is that the legal status of the place to which the individual may be sent is not material. The relevant issue will be whether it is a place where the person concerned will be at risk. This also has wider significance as it suggests that the principle of *non-refoulement* will apply also in circumstances in which the refugee or asylum-seeker is within their country of origin but is nevertheless under the protection of another Contracting State.[34]

The authors go on to explain that this may be relevant in cases where individuals seek protection at diplomatic missions within their countries of origin, or when an individual "comes under the protection of the armed forces of another state engaged in a peacekeeping or other role in the country of origin."[35]

Emanuela Gillard, former chief of the Protection of Civilians Section in the UN Office for the Coordination of Humanitarian Affairs (OCHA), discussed the issue of the application of the principle of *non-refoulement* within a country in a 2008 paper on state obligations on transfers of persons. Gillard notes that "the *travaux preparatoires* of the treaties in question reveal that the drafters had not considered the issue [of transfers between authorities within a territory], so should not be taken as having excluded it by their choice of language."[36] She goes on to say that in fact,

- all the human rights monitoring bodies that have considered the issue have consistently been of the view that transfers of persons from one authority to another within the same territory, including between different members of a multi-national force operating therein, must comply with the principle of *non-refoulement*.[37]

Indeed, in 2005 during discussions of fundamental freedoms and the prohibition of torture, the UN Sub-Committee on the Promotion and Protection of Human Rights reaffirmed that protection from *refoulement* in such contexts extends to "any involuntary transfer from the territory of one State to that of another, or from the authorities of one State to those of another, whether effected though extradition, other forms of judicially sanctioned transfer or through nonjudicial means."[38]

34 Elilhu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, June 2003, http://www.refworld.org/docid/470a33af0.html, 122.

35 Ibid, 122.

36 Emanuela-Chiara Gillard, *There's no place like home: states' obligations in relation to transfers of persons*, (International Review of the Red Cross, September 2008), https://www.icrc.org/eng/assets/files/other/irrc-871-gillard.pdf, 713.

37 Ibid, 715.

38 UN Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2005/L.12, August 4, 2005, https://goo.gl/zGCm8i.

In this context, although the letter of the relevant laws may define *refoulement* in state-centric terms, it is the spirit of the laws and jurisprudence that practitioners should consider. Protection from *refoulement* would then relate to transfers from one authority or jurisdiction to another, rather than being linked to specific geographic boundaries. Internally displaced persons who find themselves under the protection of an authority whose premises have inviolable status (such as in embassies, foreign military bases, or UN compounds) would therein be protected.

This reading is likewise consistent with the Guiding Principles on Internal Displacement, which state unequivocally 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."[39] Although the Guiding Principles are considered soft law and are not legally binding, they are derived from existing legal obligations under International Refugee, Human Rights, and Humanitarian Law, and have become binding in some cases through their incorporation into national and regional legal frameworks.

Application in the context of South Sudan

In considering the case of South Sudan, it is then necessary to establish whether IDPs in POC sites are sufficiently under the jurisdiction of an authority other than that of the state. Given that the POC sites are within UN bases, the authority over the POC sites can be derived from the Status of Forces Agreement (SOFA) signed between UNMISS and the Government of South Sudan.[40] The SOFA stipulates that, "Without prejudice to the fact that all [UN] premises remain territory of South Sudan, they shall be inviolable and subject to the exclusive control and authority of the United Nations."[41] The Agreement goes on to say that "the United Nations alone may consent to the entry of any government officials or of any other person who are not members of UNMISS to such premises."[42]

This language in the SOFA almost identically mirrors Article 22 in the Vienna Convention on Diplomatic Relations relating to the status of embassies. The Convention states that "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission."[43] UNMISS bases (and POC sites within them) can thus be understood to have a similarly sovereign status as an embassy or other diplomatic mission, despite the fact that the land is held by an international organization rather than a state.

The following section looks the United Nations as a potential duty-bearer for upholding the right to *non-refoulement* for IDPs residing within the UN's inviolable bases.

39 UNHCR, *Guiding Principles on Internal Displacement*, July 22, 1998, http://www.refworld.org/docid/3c3da07f7.html, Principle 15(d).

40 A Status of Forces Agreements (SOFA) is a legal document signed by the United Nations and a host government upon the establishment of a UN peacekeeping mission in a country. The SOFA dictates the terms of the relationship between the two parties, including the rights, duties, and obligations of each actor.

41 United Nations, The Status of Forces Agreement between the United Nations and the Republic of South Sudan Concerning the United Nations Mission in South Sudan, August 2011, http://goo.gl/gUG0LQ, paragraph 16.

