

The Electoral Rights of Conflict Forced Migrants: A Review of Relevant Legal Norms and Instruments

Participatory Elections Project (PEP)

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IOM International Organization for Migration
OIM Organisation Internationale pour les Migrations
OIM Organización Internacional para las Migraciones

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Acronyms

ASEAN	Association of Southeast Asian Nations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CFM	Conflict Forced Migrant
EAD	Electoral Assistance Division
EMB	Election Management Body
ICCPR	International Covenant for Civil and Political Rights
IDP	Internally Displaced Person(s)
IOM	International Organization for Migration
IPU	Inter-Parliamentary Union
OAS	Organization of American States
OAU	Organization of African Unity
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Cooperation in Europe
TPS	Temporary Protection Status
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner for Refugees
USCR	United States Committee for Refugees

Introduction

Conflicts result in human displacement. During the 1990s, communal conflicts around the globe forced millions of people from their homes. According to the United Nations High Commissioner for Refugees (UNHCR), the number of refugees and other “persons of concern” grew from 15 million in 1990 to over 22 million by the year 2000.¹ The United States Committee for Refugees (USCR) estimates that the global population of refugees and internally displaced persons (IDPs), which USCR together labels as “uprooted populations” totaled at least 34.8 million as of December 2002.²

Settlements to these conflicts often include elections and the establishment of democratic institutions as a key component to long-term peace building. This emphasis stems from the capacity of well-structured democratic institutions to channel material and ideological disputes away from the battlefield and into a political process.³ Fair and transparent elections, held in conjunction with efforts to re-establish rules of law and develop a healthy civil society can heal deeply polarized societies and create the conditions necessary for post-conflict rebuilding and the return of displaced populations.

Unfortunately, conflict forced migrants⁴ (CFMs) are routinely denied the right to participate in their home country and/or territory political processes. Several factors account for this: First, international electoral standards and recent practice do not provide clear or consistent guidance or are not implemented in the country conducting elections for political reasons. Second, electoral actors may object to the costs and complicated logistics associated with enfranchising displaced populations without compromising the integrity of the election. Finally, Elections conducted in post-conflict situations are complicated affairs, often occurring in the framework of a negotiated political agreement.⁵ Since the country’s political and electoral system – and perhaps even timelines and procedures – may form part of a peace agreement electoral actors may have only limited ability to influence the design of the process and ensure CFM participation.

As a result, many post-conflict elections have disenfranchised significant proportions of the eligible voting population, which rewards groups who impose their will through violence, intimidation, and the expulsion of civilian populations in order to secure short-term political objectives. Even when conflict-forced migrants have been included, mechanisms and standards for their participation have often varied, leading to inconsistent practices that can undermine the transparency of elections.

If properly organized, the enfranchisement of conflict forced migrants can support and be integrated with broader objectives for reconstruction and reconciliation. An electoral process is

¹ United Nations High Commissioner for Refugees, “Refugees by Numbers: 2000 Edition,” available from <http://www.unhcr.org>; Internet; accessed 9 October 2002.

Note that this figure includes 11.6 million refugees, 1.1 million asylum seekers, 2.5 million returned refugees, and 6.8 million IDPs.

² United States Committee for Refugees, *World Refugee Survey 2003*. Washington DC: United States Committee for Refugees, 2003. Note that because of its formal mandate, many persons may be displaced but are not technically “of concern” to the UNHCR and are thus not included in UNHCR statistics. Nevertheless, these persons may and often do receive some assistance and protection from UNHCR.

³ A large and vigorous literature has emerged debating the relationship between elections and peace-building. See Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict*, (New York: W.W. Norton and Company, 2000); Brian Riley and Andrew Reynolds. *Electoral Systems and Conflict in Divided Societies*, Washington, DC: National Academy Press, 1999; and Marina Ottoway and Theresa Chung, “Debating Democracy Assistance: Towards a New Paradigm.” *Journal of Democracy* (October 1999): 99 – 113. This debate is beyond the scope of this study, but it is an important theoretical argument.

