Creating Refuge in Hell: The Coming of Age of Safe Areas for the Protection of Civilians in Armed Conflict

WILSON CHUN HEI CHAU*

Safe areas stem from the idea that special protected zones should be established to provide refuge for civilians from the adverse effects of armed conflict. The law of armed conflict has traditionally given belligerents the liberty to create safe areas, although they can also be imposed by the United Nations Security Council. However, existing practice is overly reliant on the goodwill of belligerents and the political will of the international community to protect civilians. International human rights law and the emerging framework for the protection of internally displaced persons provide a more effective victim-oriented legal foundation. The fundamental duties owed to internally displaced persons, coupled with the non-derogable right to life, could place binding obligations on authorities to consider safe areas as a necessary means of protecting civilians.

I INTRODUCTION

The noble concept of safe areas envisages the creation of special zones designed to protect non-combatants from the harms of armed conflict. On many occasions since the early 20th century, civilians have placed their faith in designated zones, which have promised to deliver shelter and protection on the frontlines. Safe areas are regarded as a pragmatic way of mitigating the horrific outcomes of recent conflicts and humanitarian catastrophes, with international observers even suggesting that safe zones be established in response to civilian massacres in Syria.[1] The issue to be resolved is whether the imposition of safe areas can be regarded as a comprehensive and effective practice in international law. This article analyses the birth of the concept in the Fourth Geneva Convention and Additional Protocols, and examines imposed safe areas that are authorised and enforced by the Security Council. It shall reveal the shortcomings of the law that currently underpins safe areas.

On the one hand, the law gives belligerents the right to agree to and establish safe areas. On the other, the law takes into account the role of the international community and its right to impose and enforce safe areas.

---

* BA/LLB(Hons), BA(Hons). Acknowledgement and thanks go to Kris Gledhill for his supervision and assistance.

1 Michael Weiss *Safe Area for Syria: An Assessment of Legality, Logistics and Hazards* (Strategic Research and Communication Centre, 2011) at 7.

However, neither approach offers an effective, stable and sustainable approach to sheltering civilians. Of greater concern are the rights of the inhabitants of safe areas, which are largely disregarded by the current law.

These circumstances necessitate a revision of the legal framework underpinning the establishment and function of safe areas. In pursuing this revision, article shall rely on two alternative aspects of international law. First, there is an emerging framework for the protection of internally displaced persons, which has generated various norms and practices strengthening the concept of safe areas. Secondly, international human rights law should be brought into the corpus of the law pertaining to safe areas. These complementary legal frameworks can provide stronger and more consistent protection for civilians seeking refuge in safe areas, entitling individual victims to fundamental rights while placing more stringent duties on authorities.

II DEFINING SAFE AREAS

It is not uncommon for analysts to draw distinctions between various types of safe areas. Barry Posen draws a purpose-based distinction between safe zones — protected areas created where the civilian population normally resides — and safe havens, which are areas established for the protection and support of displaced persons.[2] The Secretary-General of the United Nations (UN) has used the term "security zones" to refer to havens established for the protection of civilians from war crimes, genocide and crimes against humanity.[3]

Here, "safe areas"[4] simply refers to any form of geographic area designed to provide civilians shelter from the ills of armed conflict, irrespective of their arrangement, purpose or transient nature. The terms "areas", "zones" and "havens" will be used interchangeably.

III VOLUNTARY SAFE AREAS IN INTERNATIONAL HUMANITARIAN LAW

Voluntary safe zones first emerged in the Second Sino–Japanese War. The fighting in Shanghai in 1937 forced civilians to flee and prompted Father Robert Jacquinot to establish a safe zone in the Nanshi area of Shanghai to shelter 250,000 individuals.[5] Japanese authorities agreed to respect the zone on the condition that it was kept in good order and devoid of Chinese

2 Barry Posen "Military Responses to Refugee Disasters" (1996) 21(1) International Security 72 at 93–98.

3 *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict* S/1999/957 (1999) at 21.

4 Or "safe zones" or "safe havens".

5 Marcia R Ristaino *The Jacquinot Safe Zone: Wartime Refugees in Shanghai* (Stanford University Press, Stanford, 2008) at 73.

military activity. Chinese authorities agreed that specific structures would be demilitarised and invited members of the provisional International Committee of the Red Cross to observe compliance. The zone was managed effectively, denying entry to Chinese soldiers whilst enabling access to the Red Cross and other humanitarian groups.[6] Despite the intensity of the conflict, the zone was largely spared from serious damage.

The Jacquinot Zone has carved a legacy in international law and has been cited as an example of successfully protecting civilians in wartime.[7] Parts of the Fourth Geneva Convention and the First Additional Protocol have subsequently provided for the creation of a variety of voluntary safe areas. This part shall examine the contribution of each area to the protection of civilians.

Fourth Geneva Convention

1 Hospital and Safety Zones and Localities

The option to create hospital and safety zones and localities is found in art 14 of the Fourth Geneva Convention.[8] The zones are designed to provide refuge for military and non-military persons who are unable to participate in the war effort. Protected status applies to these areas only while the belligerents agree to their establishment. Article 14 also points to the Draft Agreement Relating to Hospital and Safety Zones and Localities under Annex I as the prescribed method for establishing these areas.[9] In terms of achieving compliance, arts 2 and 3 of Annex I prohibit inhabitants within the zone from serving in any military capacity.[10] Articles 4 and 5 provide for other specific conditions:[11]

> **Article 4**
> Hospital and safety zones shall fulfil the following conditions:
> (a) They shall comprise only a small part of the territory governed by the Power which has established them.
> (b) They shall be thinly populated in relation to the possibilities of accommodation.
> (c) They shall be far removed and free from all military objectives, or large industrial or administrative establishments.
> (d) They shall not be situated in areas which, according to every probability, may become important for the conduct of the war.

6 At 68–73.

7 At 147.

8 Geneva Convention relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950), art 14 [Geneva Convention (IV)].

9 Annex I arts 1–13.

10 Annex I arts 2–3.

11 Annex I arts 4–5.

Article 5
Hospital and safety zones shall be subject to the following obligations:
(a) The lines of communication and means of transport which they possess shall not be used for the transport of military personnel or material, even in transit.
(b) They shall in no case be defended by military means.

Essentially, these conditions must be satisfied in advance.[12] Parties intending to propose such zones must carefully select territory located away from the frontlines; remove from the zone any defences or other objects that may be construed as having a military purpose; ensure the area is not adjacent to military lines of communication; eliminate any potential for the zone to be used for logistical support of war efforts; and consider whether the territory will be an important strategic objective. However, in the midst of modern warfare — in a total war environment where frontlines are not neatly identifiable — complete adherence to these conditions may be untenable.

2 Neutralised Zones

The drafters envisaged hospital and safety zones to be pre-planned and established for the duration of hostilities. Neutralised zones, in contrast, were intended to be an ad hoc response mechanism triggered by the exigencies of a tactical situation where vulnerable persons located on the frontline were facing an imminent threat.[13] Belligerents may agree to their creation for the purpose of sheltering the sick, wounded and other civilians who are not engaged in or supporting hostilities.[14] As neutralised zones technically offer refuge to all civilians, they minimise the issue of distinction between different categories of civilians based on gender, age or disability. The Fourth Geneva Convention does not specify the specific conditions for compliance to be satisfied, but art 15 appears to indicate that the parties must at least reach agreement on the governance, monitoring and logistics of such zones.