42 Ibid, paragraph 19.

43 United Nations General Assembly, *Vienna Convention on Diplomatic Relations*, April 18, 1961, http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf, Article 22.

4 RESPONSIBILITIES OF THE UNITED NATIONS FOR UPHOLDING *NON-REFOULEMENT*

The previous sections have established that all persons (including IDPs) are protected from *refoulement* under IHRL (and in some cases regional law), and that this can include protection from *refoulement* to different authorities or jurisdictions within a state rather than necessarily across an international border. The last core component of this discussion then is the ability of different actors to be considered duty-bearers for upholding the right to protection from *refoulement*.

In looking back at the treaties and conventions described in previous sections, all relate first and foremost to states. As an international organization, the UN does not have the same mechanisms for acceding to international legal frameworks – namely, through the establishment of national legislation – as would be done by state treaty parties. This does not mean that an international organization cannot be bound by the same principles, however. Indeed, the responsibilities of UN personnel and operations for upholding the principle of *non-refoulement* can be derived from four complementary pathways:

1. The commitments made by the UN in its internal policies and frameworks
2. Responsibilities as an entity with an international legal personality
3. Responsibilities as a *de facto* authority in POC site settings
4. Obligations of individual troop contributing countries

Commitments of the UN as set out in internal policies

The United Nations' guiding documents and policies outline the legal frameworks that are applicable to its operations and personnel. The charters, doctrines, and policies that have emerged over the past 60 years have consistently reaffirmed the obligation of the UN to uphold the same fundamental international legal standards that are applicable to its member states. The box below summarizes some of the most relevant sections of the different UN policies:

UN Charter

- The United Nations shall promote:…universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[44]

UN Peacekeeping Operations Principles and Guidelines (Capstone Doctrine)

- United Nations Peacekeeping operations should be conducted in full respect of human rights and should seek to advance human rights through the implementation of their mandates.[45]

DPKO/DFS Policy: The Protection of Civilians in United Nations Peacekeeping

- This policy recognizes the United Nations obligation to promote, uphold and protect international humanitarian, human rights and refugee law and is based on the principle that all United Nations personnel maintain the highest standards of integrity and conduct.[46]

44 United Nations, *Charter of the United Nations*, October 24, 1945, http://www.refworld.org/docid/3ae6b3930.html, Article 55.

45 UN DPKO, *United Nations Peacekeeping Operations: Principles and Guidelines (Capstone Doctrine)*, January 18, 2008, http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf, page 14.

46 United Nations Department of Peacekeeping Operations Policy, Ref 2015/7, *The Protection of Civilians in United Nations Peacekeeping*, April 1, 2015, http://goo.gl/0bGPXy, paragraph 3.

UN Secretary General's Bulletin: Observance by United Nations Forces of International Law

- The United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel.[47]

Interim Standard Operating Procedure: Detention in United Nations Peace Operations

- Detained persons shall not be handed over to any authority in situations where there are substantial grounds for believing that there is a real risk the detained person will be tortured or ill-treated, persecuted, subjected to the death penalty or arbitrarily deprived of life.[48]

Based on these texts, the UN has declared that its operations and staff (including in the context of Peace Operations) must adhere to International Human Rights, Humanitarian, and Refugee Law. The Interim SOP on Detention also specifically prohibits UN staff from the transfer or *refoulement* of individuals to any authority under whose jurisdiction they may be subjected to persecution or ill-treatment.

The passing of internal policies that govern the conduct of UN staff and operations is symbolically much the same as a state passing legislation that governs the conduct of its citizens and institutions. In this sense, while the UN may not have formally ascended to the relevant international legal frameworks, they have nevertheless committed themselves to upholding the same legal principles.

Adherence to these laws and norms is non-discriminatory across all UN personnel and operations around the world. By extension, in considering the context in South Sudan, UNMISS is required to adhere to these same principles. If the UN has committed itself to upholding IHRL, IHL, and IRL, and if based on the preceding elements of this paper it can be agreed that *non-refoulement* forms an integral part of each of these frameworks, then UNMISS is therefore required to uphold the right of IDPs to be protected from *refoulement*. In the context of South Sudan, the implication is that IDPs have a right not to be transferred out of or returned from inviolable UN premises – in this case, the POC sites – to any non-inviolable location where there is a credible threat of persecution or ill-treatment.