⁴ This report uses the term “Conflict Forced Migrant” to include both refugees (as defined by the 1951 Refugee Convention and expanded upon by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration on Refugees) and internally displaced persons. The legal definitions of both categories of persons are further described below.

⁵ Although recent elections in Chechnya, Colombia, Kashmir, and Sri Lanka, all of which have substantial displaced populations, have occurred prior to the implementation of a peace settlement.

an opportunity to establish communications among displaced communities so that there is visibility, transparency, and confidence as reconciliation continues. In addition, by participating in political life, displaced groups are reconnected with the home state or region, facilitating repatriation and bringing home their unique skills and capabilities. The enfranchisement of refugees and IDPs also encourages the widespread acceptance of electoral results and, hence, a durable peace. When implemented correctly, the electoral participation of conflict-forced migrants can moderate the effects of ethnic cleansing and empower disenfranchised people to elect preferred representatives.

The Participatory Elections Project

This report synthesizes the findings of an IOM research project examining the electoral rights of refugees and IDPs in their countries and territories of origin. As such, it addresses a number of issues that can be divided into two general questions:

- 1) Do conflict forced migrants have a fundamental human right to participate in their home state or territory elections?
- 2) What standards can be developed to ensure that the inclusion of conflict-forced migrants in a country's elections does not undermine the transparency of a post-conflict election?

The first question necessitates an overview of: 1) the various legal instruments that relate to refugee and IDP protection; 2) the trend towards codification of a "right" to participate in a democratic political process; and, 3) and the application of that right to conflict-forced migrants. These issues are examined in the remainder of this discussion paper.

The second question requires a detailed analysis of cases where refugees and IDPs have either been included or excluded from participating. The cases were selected to provide a representative sample of both instances, and are examined in the substantive case study chapters. Based on these case studies, the Participatory Elections Project has compiled a detailed framework of "international election standards" specifically applicable to conflict forced migrants. These issues are examined in Discussion Paper No. 2: "Enfranchising Conflict Forced Migrants: Issues, Standards, and Best Practices."⁶

Conflict-forced migrants (CFM)

Refugees

The key documents governing state behavior and treatment of refugees are the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.⁷ The Convention defines a refugee as anyone who:

"owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable ... to avail himself to the protection of that country ... or is unable to return to it."

A literal interpretation of this language suggests that the term "refugee" only applies to persons outside of their own country and unable to return to it solely because they have a "well-founded

⁶ Available at www.iom.int/pep

⁷ The language of the 1951 Convention begins "... as a result of events occurring before 1 January 1951 and owing ...". The 1967 Protocol removes this temporal limitation, but does not address the issue of broadening the categories of persons covered by the Convention. See United Nations High Commissioner for Refugees, *1951 Convention and 1967 Protocol Relating to the Status of Refugees*, Available at <http://www.unhcr.org>; Internet; accessed 9 October 2002.

fear of persecution.”⁸ Such a definition risks excluding many victims of armed conflict and human rights abuses who are simply fleeing a deteriorating security environment. As a consequence, a number of developing states in Africa and Latin America began to argue in the 1960s that the very limited interpretation of “persecution” did not apply to the vast majority of persons displaced outside of Europe as a consequence of war and internal civil strife.⁹ Thus, several regional instruments have attempted to expand the definition of refugee to include these persons. The 1969 Organization of African Unity’s (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa states that:

“The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”¹⁰

Similarly, the 1994, Cartagena Declaration on Refugees adopted by the Central American Foreign Ministers states that:

“... the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”¹¹

Taken together, these two documents seek to widen the definition of refugee and expand the protections that host governments must extend to refugee populations. Nevertheless, host governments continue to maintain wide latitude in determining who merits protection under the varying definitions, and Europe and the United States in particular continue to prefer the more limited definition contained in the 1951 Refugee Convention.

Refugee Protection

As soon as a person fleeing persecution crosses an international border, they are classified as an asylum seeker, and fall under the protection of the 1951 Convention. Signatories are required to provide minimum standards of treatment for asylum seekers, most importantly the right to *non-refoulement*, which forbids the host state from forcibly returning asylum seekers to their country of origin against their will. According to Article 33 (1) of the 1951 Convention, “no refugee should be returned to any country where he or she is likely to face persecution or torture.”¹²

⁸ It is important to stress the fact that refugees and IDPs almost always represent national or ethnic minorities.