3 Assessment of the Fourth Geneva Convention

The Fourth Geneva Convention was the first comprehensive attempt to regulate the creation of safe areas in armed conflict. However, the safe area devices in arts 14 and 15 have become problematic. They are unfeasible given the realities of modern warfare and are incapable of offering guaranteed protection. There are four strands to this critique.

First, reliance on an agreement between belligerents is a fundamental weakness. The drafters assumed that armed conflicts would be conducted

---

12 Jean S Pictet (ed) *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, Geneva, 1958) at 631.

13 Pictet, above n 12, at 129. See also Mohamed S Elewa "Genocide at the Safe Area of Srebrenica: A Search for a New Strategy for Protecting Civilians in Contemporary Armed Conflict" (2001) 10 Mich St U Det CLJ Int'l L 429 at 446.

14 Geneva Convention (IV), art 15.

between civilised authorities that exercise effective control over their forces and act with goodwill. However, Mohamed Elewa points out that consent in war is unpredictable and fragile, and capable of being withdrawn at any time.[15] Moreover, he highlights the further possibility that belligerents would employ safe areas only when it suits their tactical situation.[16]

Secondly, these safe areas are impractical given the rapid pace of modern warfare. The establishment of safe areas under arts 14 and 15 is not an efficient process given the need for all sides to agree on their precise conditions. Even if negotiations reach a point of agreement, it may take time for the proposing party to satisfy the conditions. Demilitarisation and the establishment of neutral third-party authorities require detailed planning. By the time these areas are fully negotiated and properly established, the intended protection for non-combatants may be greatly diminished.

Thirdly, the protection offered by these safe areas is not a right but a privilege granted by the belligerents. There is no scope for the vulnerable to request safe areas or to contribute to the zone-establishment process. The actions under arts 14 and 15 are conducted purely between the state authorities in the conflict. The extent to which non-combatants can participate in the process is limited to the administration of, and humanitarian support for, safe areas. Even so, the ability of these third parties to carry out this support is solely dependent on the conditions and terms determined by the belligerents.

Finally, in the absence of enforcement mechanisms, the zones are entirely at the mercy of the belligerents. Deploying defences and other military objectives in these zones would contravene the purpose of a demilitarised safe area. Yet the drafters failed to account for the situation where the arrangements break down. Annex I provides a time limit on rectifying non-compliance,[17] but if the parties are not satisfied and choose to revoke recognition of the zone, it appears that the area and its inhabitants would return to their vulnerable state. Ultimately, the lack of trust between warring parties undermines the stability and sustainability of these proposed safe areas.[18]

Protocol Additional to the Geneva Conventions

The First Additional Protocol provides two further forms of safe areas. Like neutralised zones, these are also not intended to shelter specific categories of persons. Rather, the intention is to "place certain localities or zones with their entire population, apart from combatants, outside the theatre of war".[19]

15 Elewa, above n 13, at 451.

16 At 451.

17 Geneva Convention (IV), annex I art 9.

18 Jean-Philippe Lavoyer "International Humanitarian Law After Bosnia" (1996) 3 ILSA J Int'l & Comp L 583 at 586.

19 Elewa, above n 13, at 431.

1 Non-defended Localities

Once a party declares a non-defended locality, attacks on that designated area are prohibited. Combatants and their mobile equipment must be withdrawn, the use of fixed military installations must cease and the inhabitants cannot conduct acts of hostility.[20] The proposing party is required to define precisely the limits of a non-defended locality.[21]

A distinctive feature of non-defended localities is that there is no obligation to conclude a mutual agreement. The locality is established once the conditions in art 59(2) are satisfied, the proposal has been communicated to the adverse parties, and the notification has been acknowledged. This provides a speedier process for creating zones that are protected from attack and off-limits to military operations. A noteworthy accomplishment by the drafters is the emphasis placed on the protected status of the inhabitants, regardless of whether the conditions of the non-defended localities are met.[22] The principle of distinction[23] and other rules protecting civilians therefore serve as a permanent secondary layer of protection where arrangements collapse.

2 Demilitarised Zones

The rules pertaining to demilitarised zones are almost identical to those of non-defended localities, although there are some notable differences. Parties are prohibited from extending military operations to demilitarised zones.[24] The creation of a demilitarised zone requires express agreement between the parties, defining and describing the limits of the zone and means of supervision.[25] The agreement can be reached in peacetime or once hostilities have commenced. Article 60 specifically provides (where the parties have so agreed) that in the crucial moments when fighting approaches a demilitarised zone, the parties must not unilaterally revoke the zone's status.[26] The important implication of such an agreement would be to forbid the new controlling party from doing anything more than setting up a civilian administration for the zone.[27]

---

20 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 12 December 1977, entered into force 7 December 1979), art 59(2).

21 Article 59(4).

22 Article 59(4).

23 Articles 51 and 54 underpin the principle of distinction, which prohibits combatants from indiscriminately targeting civilians.

24 Article 60(1).

25 Article 60(2).

26 Article 60(6).

27 Jean Pictet (ed) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Geneva, 1987) at 710.

3 Analysis and Critique of the First Additional Protocol

Non-defended localities represent a substantial improvement over the safe areas facilitated by the Fourth Geneva Convention. With influence over the drafting of the First Additional Protocol, the International Committee of the Red Cross was determined to refine the safe area concept to suit the "heat of the moment".[28] The removal of the requirement for adverse parties to negotiate a formal agreement has consequently been regarded as an improvement.

Despite this refinement, the state-centred nature of the treaties regulating armed conflict means that only parties to the conflict are empowered to initiate non-defended localities. Creation of these areas depends on the impetus of the authorities, especially their willingness to subjugate territory to the welfare of civilians. It is largely contingent on the strategic objectives and goodwill of the belligerents.[29] The plight of civilians alone cannot trigger the creation of non-defended localities for their protection.

Additionally, the sustained protection and administration of civilians is left to the belligerents. The Protocol assumes that the controlling party will still have the resources and organisation to supervise compliance and administer the population within a zone. However, it ignores the possibility that a belligerent's ability to administer and logistically support a demilitarised zone or non-defended locality may disintegrate under the pressures of hostilities.[30] There is no express provision that permits neutral third parties to fill the void in this eventuality.

Overall Assessment of Voluntary Safe Areas

If the onus to establish and sustain safe areas rests entirely on the belligerents acting in goodwill, non-combatants would not be protected in an effective and practical manner. Obtaining consent is a difficult and timely process that often makes it impossible to offer civilians refuge expediently. Even if obtained, consent is fragile and can be easily revoked based on changing tactical evaluations.