This right was further reaffirmed in a draft UN Interim Task Force (ITF) paper on "Challenges, lessons learned and implications of the protection of civilians sites in South Sudan," which outlined some of the steps "required to uphold the Mission's legal obligations in accordance with the principle of *non-refoulement*."[49] Although the reference in the ITF paper was specifically to persons in UNMISS holding facilities, there is no logical reason that this right would be afforded to persons detained by UNMISS, but not the rest of IDPs who are under UNMISS' protection in the inviolable POC sites.

Legal responsibilities as an entity with an international legal personality

International legal personality refers to the ability of an entity to have rights and obligations under international law. In the case of an international organization, having an international legal personality recognizes that the entity itself can independently enter into contracts, exercise rights, and hold obligations that are distinct from those of its member states. Whereas states and individual persons have an inherent legal personality, international organizations must acquire a legal personality before being able to benefit from or be liable to international law.

47 United Nations Secretary General, ST/SGB/1999/13, *Secretary-General's Bulletin: Observance by United Nations Forces of International Law*, August 6, 1999, http://www.refworld.org/docid/451bb5724.html, Section 3.

48 United Nations, Interim Standard Operating Procedure: Detention in United Nations Peace Operations, January 25, 2010, paragraph 80.

49 UN DPKO, Draft paper on "Challenges, lessons learned and implications of the protection of civilians sites in South Sudan," May 2016, paragraph 16.

There are two approaches to the acquisition of international legal personality: 1) the subjective approach, where legal personality is derived from the explicit or implicit will of states to grant such a personality (such as in a mandate or charter), or 2) the objective approach, where legal personality is derived from the necessity to have such a status in order to fulfill mandated functions. In 1949, the International Court of Justice ruled on the ability of the UN to have an international legal personality, and concluded that in light of the important peace and security tasks entrusted to the UN, it objectively requires an international legal personality in order to realize its mandated responsibilities.[50]

The scope of the rights and obligations of organizations with an international legal personality is determined by the breadth of the personality, and is in large part related to the mandated functions of the entity. In this context, the obligations can change from location to location if the mandate varies.

In the case of South Sudan, the extent of the international legal personality is significant given UNMISS' unique mandate to "maintain public safety and security of and within UNMISS protection of civilians sites."[51] Although UNMISS does not have a full executive mandate that would allow it to officially fill state functions, it is nevertheless tasked with carrying out many of the usual obligations and duties of the state within the POC sites (for example, policing, protection, and investigating threats). To effectively fulfill this mandate, UNMISS must be entrusted with a high level of legal personality, and as such, its obligations under international law should not be taken lightly. Given that any state in a similar position would be expected to comply with legal obligations on *non-refoulement*, and given that the UN has already committed to doing so in various internal policies, reports, and guidelines, it can be reasonably concluded that UNMISS is equally bound to upholding *non-refoulement* for IDPs in the POC sites.

De jure vs *de facto* authority

Recent rulings have also found that legal obligations to uphold rights (including *non-refoulement*) are not necessarily bound to the *de jure* jurisdiction of an authority at all.[52] In 2008, the Committee against Torture found that "the jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention."[53] The Human Rights Committee (HRC) has made similar arguments in favor of a "personal model" of jurisdiction and obligation, which focuses on the ability of an authority to impact upon an individual's rights, rather than whether the authority is the primary duty-bearer of them. In the context of the International Covenant on Civil and Political Rights, the HRC found that the discussion of territory "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State."[54]

In the context of South Sudan, the implication is that even in the absence of an executive mandate, the fact that UNMISS has *de facto* authority (and indeed according to the SOFA, "exclusive control and authority") over IDPs in the POC sites means that UNMISS has a responsibility for upholding the legal rights of the IDPs residing therein. Likewise, the fact that UNMISS is not the primary duty bearer for upholding the rights of South Sudanese citizens does not absolve it of legal responsibilities when South Sudanese IDPs are within UNMISS' inviolable bases, given that UNMISS has a direct (and arguably unique) ability to influence the fulfillment or derogation of the rights of these individuals.

50 International Court of Justice, *Advisory Opinion: Reparations for Injuries Suffered in the Service of the United Nations*, April 11, 1949, http://www.icj-cij.org/docket/files/4/1837.pdf.

51 UN Security Council, S/RES/2252 (2015), *Resolution 2252*, December 15, 2015, http://goo.gl/NAqrj1, Paragraph 8(iv).

52 *De jure* can be described as a matter of law, as compared to *de facto*, which relates to a matter of practice or actuality.

53 J.H.A. v. Spain, CAT/C/41/D/323/2007, UN Committee Against Torture (CAT), November 21, 2008, http://www.refworld.org/cases,CAT,4a939d542.html.