⁹ Eduardo Arboleda, “Refugee Definitions in Africa and Latin America: The Lessons of Pragmatism,” *International Journal of Refugee Law* 3, no. 2 (1991): 186.

¹⁰ The Assembly of Heads of State and Government at its Sixth Ordinary Session, Organization of African Unity. *Convention Governing the Specific Aspects of Refugee Problems in Africa*, (10 September 1969). Available at http://www.afrol.com/archive/documents/refugees_convention.htm; internet accessed on 15 May, 2002.

¹¹ *Cartagena Declaration on Refugees*, Adopted at a colloquium entitled “Coloquio Sobre la Proteccion Internacional de los Refugiados en American Central, Mexico y Panama: Problemas Juridicos y Humanitarios,” Held at Cartagena, Columbia (19 - 22 November 1984). Available at <http://www.asylumlaw.org/docs/international/CentralAmerica.PDF>; Internet Accessed on 1 June 2002.

¹² A vigorous scholarly debate has emerged regarding whether the right to *nonrefoulement* has become a rule of customary international, thus establishing an enhanced obligation on states to never *refoul* persons fleeing humanitarian crises. Guy Goodwin Gill, for example, argues that “State practice has broadened the scope of Article 33. First it has confirmed that the duty of *non-refoulement* extends beyond expulsion and return and applies to measures such as rejection at the frontier and even extradition. Second, it has further ... extend[ed] it application to a broader category of refugees ... Customary international law incorporates this core meaning, but extends the principle of *non-refoulement* to include displaced persons who do not enjoy the protection of the government of the country of origin.” (Guy S. Goodwin Gill, *Non-refoulement and the New Asylum Seekers*” in David Martin, ed., *The New Asylum Seekers: Refugee Law in the 1980s*, Dordrecht: Martinus Nijhoff, 1988: 105. (See also Goodwin-Gil, *The Refugee in International Law*, 2 ed., Oxford: Clarendon Press, 1996). Kay Hailbronner, on the other hand, takes a more restrictive view of the principle: “The proponents of a customary international norm, however, ignore the fact that a rule of customary international law requires

Ultimately, however, it is up to the host state to determine whether the asylum claim is valid, and states often apply differing criteria when assessing whether the refugee faces a legitimate threat of being “persecuted,” as defined by the Refugee Convention. Should the person be granted asylum status, the host state is obligated to ensure that they are treated “no less favorably” than other citizens of the country in regards to fundamental human rights such as access to courts, due process, the right to work, and freedom of movement.¹³ Host states may periodically review the status of those granted asylum, with an eye towards eventually repatriating them (preferably not against their will) when conditions in their home state improve. Once refugees return to their home state, they are classified as returnees and are no longer covered by the Convention.¹⁴

The United Nations High Commissioner for Refugees (UNHCR) provides the institutional home for the protection of refugee rights as detailed by the 1951 Convention. Its core functions include ensuring that refugees are treated in accordance with the Convention and other international human rights instruments, providing immediate humanitarian assistance to refugees, and seeking durable solutions to the causes of refugee flows. Other important actors in refugee care and protection include the International Organization for Migration, various UN specialized agencies whose mandates may overlap with UNHCR (such as the UN High Commissioner for Human Rights and the Office for the Coordination of Humanitarian Affairs), the International Committee of the Red Cross (ICRC) and a wide variety of non-profit humanitarian organizations such as CARE, Doctors without Borders, and the International Rescue Committee.

Refugees and asylum

The civil and ethnic conflicts that emerged following the end of the Cold War changed the refugee protection landscape. By 2000, the UNHCR estimated a global population of 14 million refugees and asylum seekers worldwide, although many believed that the number was substantially higher. As a consequence, the UNHCR and industrial country governments suddenly confronted a dramatic increase in asylum claims and inflows of irregular and mixed motive migrants. In addition, the changed nature of the international political system and emergence of failed states and civil wars created large numbers of IDPs, who found themselves needing protection but falling outside of the definition of “refugee” as provided by the Convention.