Moreover, the variety of safe areas is problematic. Each has its own unique rules and conditions to satisfy. The law was meant to offer belligerents a range of options appropriate to various tactical circumstances: from high-threshold protective areas (such as demilitarised zones) to speedier and less comprehensive arrangements (such as non-defended localities). However, reliance on numerous categories of safe area may turn out to be an inflexible solution to the urgent needs of victims. Civilians and belligerents may not know with sufficient certainty what protections are guaranteed or what conditions, inside and outside the area, have to be met. The operations of

28 Pictet, above n 27, at 697.

29 The frequently cited example is the declaration of Paris as an "open city" in light of advancing German forces in 1940. See Elewa, above n 13, at 449.

30 See Lavoyer, above n 18, at 584.

humanitarian agencies and the extent to which they can offer assistance could also be obfuscated, as it is uncertain whether belligerents would guarantee such agencies unhindered access to each permutation of safe area.

Furthermore, it is noteworthy that the protection offered by voluntary safe areas is directed at sheltering *areas* from external harm. Yet the comprehensive protection of *civilians* — of their rights, their basic health and living standards, and their security from non-military threats or harassment — is an issue that international humanitarian law does not address. These finer layers of protection should not simply be left to the whim of warring parties.

IV IMPOSED SAFE AREAS

Safe areas imposed by the Security Council aim to set up spaces for sheltering civilians and facilitating humanitarian relief in war zones without needing the consent of belligerents. Their imposition is a manifestation of worldwide condemnation of civilian massacres. Such safe areas also reflect the international community's humanitarian conviction to shoulder the responsibility of protecting civilians, even if it requires disregarding state sovereignty. Imposed safe areas complement existing tools available to the international community when responding to humanitarian catastrophes.

Perhaps the greatest accomplishment is the disposal of the requirement of belligerent consent. There is acknowledgement that international and non-international armed conflicts are being fought in an increasingly asymmetric manner. Parties often lose control of their forces. Warring factions have not always demonstrated a desire or even a capacity to comply with international humanitarian law. Imposed safe areas would therefore divorce the concept from consent by permitting the international community to employ diplomatic and military measures to enforce a humanitarian zone.

Responding to Humanitarian Catastrophes with Chapter VII Powers

The Security Council can exercise its prerogative to authorise interference with a state's sovereignty under Chapter VII of the Charter of the United Nations.[31] The Security Council must first find a threat to, or breach of, international peace. It must then decide what measures to take in accordance with arts 41 and 42 to maintain or restore peace (the latter enabling the Council to authorise the use of force).[32] Thereafter, member states may undertake the requested enforcement activities or provide assistance.[33] In addition, regional agencies, such as military alliances and regional organisations, are

31 Charter of the United Nations, art 42.

32 Article 39.

33 Article 48.

empowered to contribute to such efforts.[34]

To infringe state sovereignty by imposing a safe area, the fundamental hurdle the Council has to overcome is categorising a humanitarian crisis as a threat to international peace and security. Such crises are usually domestic incidents that do not automatically attract the status of a conventional threat to international peace and security. However, Surya Subedi points out that Chapter VII "has enough elasticity to allow for the establishment of a link between gross violations of human rights and the threat to international peace and security".[35] Through several critical emergencies, the Council has demonstrated its propensity to acknowledge humanitarian catastrophes within a state's domestic jurisdiction as threats to international security. Resolution 688 was promulgated in response to the repression of Kurds in Northern Iraq.[36] It indicated for the first time the Council's willingness to recognise that the repression of civilians can constitute a threat to international peace and security.[37] Another crucial resolution followed. In 1992, the Council unanimously adopted Resolution 733. It expressed alarm at the humanitarian situation in Somalia caused by the internal conflict, and acted under Chapter VII to impose an arms embargo and peacekeeping operation.[38]

Safe Areas in Bosnia and Herzegovina

The conflict in the Balkans tested the resolve and ability of the Security Council to protect civilians within its imposed safe havens. By 1992, the Council had recognised the situation in Bosnia as a threat to international peace and security, triggering Chapter VII authorisation of humanitarian assistance.[39] The Council had already authorised a no-fly zone and deployment of the United Nations Protection Force (UNPROFOR) for the protection of humanitarian convoys.[40] However, the situation deteriorated when Serb forces besieged Srebrenica and a number of towns.[41] This marked the beginning of a brutal phase of urban fighting, perpetration of crimes against humanity, acts of genocide and the onset of a humanitarian disaster caused by the

---

34 Article 53.

35 Surya P Subedi "The Legal Competence of the International Community to Create 'Safe Havens' in 'Zones of Turmoil'" (1999) 12 Journal of Refugee Studies 23 at 29.

36 *Resolution on Repression of the Iraqi Civilian Population, Including Kurds in Iraq* SC Res 688, S/Res/688 (1991).

37 The threat to international peace and security was the flight of refugees to Turkey. See Inger Österdahl "By All Means, Intervene!: The Security Council and the Use of Force under Chapter VII of the UN Charter in Iraq (to protect the Kurds), in Bosnia, Somalia, Rwanda and Haiti" (1997) 66 Nord J Int'l L 241 at 242.

38 *Resolution Calling for a Complete Embargo on Deliveries of Weapons and Military Equipment to Somalia* SC Res 733, S/Res/733 (1992). See also Bertrand G Ramcharan *The Security Council and the Protection of Human Rights* (Martinus Nijhoff, The Hague, 2002) at 51.

39 *Resolution on Humanitarian Assistance to Sarajevo and Other Parts of Bosnia and Herzegovina* SC Res 770, S/Res/770 (1992) at preamble.

40 *Resolution on Enlargement of the Mandate of the UN Protection Force* SC Res 776, S/Res/776 (1992), cl 2; and *Resolution on Establishment of a Ban on Military Flights in the Airspace of Bosnia and Herzegovina Except the Flights of UN Operations, Including Humanitarian Assistance* SC Res 781, S/Res/781 (1992), cls 1–3.

41 Carol McQueen *Humanitarian Intervention and Safety Zones: Iraq, Bosnia and Rwanda* (Palgrave MacMillan, Hampshire, 2005) at 58.

displacement of civilians.

On 16 April 1993, the Security Council exercised its powers under Chapter VII to impose a safe area.[42] Resolution 819 designated all of Srebrenica and its surrounding areas a protected zone and demanded the withdrawal of Serb forces from the town.[43] The Resolution also called on UNPROFOR, at that time serving as a peacekeeping force, to monitor and enforce the safe area.[44] On 6 May, the Security Council also designated Sarajevo, Tuzla, Zepa, Gorazde and Bihac as safe havens.[45] Resolution 824 specified several other requirements to be met by the belligerents. Serb forces were to withdraw artillery pieces and all belligerents were to allow unimpeded access for UNPROFOR and humanitarian agencies.[46]

Resolution 836 expanded UNPROFOR's mandate in an attempt to give UN forces more teeth in enforcing the safe areas.[47] UN forces were tasked with monitoring the ceasefire and were permitted to occupy key positions around the safe areas and deter violations.[48] Clauses 9 and 10 gave explicit authorisation for UNPROFOR to use force in response to attack and permitted NATO to employ air power to protect the zones.[49] Resolution 836 therefore gave UN peacekeepers partial authority to use force in discharging their mandate.