54 Sergio Euben Lopez Burgos v. Uruguay, *Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176*, UN Doc CCPR/C/13/D/52/1979, UN Human Rights Council, July 21, 1981, http://hrlibrary.umn.edu/undocs/session36/12-52.htm, Article 12.3.

Obligations of Troop and Police Contributing Countries

Finally, despite being deployed under the auspices of the UN, troops deployed to UN missions can continue to be bound by the international legal obligations of their home countries. As a member of their nation's security forces, troops constitute a state organ regardless of their location, and can are responsible for the same international laws and treaties as would be applicable in their home country.

The liability of the troops for violations of international law is determined by the degree of command and control exerted by the UN Force Commander. In most UN peace operations, the Force Commander will hold Operational Command over all troops (i.e.: macro level command), but each troop contributing country (TCC) will have an independent commander who retains Tactical Command (i.e.: micro level command) over the troops of their country. The exact terms of this division are typically outlined in a Transfer of Authority Agreement or memorandum of understanding between the TCC and the Mission.

If troops violate an international law (including *refoulement*), a critical question will be where the order originated. If it came from the Force Commander, the liability will likely remain with the UN. If, however, a TCC violates international law due to a flawed interpretation or execution of a broader order, this liability is may remain with the TCC.[55]

In the case of South Sudan, if there were an order to force IDPs to leave the sites, all TCCs would have the potential to be held responsible, depending on the origin of the order. As outlined in the preceding sections, *non-refoulement* is a norm of customary international law and applies to all states, regardless of whether or not they have ratified the specific Conventions and Treaties that gave rise to the customary nature of the law. In this context, even those TCCs that are not party to the 1951 Refugee Convention or relevant international human rights conventions are still bound to respect the principle of *non-refoulement*. Likewise, given that many of the TCCs in South Sudan originate from African nations, they are also bound under the regional frameworks such as the African Charter, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and some under the ICGLR Protocol on the Protection and Assistance to Internally Displaced Persons and the SADC Protocol on Extradition.

[55] An additional question for consideration is the responsibility of a TCC if they knowingly carry out an order that violates international law. While the legal implications of this are not yet conclusive, it is possible that the TCC could nevertheless be held accountable.

CONCLUSIONS

This paper has sought to establish two points: the applicability of the principle of *non-refoulement* in contexts of internal displacement, and the application of this principle to IDPs inside the POC sites in South Sudan. The following bullet points provide a very brief summary of the key findings and conclusions.

On *non-refoulement* under international and regional law:

- The principle of *non-refoulement* forms an integral part of the human right to be protected from torture and cruel, inhuman, or degrading treatment.
- *Non-refoulement* is also a core component of International Humanitarian Law, and is specifically addressed in Article 45 of the Fourth Geneva Convention.
- *Non-refoulement* continues to be a core tenet of International Refugee Law, and its inclusion in the Refugee Convention is now increasingly seen to include protection of internally displaced persons.
- Numerous regional frameworks, particularly in Africa, Europe, and the Americas include provisions that offer protection from *refoulement*.

The territorial dimensions of *non-refoulement:*

- International Human Rights and Humanitarian Law, including the principles of *non-refoulement* contained therein, apply to all persons regardless of displacement status or location.
- *Non-refoulement* is increasingly understood to refer to returns or transfers of persons between authorities or jurisdictions rather than between countries. The references to "countries," "states," and "territories" included in many relevant conventions should be recognized as non-prohibitive given that in most cases the issue of the application of *non-refoulement* within a country was not considered by the drafters (as recorded in the *travaux preparatoires*), and in some cases the language is sufficiently open as to allow for multiple interpretations.
- The Guiding Principles on Internal Displacement state that based on existing laws, *non-refoulement* unequivocally applies to IDPs.

The obligation of the UN to uphold *non-refoulement:*

- The UN has committed itself to uphold International Human Rights, Humanitarian, and Refugee Law in its internal policies and guidelines. As *non-refoulement* is included in each of these bodies of law, it has likewise committed itself to adhere to the principle of *non-refoulement*.
- Court cases have also ruled that the UN holds an international legal personality, and as such can be responsible for upholding international laws despite not being a treaty signatory.
- An actor need not necessarily hold *de jure* control to establish jurisdiction – *de facto* authority may be sufficient to confer legal obligations (including in regard to *non-refoulement*). UN entities holding *de facto* authority over a population may thus have legal responsibilities even in the absence of a full executive mandate.
- Troop contributing countries can also be held liable for violations in international law committed while in the employ of a peacekeeping operation if the action is not carried out as a direct order of a UN commander.