The dramatic rise in asylum claims in the early 1990s prompted a major change in the way many host countries (particularly in Europe and North America) dealt with asylum seekers. Many countries limited access to asylum procedures or even blocked the entry of refugees onto their territory by either denying entrance at the border or diverting the refugee to a third country. Other countries sought to establish alternate mechanisms, such as the creation of “safe areas” in the countries of origin. In these cases, those displaced by conflict received protection and support from the international community, but would not create legal obligations on host states under the 1951 Convention.¹⁵ While forcible repatriation of refugees was rarely implemented, the emergence of “temporary protection status” (TPS), in which the refugee was provided immediate protection but not a formal asylum hearing, became increasingly common. According to the USCR:

proof of consistent state practice. Neither the UNHCR’s extended mandate nor its repeated recommendations that de facto refugees should at least be protected against *refoulement* and be permitted to remain in the territory of refuge until an appropriate solution is found for them provides sufficient evidence of the emergence of customary international law ... The point at which UNHCR’s view of non-refoulement diverges from state practice is the point at which wishful legal thinking replaces careful factual and legal analysis. The requirements for the existence of customary international law -- consistent state practice and *opinion juris* -- simply are not met.” Kay Hailbronner, Non-refoulement and ‘Humanitarian’ Refugees: Customary International Law or Wishful Legal Thinking?” in David Martin, ed., *The New Asylum Seekers: Refugee Law in the 1980s*, Dordrecht: Martinus Nijhoff, 1988: 129.

¹³ It is important to note, however, that these rights only apply to those who have successfully petitioned for asylum.

¹⁴ Although UNHCR may continue to assist them as they reintegrate.

¹⁵ The creation of “safe areas” in Iraq and Bosnia, for example, was largely driven by the desire of industrial country governments to prevent mass influxes of refugees from reaching their borders. See UNHCR, *The State of the World’s Refugees: Fifty Years of Humanitarian Action*. Available at <http://www.unhcr.ch/pubs/sowr2000/sowr2000toc.htm> (esp. Ch. 8).

States, justifiably or not, argued that their refugee status determination systems risked being overwhelmed, that the crisis might be resolved shortly, and that conferring durable refugee status on those displaced would reify programs of ethnic cleansing, contrary to fundamental human rights values. As a result, divergent policies on temporary protection emerged at the national level... Temporary protection can be seen as a form of complementary protection, designed to protect persons at risk of generalized conflict or violence, who do not qualify as refugees under the 1951 Convention. In this sense, temporary protection measures at the national level may functionally adopt a broadened refugee definition, analogous to Article 1A(2) of the 1969 OAU Convention.¹⁶

Recognizing the resource constraints facing host countries and the possibilities for a domestic political backlash, the UNHCR endorsed temporary protection in situations of mass refugee influxes that overwhelmed the capacity of host states to respond through traditional asylum procedures. Nevertheless, UNHCR has urged governments to ensure that such mechanisms do not violate the fundamental right of *nonrefoulement*, arguing that the purpose of temporary protection ought to be "...to ensure immediate access to safety and the protection of basic human rights."¹⁷ In addition, the agency noted a number of problematic questions raised by temporary protection, including the fact that those assigned TPS status might receive less favorable treatment than those with Convention Status, the social and political entitlements recipients of TPS should be granted and the extent of state responsibilities to these persons at the end of the war.

Several important exceptions to the principle of *nonrefoulement* are contained in the Refugee Convention. Article 1.F holds that the provisions of the Convention do not apply to persons where there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity ...
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He is guilty of acts contrary to the purposes and principles of the United Nations.

These exceptions to the definition of refugee (and thus to the principle of *nonrefoulement*) have serious implications for considering the electoral rights of conflict forced migrants and are further discussed below and in Section II of this report.