However, the intention to defend the zones was not met with the resources, political will or rules of engagement required to enable effective enforcement. The French believed that 50,000–60,000 UN troops would be required to retake and hold the safe areas.[50] The UN committed only 7,600 troops.[51] Such a small force was never able to accomplish the demanding objectives outlined above. Moreover, UNPROFOR remained a peacekeeping force with only the ability to exercise self-defence in response to bombardment.[52] This went some way to enhancing enforcement, but UNPROFOR was never given a direct or explicit mandate to protect civilians. The Secretary-General was hesitant to cross this threshold, being of the opinion that it would have eliminated the UN's role as an impartial force.[53]

Clause 10 of Resolution 836 authorised NATO to assist UNPROFOR with air power. It was thought that NATO's air forces would be sufficient

42 *Resolution on Demanding that Srebrenica and the Surrounding Area, Bosnia and Herzegovina, Be Treated as a Safe Area* SC Res 819, S/Res/819 (1993), cl 1.

43 Clauses 1–2.

44 Clause 4.

45 *Resolution on Treatment of Certain Towns and Surroundings in Bosnia and Herzegovina as Safe Areas* SC Res 824, S/Res/824 (1993), cl 3.

46 Clause 4.

47 *Resolution on Extending the Mandate of the UN Protection Force and Authorizing the Force to Use All Necessary Measures in Reply to Bombardments against the Safe Areas* SC Res 836, S/Res/836 (1993).

48 Clause 5.

49 Clauses 9–10.

50 McQueen, above n 41, at 72.

51 Posen, above n 2, at 103.

52 Tarcisio Gazzini "NATO Coercive Military Activities in the Yugoslav Crisis (1992–1999)" (2001) 12 EJIL 391 at 398.

53 See Trevor Findlay *The Use of Force in UN Peace Operations* (Oxford University Press, Oxford, 2002) at 227.

to compensate for UNPROFOR's limited resources. To a great extent, NATO was the primary instrument of enforcement. It imposed, for instance, a 24-kilometre "weapons exclusion zone".[54] Nonetheless, because UNPROFOR was still essentially acting under a self-defence mandate, any employment of air power had to be a proportionate retaliatory response to attacks on UN personnel, as opposed to attacks on civilians. Moreover, the flexibility and adaptability of NATO air power was limited, as each strike needed the Secretary-General's personal approval.[55] These restrictions were compounded by the fact that decision-makers were hesitant to resort to air power because they wanted to retain impartiality.

The Tragedy of Srebrenica and the Failure of Imposed Safe Areas

The endgame for Srebrenica came on 9 July 1995, when peacekeeping forces withered under Serbian pressure. Civilians who attempted to flee were shelled and 6,000 military-aged males were massacred.[56] The safe area intended to protect Srebrenica ended as a tremendous failure. The absence of corresponding force and political will from the international community worked to nullify the safe area. Carol McQueen suggests that insufficient resources and constrained rules of engagement rendered UN forces ineffective.[57] This was clearly illustrated when Dutch peacekeepers assigned to Srebrenica were taken as hostages. The obsession to maintain impartiality, coupled with this development, precluded the UN from calling on air power to protect Srebrenica. Similarly, Christopher Tiso points out that the failure to disarm and control the belligerent factions ultimately led to a failure to achieve security.[58] Serb forces were allowed to retain and relocate their arms, as UN forces had neither the ability nor the impetus to seize them.[59] So long as heavy weapons remained, Serb forces continued to pose a challenge to the zones.

The Security Council's failure to demilitarise the areas further complicated the situation. Bosnian government forces and their arms were allowed to remain, enabling them to recuperate and launch strikes from safe areas.[60] Other warring factions thus inferred that UNPROFOR was taking sides. This critical failure was observed in the previous assessment of voluntary safe areas: if the condition of demilitarisation was not met, adverse parties would consider it a breach sufficient to revoke the safe area status. The omission of any overarching requirement for demilitarisation within the safe

54 Thomas G Weiss *Military–Civilian Interactions: Humanitarian Crises and the Responsibility to Protect* (2nd ed, Rowman & Littlefield, Lanham (MD), 2005) at 84.

55 Gazzini, above n 52, at 399.

56 Weiss, above n 54, at 89.

57 McQueen, above n 41, at 80.

58 Christopher M Tiso "Safe Haven Refugee Programs: A Method of Combatting International Refugee Crises" (1994) 8 Geo Immigr LJ 575 at 584.

59 At 585.

60 Weiss, above n 54, at 85.

areas therefore aggravated the risks present.

The most significant weakness of the Security Council-imposed safe areas is that political considerations — rather than humanitarian necessity — dominate their implementation.[61] The needs of civilians and victims on the ground constitute only a partial consideration underpinning the imposition of safe havens. Action relies almost exclusively on contributions from governments, who are unlikely to endorse such a costly and hazardous endeavour, unless there are political gains or national interests at stake. The fact that the needs of civilians faced with armed conflict must compete with political factors creates an extremely delicate foundation for creating safe areas through the Security Council. Even if political hurdles can be overcome, the level of resources dedicated to such operations is entirely contingent on the domestic politics of contributing governments. In the case of Srebrenica, this ultimately reduced the enforcement effort to a light peacekeeping force, evidently ill-equipped and undermanned. While imposed safe areas are not burdened by the requirement of belligerent consent, they are just as fragile and plagued by instability as their voluntary counterparts, for their success relies on the political will of external actors.

If internationally imposed safe areas are to evolve into a truly effective form of protection, what is needed is an overarching legal framework that will partially transcend the politics of the Security Council. The international community can benefit from a framework in which it can execute safe area operations according to a set of prescribed expectations. Such a framework would streamline international practice. It would enable safe areas to evolve from unplanned practices into a sophisticated legal method of protection that would serve the security and welfare of trapped non-combatants. Additionally, reliance on such a framework would help decision-makers appeal to objective criteria, rather than base safe area initiatives entirely on unforeseeable political lobbying.

V REVISING THE LEGAL FOUNDATION FOR SAFE AREAS

Neither international humanitarian law nor the authority of the Security Council have been able to provide an effective foundation for the creation and maintenance of safe areas. The former is predicated on the unrealistic consent of belligerents, the latter on political considerations. Moreover, neither adequately addresses the quality of the protection offered nor the rights of the individuals whose protection safe areas ought to contemplate. In order for safe areas to accommodate the rights of the victims better, other areas of international law must be taken into account.

The emerging framework for the protection of internally displaced persons and international human rights law could both place stronger and

61 Karin Landgren "Safety Zones and International Protection: A Dark Grey Area" (1995) 7 Int'l J Refugee Law 437 at 445.

clearer obligations on individual states and the international community to establish, enforce and respect safe areas. Only a refinement of the current legal framework, incorporating other areas of international law, could transform the intention behind safe areas into a comprehensive and effective practice.