Application of *non-refoulement* to IDPs in South Sudan's POC sites:

- Recognizing that, for the reasons described above, the UN is responsible for upholding International Human Rights, Humanitarian, and Refugee Law (including the principle of *non-refoulement* therein), and acknowledging that UNMISS is an organ of the UN, UNMISS is therein responsible for upholding the principle of protection from *refoulement* for persons under their exclusive control and authority.
- The Status of Forces Agreement between UNMISS and the Government of South Sudan establishes UNMISS bases as inviolable territories under the "exclusive control and authority" of the UN. Given that the POC sites within UN bases, IDPs therein are therefore also under the "exclusive control and authority" of the UN.
- In light of the widespread human rights violations and targeted persecution in South Sudan, there are reasonable grounds to believe that in transferring a person to an area outside of the exclusive control and authority of the UN, the person could be exposed to persecution or violence. Any forced returns or relocations in this context could constitute *refoulement*.

- IDPs in the South Sudan POC sites are protected under international law by the principle of *non-refoulement*, and should thus not be forced to leave the site while a well-founded fear of persecution, torture, or cruel, inhuman, or degrading treatment still remains.

In this context, it is vital that UNMISS uphold the right of IDPs in the POC sites to protection from *refoulement*. Any discussions of transfers or returns of IDPs living in the POC sites should meet the same minimum standards as would be applied to refugees or detainees – namely, prior to closing the sites or transferring anyone to a different authority, there should be an individual case assessment of their persecution claims. While voluntary returns can and should be supported, it is not only unethical, but arguably a violation of international law for the UN to require someone to leave a POC site without first assessing whether they could do so safely. As is the case with refugees, individual persecution can still exist even once widespread hostilities have ceased and as such, claims need to be evaluated at an individual level rather than attempting to work on a location by location basis.

Implications and areas for further investigation

There are a number of additional implications of these findings that could not be explored in depth in this paper, but which are nevertheless critical to understanding the full scope of the protection offered by the principle of *non-refoulement*.

A first, crucial implication of the conclusions above is that in recognizing that *refoulement* relates to transfers of persons between authorities rather than between geographically demarcated states, any act which *de facto* results in the transferring of authority would constitute *refoulement*. In the case of South Sudan, this could include any of the following:

- Relocating IDPs to a site that is not within inviolable UN bases, regardless of whether or not UNMISS provides security
- Withdrawing UNMISS troops from an existing POC site, re-classifying the POC site portion of a base as non-UNMISS territory, or leaving a POC site absent of UN protection (as this would *de facto* permit the authorities to exercise control)
- Deliberately creating conditions within the POC site that would force people to leave

Another implication (and one that is likely to spark much greater debate) is how the principle of *non-refoulement* relates to the UN's obligations to open their gates to IDPs in the first place. Although this is already clearly established as an obligation in the DPKO/DFS Protection of Civilians Policy, humanitarians have observed a reluctance from UNMISS to accept IDPs even in times of extreme violence.[56] Given that *non-refoulement* under International Refugee Law prohibits not only the return of persons, but also a failure to admit them where there is prima facie basis for doing so,[57] there is potentially a case to be made that Refugee Law similarly applies to accepting IDPs into UN bases when they are fleeing violence. This requires much closer examination however, and has been the subject of considerable debate when it comes to the obligations of embassies and consulates to accept IDPs under similar circumstances.[58]

Other issues that require further examination include are options for managing cases in which there are a large number IDPs who have a sustained, well-founded fear of persecution. Recognizing that UN bases are not designed to host tens of thousands of IDPs indefinitely, it may ultimately be necessary to consider alternative long-term solutions. For all the reasons described above, however, this is not a straightforward process and will necessitate much further consideration.

Finally, one last and particularly complex question is what happens if a UN mission is expelled from a country. Although this would be unprecedented, UN peace operations require the permission of the host state in order to operate within a country. Should the host state withdraw this authorization and demand the UN to leave, or should the inviolable status of its bases be revoked, it is unclear what the UN's legal obligations would be for IDPs under its protection inside POC sites.

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56 In January 2016, UNMISS troops redirected IDPs into NGO compounds in Yambio, South Sudan when they arrived at UNMISS gates seeking protection. UNMISS similarly initially refused to allow IDPs into their Logistics Base in Malakal during an attack in February 2016.

57 UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, January 31, 1994, http://www.refworld.org/docid/437b6db64.html.

58 See for example Kate Ogg, *Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates*, Refugee Survey Quarterly (2014) 33(4), November 7, 2014, https://doi.org/10.1093/rsq/hdu014, 81-113.