Internally Displaced Persons (IDPs)

Neither the Convention nor the UNHCR have competence over matters of internal displacement, although UNHCR does provide some forms of limited assistance in certain situations. A displaced person becomes a refugee only after crossing an international border, even though they may have been driven from their homes and communities in response to violent conflict or "well-founded fears of persecution." Internal displacement, on the other hand, results in a situation where the affected population remains within the territorial boundaries of the concerned state. As a consequence, the protection of IDPs is primarily an internal matter, and external interference can constitute an illegal intrusion into state sovereignty. Until recently, international law has not directly addressed the needs of internally displaced populations.

Internal displacement affects 20 to 25 million people in over 40 countries around the globe. Many IDPs are simply fleeing the violence and mayhem of war while others are displaced as part of a conscious government strategy to control or rid themselves of unwanted or problematic groups. As the number of IDPs skyrocketed during the early 1990s, the international community

¹⁶ Joan Fitzpatrick, "Taking Stock: The Refugee Convention at 50," Available at: http://www.uscr.org/world/articles/takingstock_wrs01.htm

¹⁷ UNHCR, *State of the World's Refugees: Fifty Years of Humanitarian Action*. p. 168

scrambled to respond. In 1992 Secretary General Boutros Gahli appointed Francis M. Deng, a Sudanese Diplomat, as the first “Representative of the Secretary-General on Internally Displaced Persons.” The position is intended to serve as “a catalyst within the international system, to raise the level of awareness about the plight of the internally displaced, to advocate their cause, and to dialogue with governments and all pertinent actors on ways of ensuring their protection and assistance.”¹⁸ Deng has subsequently focused his work on several thematic areas: creating a normative framework for the protection and assistance needs of IDPs; developing institutional structures at the international level to respond to the immediate needs of IDPs; drawing international attention to specific country situations; and, catalyzing research to broaden understanding of the problem.¹⁹

The Guiding Principles on Internal Displacement

In 1998, Deng released a document entitled “Guiding Principles on Internal Displacement.”²⁰ Rather than forming the basis of a new international treaty law, the Guiding Principles undertook to identify rights and obligations contained in existing human rights instruments and remind governments that these protections extended to IDPs. This approach had the unique advantage of avoiding the lengthy negotiations and drafting schedules of a new international convention, providing an immediate basis for the international community to act on the issue.²¹ The principles, in conjunction with a detailed compendium of relevant treaties and state practices, identify major human rights issues associated with IDPs and extract relevant provisions that provide standards for their protection. According to the Global IDP Project, “[the Guiding Principles] restate and reflect international conventions in the fields of Human Rights Law, Humanitarian Law and Refugee Law. Practically all Principles can be traced to a particular instrument under one of these three categories of binding international law.”²² Roberta Cohen further argues that: “The Guiding Principles consolidate into one document all the international norms relevant to IDPs, otherwise dispersed in many different instruments. Although not a legally binding document, the principles reflect and are consistent with existing international human rights and humanitarian law. In restating existing norms, they also seek to address grey areas and gaps.”²³

The Guiding Principles define IDPs as: “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”²⁴ Following this definition, the document goes on to define a number of specific rights that governments must not violate in relation to the internally displaced. These rights include:

- Full equality and the same freedoms enjoyed by the non-displaced (Principle 1);
- The right not to be arbitrarily displaced (Principle 6);
- Protection from genocide, murder, and arbitrary execution (Principle 10);
- Freedom of movement and the right to leave the country and seek asylum elsewhere (principles 14 and 15);

¹⁸ United Nations Commission on Human Rights, “Statement by Mr. Francis M. Deng: Representative of the Secretary-General on Internally Displaced Persons,” 12 April 2001. Available at http://www.idpproject.org/weekly_news/2001/word_files/2001FDSTMNT_doc; Internet accessed on 13 September.

¹⁹ Francis Deng, and Dennis McNamara, “International and National Responses to the Plight of IDP’s,” *Forced Migration Review* 10 (April 2001): 24.

²⁰ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2, Available at <http://www.unhcr.ch/html/menu2/7/b/principles.htm>; Internet Accessed on 1 June, 2002.

²¹ Walter Kalin, “How Hard is Soft Law? The Guiding Principles of Internal Displacement and the Need for a Normative Framework,” Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, CUNY Graduate Center. 19 December 2001.