Framework for the Protection of Internally Displaced Persons

There is potential for safe areas to be encompassed within the emerging framework for the protection of internally displaced persons. Drawing on this area of international law could bring about more comprehensive and consistent protection, as it posits the rights and well-being of victims as its primary concern. The concept of temporary protection, as well as the recognition of the role of international actors like the Office of the United Nations High Commissioner for Refugees (UNHCR), provide the components for a more appropriate basis for the regulation of safe areas.

1 Definition of Internally Displaced Persons

A refugee is generally defined as "a person whose government fails to protect his basic needs, who has no remaining recourse than to seek international restitution of these needs, and who is so situated that international assistance is possible".[62] The essential components to the definition are that the host state has severed its obligations to the citizen, the individual is compelled to flee due to persecution or danger, and the individual has crossed into another jurisdiction.[63]

Forming such a clean definition for internally displaced persons is, however, rife with difficulty. Internally displaced persons should include any individual who has been physically displaced by armed conflict, systematic repression or natural disaster. It should also include any individual who could otherwise be a refugee if they were able to escape the host country. As Catherine Phuong notes, there could be no definition sufficiently inclusive to encompass every root cause of internal displacement.[64] Yet a definition may underappreciate the vulnerabilities experienced by all victims. Those seeking to define internally displaced persons and enact protective regulations must aim to be broad.

62 Andrew E Shacknove "Who Is a Refugee?" (1985) 95(2) Ethics 274 at 282. See also United Nations Convention relating to the Status of Refugees 189 UNTS 150 (opened for signature 28 July 1951, entered into force 22 April 1954), art 1.

63 While the Refugee Convention opted for a narrow definition restricted to persecution, both the Organisation of African Unity and Organisation of American States have introduced broader definitions. Therefore, a person who is compelled to leave their country of origin due to aggression, occupation or "disturbing public order" can constitute a refugee. See Martin Jones and Sasha Baglay *Refugee Law* (Irwin Law, Toronto, 2007) at 96.

64 Catherine Phuong "Internally Displaced Persons and Refugees: Conceptual Differences and Similarities" (2000) 18 NQHR 215 at 225.

2 Temporary Protection

The emergence of the principle of temporary protection is inextricably tied to refugee law. The United Nations Convention relating to the Status of Refugees (the Convention) forms the cornerstone of international refugee law.[65] The Convention accords refugees a range of protections, rights and guarantees; these include juridical status, employment, welfare, freedom of movement and other administrative mechanisms.[66]

There is no comparable framework for internally displaced persons. James Hathaway identifies two reasons for this.[67] First, internally displaced persons remain the primary duty of the host state. It is the host state that owes continuing obligations to its own citizens. Secondly, according such individuals refugee status would constitute a violation of national sovereignty.

However, international attitudes towards internally displaced persons changed after the Cold War. Several humanitarian catastrophes in the 1990s showed that the refugee system was not tailored to accommodate mass influxes of displaced persons.[68] Tiso argues that the international community was thus interested in containing potential refugee crises to minimise the costs associated with processing and resettling thousands of individuals.[69] This was the inception of the temporary protection principle. International intervention and humanitarian assistance would be undertaken with the primary objective of preventing a mass influx of refugees. Safe zones have been used as a way of cultivating conditions in which the right to seek asylum would be diminished, as such zones would offer a place for internally displaced persons to receive protection within their own country.[70]

Temporary protection would be a pragmatic and politically motivated response to the threat of a mass influx of refugees. Yet this shift in international attitude could indirectly benefit the law relating to the establishment of safe areas. If the intent of international actors is to nullify or minimise the prospects of granting refugee status to displaced persons, certain conditions of safe areas have to be satisfied. The most significant of these conditions is the elimination of factors that compel refugees to leave their country of residence. Safe areas cannot exist in name only, relying solely on international actors to fulfil their conditions. They must be able to demonstrate a substantive ability to provide physical and psychological protection from the dangers that would otherwise have caused their inhabitants to leave the country.

Martin Jones and Sasha Baglay note that "well-founded fear" serves as an essential criterion for refugee status.[71] Safe areas employed for temporary

65 United Nations Convention relating to the Status of Refugees, above n 62.

66 Articles 12–34.

67 James C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) at 29–31.

68 Ahilan T Arulanatham "Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System" (2000) 22 HRQ 1 at 13.

69 Tiso, above n 58, at 590.

70 Landgren, above n 61, at 456.

71 Jones and Baglay, above n 63, at 108–109.

protection must therefore demonstrably eliminate the "well-founded fear" and "serious possibility" of dangers to the displaced individuals.[72] Considerations as to the quality of safe areas could include the timeframe of protection offered, and whether the measures provide a healthy and safe environment for inhabitants. This is not to say that safe areas should provide a substitute for the right to seek asylum. However, temporary protection cannot be nominal. Even these safe areas must provide substantive protection.

3 Affirmation of UNHCR

Hikaru Yamashita suggests that there is an emerging understanding that the responsibility to provide shelter falls on international actors, as internally displaced persons are threatened in their own countries.[73] The question is who those international actors might be.

UNHCR is tasked with providing international protection for refugees. The agency's fundamental objective is to prevent refugee situations and protect the rights of individual refugees.[74] The expansive definition of refugee protection covers the preservation of life, humane treatment on arrival, compliance with humanitarian standards and ensuring non-deportation to an unsafe environment.[75] To fulfil this objective to protect, UNHCR enjoys a broad mandate to conduct a variety of humanitarian activities.

There is increasing acceptance that the prevention of mass influxes of refugees would require UNHCR's assistance in cases of internal displacement. The Executive Committee of UNHCR has concluded that its mandate is capable of extending to internally displaced persons in:[76]

> (a) Situations of internal displacement where there is a direct link with UNHCR's activities under its basic mandate to protect refugees and seek solutions to refugee problems, including:
> (i) those where internally displaced populations are mingled with groups of returnees or are in areas to which refugees are expected to return; or
> (ii) those where the same causes have produced both displacement and refugee flows or there is a significant risk of cross-border movement of some or all of the internally displaced.
> (b) Other situations where the link with mandated UNHCR activities is not present or is less direct. In these situations, UNHCR may nevertheless consider involvement to relieve the causes of internal

72 At 108–109.

73 Hikaru Yamashita *Humanitarian Space and International Politics: The Creation of Safe Areas* (Ashgate, Hampshire, 2004) at 23.

74 *Statute of the Office of the United Nations High Commissioner for Refugees* GA Res 428(V), A/Res/428(V) (1950), annex cl 8.

75 Arthur C Helton "What Is Refugee Protection?: A Question Revisited" in Niklaus Steiner, Mark Gibney and Gil Loescher (eds) *Problems of Protection: The UNHCR, Refugees, and Human Rights* (Routledge, New York, 2003) 19 at 26.

76 *Note on International Protection (submitted by the High Commissioner)* A/AC96/815 (1993) at [46].

> displacement and to contribute to conflict resolution through humanitarian action, but UNHCR activities would normally be supplementary to the humanitarian efforts of other international organizations.

The UN General Assembly also reinforced these findings by calling for "a more concerted response by the international community to the needs of internally displaced persons".[77] However, it affirmed that its support of UNHCR activities is conditional on "specific requests from the Secretary-General or the competent principal organs of the United Nations and with the consent of the State concerned".[78] Thus, UNHCR cannot act independently without relevant authority and the consent of other actors.

That UNHCR is entitled to offer assistance to internally displaced persons leads to the corollary issue of whether the establishment of safe areas falls within the mandate of UNHCR. At the request of states or the UN, UNHCR has traditionally established refugee camps, on which armed attacks are prohibited.[79] The Executive Committee also requested in its General Conclusions that states provide "all necessary assistance to relieve the plight of the victims of such military and armed attacks on refugee camps".[80] Other states are called upon to assist the state of refuge to ensure the "humanitarian character of such camps and settlements is maintained".[81] Should domestic authorities struggle to perform their duties, these declarations would provide a strong customary legal basis for the international community to deliver military protection and humanitarian relief for UNHCR settlements. A designated UNHCR settlement, created with the consent of the host state, could equate to a safe area. Obligations would be placed on both the host state and members of the international community to provide security and assistance to the UNHCR settlement.

Importantly, the Secretary-General and other UN organs can authorise UNHCR settlements without the Security Council's involvement. By avoiding the need for the Council to construe the case of internal displacement as a threat to international security, this tool should be more responsive to humanitarian needs than geopolitical considerations.

In summary, settlements established by UNHCR for the purposes of serving and protecting internally displaced persons could be an expedient safe area exercise. They would be lawful in the sense that there is international recognition of the agency's mandate to deal with internal displacement. Their expedience lies in the fact that UNHCR camps do not require holistic belligerent consent or specific Security Council authorisation.

---

77 *Resolution on Office of the United Nations High Commissioner for Refugees* GA Res 49/169, A/Res/49/169 (1995), cl 10.

78 Clause 10.

79 *Conclusions Adopted by the Executive Committee on the International Protection of Refugees: 1975–2009 (Conclusion No 1–109)* (2009) at 63.

80 At 63.

81 At 63.

Once established, they can attract the protection of both the host state and the international community.

4 Guiding Principles

Additionally, there are emerging principles for the protection of internally displaced persons that could form a suitable framework for safe areas. These principles are contained in a document published by the Representative of the Secretary-General on internally displaced persons titled *Guiding Principles on Internal Displacement*.[82] The *Guiding Principles* adds a comprehensive layer of protection to the concept of temporary protection and UNHCR's mandate, in expressing the fundamental rights of displaced persons and the core duties of host states. The document also contains obligations of non-state actors and the wider international community. The force of these principles is enhanced by the General Assembly's recognition of the Representative's work.[83] The General Assembly has subsequently recognised the *Guiding Principles* as "an important international framework for the protection of internally displaced persons", a monumental step towards their potential transition to customary international law.[84]

The second principle provides that authorities, groups and individuals — regardless of their legal status — must observe the principles.[85] The implication is that the *Guiding Principles* binds state authorities and non-state actors. It is irrelevant whether the belligerents are involved in an international or non-international armed conflict and whether they constitute parties to the conflict or have attained combatant status. If a safe area is established according to these principles, all parties to (and individuals in) the conflict would be bound to recognise and respect it.

The third principle places the onus of protection and provision of humanitarian aid onto national authorities.[86] This is a major distinction from the law of armed conflict, where safe areas are voluntary. According to the third principle, state authorities have no discretion in choosing whether to take proactive steps to protect civilians. Their obligation to protect and assist could require them to provide personnel to guard and monitor the safe area. They might also have to ensure that the environment within the designated zone facilitates humanitarian relief activities for the inhabitants.

Significantly, this principle grants displaced persons the right to call on their national authorities to provide protection.[87] In the case of safe areas, civilians exposed to significant risks could, in principle, call on civil or

---

82 *Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to Commission resolution 1997/39 (Addendum): Guiding Principles on Internal Displacement* E/CN4/1998/53/Add2 (1998) [*Guiding Principles*].

83 *Resolution on Protection of and assistance to internally displaced persons* GA Res 54/167, A/Res/54/167 (2000), cl 7.

84 *2005 World Summit Outcome* GA Res 60/1, A/Res/60/1 (2005), cl 132.

85 *Guiding Principles*, above n 82, principle 2(1).

86 Principle 3(1).

87 Principle 3(2).

military authorities to erect safe zones to shelter them. This has the potential to transform dramatically the relationship between individual civilians and national authorities. It would give victims of armed conflicts a recourse non-existent under international humanitarian law or imposed safe areas.

The fourth principle accords to categories of particularly vulnerable displaced persons a higher degree of protection.[88] These include children, mothers, female guardians, the disabled and the elderly. The principle requires that the protection and treatment they receive be tailored to their special needs, providing an even stronger imperative for the establishment of safe areas. It is unlikely that special victims can be given the appropriate care and protection unless they are provided with a healthy and safe environment insulated from danger.

The sixth and seventh principles prohibit the arbitrary displacement of civilians.[89] Even in the event of an armed conflict, displacement is prohibited unless there is a military imperative or a certain threat to the safety of civilians. When authorities displace persons, they must have met the high threshold of having explored all practical alternatives. Safe areas established to protect the residents of an area would therefore constitute a compatible method of preventing displacement. They would ensure national authorities do their utmost to either spare an area from military operations or take positive action to protect residents from adverse effects that would otherwise lead to their arbitrary displacement.

The *Guiding Principles* does consider situations in which the risks warrant civilian displacement. In the event of legitimate civilian displacement, authorities have a duty to ensure that they are accommodated in safe and healthy conditions.[90] This would require the establishment of settlements either located far away from hostilities or otherwise capable of providing substantive protection against frontline dangers.

Finally, the tenth and eleventh principles are centred on the fundamental rights of internally displaced persons.[91] These enshrine the right to life, the right not to be tortured and the right to humane treatment. Recognition of these fundamental rights in the *Guiding Principles* constitutes a further imperative for the establishment of safe areas. It requires authorities to ensure that such zones are properly administered, monitored and policed in order to ensure that individual victims can enjoy their fundamental rights.

Thus, in drawing from the *Guiding Principles*, safe areas could become a measure enabling national authorities to fulfil their obligations to protect and provide humanitarian assistance to the internally displaced. Compliance with these principles would go a considerable way in addressing the deficiencies of international humanitarian law. It would place more emphasis on the rights and needs of non-combatants and make it mandatory for governments

88 Principle 4(2).
89 Principles 6–7.
90 Principle 7(2).
91 Principles 10–11.

engaged in armed conflict to establish protected zones. These principles could further serve as guidelines for Security Council-imposed safe areas.

Appealing to International Human Rights Law

Human rights play a concurrent role in the regulation of warfare alongside the law of armed conflict by "limiting the use of force to situations of absolute necessity" and placing checks on state activities.[92] The regulation of warfare is not a vacuum in which human rights law does not apply. Such law should be regarded as providing an additional layer of protection for safe area inhabitants. Special attention should be paid to the right to life, as the primary purpose of safe areas is to preserve the lives of non-combatants. To that end, the exact manner in which the right to life could augment the law underpinning the implementation and enforcement of safe areas shall be discussed.

1 Application of Human Rights in Armed Conflict

Fundamental human rights cannot be discarded even in extraordinary circumstances like armed conflict. The right to life is not absolute insofar as combatants can take the life of other combatants. However, non-combatants' right to life remains undisturbed in armed conflict due to the right's non-derogable nature. It is a principle reinforced by civilian immunity provided under Common Article 3 of the Geneva Conventions.[93] The European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights give state parties some elasticity to derogate from rights in circumstances where there is a serious emergency threatening the life of the nation.[94] However, arts 2 and 6 of these declarations specify a number of fundamental rights that cannot be derogated from, including the right to life.[95] The jurisprudence of the European Court of Human Rights also affirms that certain rights remain in place during armed conflict. For instance, in *Ilascu v Moldova and Russia*, the Court found that Moldova and Russia, as signatories to the ECHR, had breached the applicant's right not to be tortured and inhumanely treated, notwithstanding the fact that the breaches took place during the internal armed conflict and state of emergency in Transnistria.[96]

It is generally accepted that non-state parties to non-international armed conflicts are expected to respect the right to life of non-combatants. Yet, states are reluctant to grant non-state actors — particularly insurgents

92 Kenneth Watkin "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict" (2004) 98 AJIL 1 at 18.

93 Geneva Convention (IV), art 3. See also *Resolution on respect for human rights in armed conflicts* GA Res 2444, XXIII (1968).

94 Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953), art 15 [ECHR]; and International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976), art 4 [ICCPR].

95 ECHR, art 2; and ICCPR, art 6.

96 *Ilascu v Moldova and Russia* (2005) 40 EHRR 46 (Grand Chamber, ECHR) at [445]–[448].

and terrorists — status as combatants, let alone legitimate authorities.[97] It is thus often assumed that non-state parties are not bound by human rights law.

Despite this, observers have concluded that non-state actors do in principle have a duty to respect human rights. For example, a UN investigative body affirmed that the actions of the Liberation Tigers of Tamil Eelam during the Sri Lankan Civil War should be judged against the Universal Declaration of Human Rights.[98] Further, Andrew Clapham asserts that international humanitarian law imposes certain duties on non-state actors to respect human rights norms in times of war.[99] Common Article 3 and Additional Protocol II offer protection to non-state combatants comparable to that of prisoners of war.[100] Non-state actors should thus be similarly responsible for compliance with international humanitarian law, especially the immunity of civilians. Common Article 3 in particular prohibits all belligerents of a non-international armed conflict from undertaking acts of violence against non-combatants.[101] Therefore, by extension of international humanitarian law, non-state parties could be required to respect the right to life of non-combatants. This includes the duty not to kill, harm or threaten non-combatants.

2 Negative Human Rights Obligations in Relation to Safe Areas

Under international humanitarian law, the legal status of a safe area would be largely dependent on whether the proposing power has met the agreed conditions. A breach may result in an immediate revocation of the safe area's status. Similarly, if a Security Council resolution is the basis of a safe area, its protected status would rest entirely on the specifics of the resolution and the effectiveness of international enforcement. The inhabitants' right to life would not serve as the safe area's raison d'etre.

Recognising the right to life as a founding principle of safe areas would require the deconstruction of traditional conceptions of safe areas. International law has to depart from the current notion that a safe area is only an act of mercy or goodwill granted to non-combatants. Safe areas should instead be recast as fundamental to the respect of non-combatants' right to life. Belligerents to the conflict must refrain from attacking a safe area or harming its inhabitants — not because they agree to its existence or because of coercive international enforcement, but because they are obliged under international human rights norms not to violate the right to life. The fundamental, non-derogable nature of the right to life would mean that even a temporary misuse of a safe area by belligerents or a change in tactical situation could not affect the inviolability of a safe area.

---

97 Gerald L Neuman "Humanitarian Law and Counterterrorist Force" (2003) 14 EJIL 283 at 297.

98 Philip Alston *Mission to Sri Lanka* E/CN4/2006/53/Add5 (2006) at [26].

99 Andrew Clapham "Human rights obligations of non-state actors in conflict situations" (2006) 88 International Review of the Red Cross 491 at 493 and 496.

100 Geneva Convention (IV), art 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II) 1125 UNTS 609 (opened for signature 12 December 1977, entered into force 7 December 1978), arts 13–18.

101 Geneva Convention (IV), art 3.

State authorities may also be accountable under international human rights law if their forces violate a safe area established in foreign territory. *Bankovic v United Kingdom* concerned a NATO air raid that killed 16 civilians. The European Court of Human Rights held that the European Convention could only apply to extraterritorial actions if the alleged breaches occur in an area "capable of falling within the jurisdiction" of the state party.[102] There may be difficulties in finding state authorities accountable for breaching human rights law. This would be particularly true if actions undertaken over a foreign safe area not within its capable jurisdiction, such as an air strike or artillery bombardment, result in death. In such instances, it may be prudent to use international humanitarian law as well as the emerging legal framework for the protection of internally displaced persons to support the proposition. However, if a state's actions do fall within the parameters of temporary and capable jurisdiction, the Court confirmed that:[103]

> ... the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.

A belligerent state seizing a safe area in foreign territory and taking over its administration would almost certainly fulfil this test. The relevant occupying authority would be obliged to uphold the fundamental rights of the safe area's inhabitants. Any erosion of the protective environment provided by the safe area that jeopardises the lives of its inhabitants would likely constitute a violation of the right to life. The occupying state authority could consequently be held accountable under the international human rights legal framework.

3 Positive Human Rights Obligations in Relation to Safe Areas

What needs to be resolved is whether international human rights law is capable of imposing a positive obligation on state authorities to create safe areas. Douwe Korff, in the Council of Europe's Human Rights Handbook series, observes that state authorities do have several positive responsibilities to fulfil during wartime, in order to uphold the right to life in art 2 of the ECHR:[104]

> [I]n situations of (internal) armed conflict, arrangements must be made to evacuate civilians, and especially the vulnerable and infirm, by the creation of safe escape routes, and the informing of the civilian population of these measures, whenever possible; and that when there are civilians in an area of conflict, the authorities must exercise "extreme caution" in the use of lethal force.

---

102 *Bankovic v United Kingdom* (2007) 44 EHRR SE5 (Grand Chamber, ECHR) at [52].

103 *Issa v Turkey* (2005) 41 EHRR 27 (Section II, ECHR) at [71].

104 Douwe Korff *The right to life: A guide to the implementation of Article 2 of the European Convention on Human Rights* (Council of Europe, Belgium, 2006) at 56.

The emerging jurisprudence of the European Court of Human Rights reinforces Korff's observations. The case of *Ergi v Turkey* concerned an ambush organised by Turkish armed forces against Kurdish separatists. The Court found that Turkey violated the right to life by having its forces positioned in such a manner that villagers were exposed to considerable risk of crossfire.[105] The right to life thus obliges state authorities to take precautions prior to an armed engagement and refrain from executing operations where the risk of collateral damage is high. The finding of the Court could be extended to safe areas. Part of the duty to take precautionary steps in the planning and execution of military options might include designating areas featuring a high concentration of civilians as safe zones. Failure to establish safe zones in circumstances where military operations are likely to affect civilians by way of indiscriminate attacks or substantial crossfire would be a breach of the right to life.

The duty may go even further than merely establishing a safe area. The Court in *Isayeva v Russia* stated that Russian forces were not merely duty-bound to evacuate civilians prior to a military operation that specifically targeted a village.[106] Their duty to evacuate required them to convey advanced warning of military operations, and inform civilians of the duration of operations, the length of temporary displacement, routes of evacuation and the safety measures in place.[107] By extension, it would appear that if a safe area is to be established, protected non-combatants are lawfully entitled to information regarding the duration of the safe area and the specific arrangements concerning their protection.

There may be limitations to the jurisprudence of the European Court of Human Rights. Both *Ergi* and *Isayeva* concerned non-international armed conflicts only. Furthermore, until additional cases come before the Court, the rules and principles are not crystallised. However, the Court is likely to transmit the rules onto cases concerning an international armed conflict by way of analogy, provided the requirement of effective control is met. Moreover, these cases are significant because they represent the few occasions in which a judicial body has used international human rights law to supplement international humanitarian law shortcomings to find state authorities accountable for failing to protect the right to life of non-combatants.

Finally, the right to life imposes certain procedural obligations that are applicable to the administration and respect of safe areas. The European Court of Human Rights has noted that states have several key duties where the use of force by state agents has taken an individual's life. One such duty requires the state to conduct an effective investigation "capable of leading to a determination of whether the force used in such cases was or was not justified

105 *Ergi v Turkey* (2001) 32 EHRR 18 (Grand Chamber, ECHR) at [80]–[81].
106 *Isayeva v Russia* (2005) 41 EHRR 38 (Section I, ECHR) at [189].
107 At [189].

in the circumstances".[108] In *Al-Skeini v United Kingdom*, the European Court recently affirmed the specific post-facto procedural obligations that apply to state authorities even in fragile security situations.[109] An investigation must be launched by the state once the alleged breach has come to its attention. It must be carried out independently from the implicated state authorities and be of sufficient scope to take into account the actions of state agents and surrounding circumstances. Moreover, the investigative process should be capable of identifying and punishing those responsible.[110] In the event inhabitants of a safe area perish, international human rights law holds the administering power accountable and requires it to investigate thoroughly any failure to preserve the right to life. Furthermore, international law would require the state to hold accountable those agents who were responsible for inflicting harm or being grossly negligent in administering a safe area.

VI EVALUATION AND CONCLUSION

Safe areas have been criticised as failed responses to humanitarian crises, offering false hopes and consequently entrapping, rather than sheltering, victims.[111] However, this should not justify the disposal of safe areas in their entirety. The nature of modern warfare is such that there are no clearly delineated frontlines. Without the implementation of safe areas, non-combatants are protected solely by the principle of distinction, which marks the individual as immune from attack. Safe areas offer a more effective form of protection by marking the individual, the space around them and their access to humanitarian assistance as collectively protected. Rather than pointing to the need to eliminate the concept entirely, the instances where safe areas have failed indicate a desperate need to refine the existing law underpinning the concept.

It is time for international law to transcend the untenable line of thought that safe areas are privileges granted by higher authorities. Equally unacceptable would be reliance on Security Council-imposed safe areas. They are ad hoc exercises that follow no precedent, are largely determined by the geopolitical climate and require the finding of a threat to international peace and security.

Instead, safe areas should be viewed as a prerequisite action that must be fulfilled in order for a state to satisfy its obligations under treaty or customary international law. It would thus evolve into a compulsory initiative. Traditionally, the only instance in which a state must respect the establishment of a safe area was if a Security Council resolution bound it.

108 At [212].

109 *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 (Grand Chamber, ECHR) at [164]–[167].

110 At [166]. The obligation to hold state agents accountable for deaths occurring under their responsibility is also affirmed in *McKerr v United Kingdom* (2002) 34 EHRR 20 (Section III, ECHR) at [111].

111 See Jennifer Hyndman "Preventive, Palliative, or Punitive? Safe Spaces in Bosnia-Herzegovina, Somalia, and Sri Lanka" (2003) 16 Journal of Refugee Studies 167 at 175.

However, as the analysis and arguments presented in the previous sections suggest, state authorities do not have to wait for a Security Council resolution before having to undertake compulsory action relevant to safe areas. International human rights law and the emerging principles for the protection of internally displaced persons have established a framework of non-derogable obligations. Whenever the exigencies of an armed conflict or emergency reach a point where the survival of non-combatants is threatened, those circumstances should automatically trigger the state's duty to consider the creation of safe zones.

The non-derogable nature of the right to life, coupled with the availability of jurisprudence that has consolidated specific guidelines and expectations, identifies international human rights law as the most preferable framework for binding and regulating states in the implementation of safe areas. Under the rubric of international human rights, the right to life sets a particularly high threshold test. Safe areas must be capable of providing, to the greatest extent possible, credible shelter to non-combatants from the external risks posed by military operations. A failure to do so should constitute a breach of the right to life, or a finding that state authorities did not adopt the precautionary measures that were necessary to spare civilians in wartime. Safe areas must also be appropriately administered to facilitate a safe and healthy environment for their inhabitants in order for state authorities to discharge their responsibilities. If a safe area's inhabitants die or suffer from inhumane and degrading conditions, state authorities are obliged to execute a post-facto investigation. They may even be held accountable for negligent administration.

The emerging legal framework for the protection of internally displaced persons would serve as a secondary set of principles for regulating safe areas. The onus is primarily on state authorities to protect the internally displaced. It would be reasonable to expect safe areas to be a practical necessity for state authorities to discharge their duties outlined by the *Guiding Principles on Internal Displacement*.

The most notable advantage of the framework is that it acknowledges UNHCR's role in responding to circumstances where the state has failed to provide protection. Principles stipulated by various UN General Assembly declarations set a normative framework that affirms the immunity of UNHCR-administered areas from armed attack or interference. Customary international law therefore renders UNHCR-administered areas a form of safe area.

Additionally, there is normative support for members of the international community to have a duty to assist UNHCR in facilitating protection and giving humanitarian assistance. This is not an invitation for states unilaterally to impose and enforce safe areas. UNHCR safe areas still require the preliminary approval of the Secretary-General and other UN organs. However, it represents a tremendous improvement from traditional reliance on the Security Council's approval of safe areas under Chapter VII powers.

Thus, international human rights law and the emerging framework for the protection of internally displaced persons should be considered as capable of constituting a new legal foundation for the creation and implementation of safe areas. In contrast to the traditional sources of safe area law, the new approach offers stronger and more consistent protection to non-combatants. It gives due consideration to the rights of victims and could generate a binding legal obligation on both state authorities and the international community to support safe area endeavours. Giving serious consideration to these refinements would enable safe areas to transition from a loose, nominal assurance to a practical, sophisticated and effective exercise.