²² See Global IDP Project, *Global Overview*, Available at: http://www.idpproject.org/global_overview.htm; Internet accessed on 3 July 2002.

²³ Roberta Cohen, “The Guiding Principles on Internal Displacement: A New Instrument for International Organizations and NGO’s,” *Forced Migration Review*, no.2, (August 1998): 31.

²⁴ *Guiding Principles on Internal Displacement*, Introduction.

- Recognition everywhere as a person before the law, including the right to obtain basic documents (Principle 20).

A considerable debate has emerged regarding how the Guiding Principles relate to international and domestic legal systems. The general approach of the Guiding Principles is to identify existing provisions in international human rights, humanitarian, and refugee law and then remind governments that these rights also apply to the internally displaced.²⁵ As Walter Kalin notes, "An obvious disadvantage of the non-binding nature of the Guiding Principles is the fact that states cannot be held accountable if they disregard them, and, as such, they cannot be invoked in legal proceedings at the domestic level."²⁶ However, Kalin still believes that the approach provides important and immediate protections to IDPs, as "...it is always possible to invoke the hard law that lies behind the Guiding Principles where necessary."²⁷ Some governments, however, refuse to recognize that the Principles create any binding obligations, but rather serve as a set of normative statements. This position reflects the continued sensitivity of some developing country governments and former colonies to instruments that appear to present an intrusion into their domestic sovereignty.

Taken together, the 1951 Refugee Convention and (the Guiding Principles although not legally binding directly) provide a framework under which the rights of conflict forced migrants are recognized and, in some instances, directly protected. The core principles of *nonrefoulement*, and non-discrimination obligate states to undertake certain actions in relation to these populations.²⁸ However, the right to political participation appears to be more firmly entrenched in the Guiding Principles than in the 1951 Convention. The remainder of this section explores the evolution of the right to political participation, before turning to the issue of how this right can be extended to conflict forced migrants.

Democracy and the right to participation

Do individuals have a fundamental right to live under an open and democratic political system, and to what extent is their right to participate in their government's affairs protected by international human rights law? The question raises a number of vexing political and legal issues, not least of which is the tension between state sovereignty and the fundamental rights of individuals. Until recently, international legal scholarship rarely addressed the constitutional structure of states.²⁹ Since 1945, however, the idea that individuals possess a universal and non-derogable right to participate via free and fair elections in the affairs of their state has found its way into a variety of international treaties, declarations, and the rulings of international human rights courts and tribunals. The end of the Cold War and dramatic expansion in the number of countries moving to democratic systems of governance³⁰ has reinforced this idea, paving the way for observers to argue that the right to democratic governance has become enshrined in international human rights law.³¹

²⁵ As an addendum to the *Principles* states: "existing international law as applied to internally displaced persons consists of a highly complex web of norms originating from a variety of legal sources which make its application ... difficult."

²⁶ Kalin, "How Hard is Soft Law?:" 7

²⁷ Kalin, "How Hard is Soft Law?:" 7

²⁸ The concept of a "regime" indicates "the principles, norms, rules, and decision-making procedures around which actor's expectations converge in a given issue area." Academics and practitioners refer to regimes when discussing the wider set of rules and normative principles surrounding a given area of international law.

²⁹ The *Restatement (third) of the Foreign Relations Law of the United States* (1987) notes, "(I)nternational law does not generally address domestic constitutional issues, such as how a national government is formed."

³⁰ Freedom House reports that as of the end of the year 2000, "electoral democracies now represent 120 of the 192 existing countries and constitute 62.5 percent of the world's population." See Freedom House, "*Democracy's Century: A Survey of Global Political Change in the 20th Century*," Available at: <http://www.freedomhouse.org/reports/century.html>; Internet, accessed on 9 June 2002.

<http://www.freedomhouse.org/reports/century.html>

³¹ See Gregory H. Fox and Brad R. Roth, eds, *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), and Franck, Thomas. "The Emerging Right to Democratic Governance," 86 *American Journal of International Law* 46 (1992): 46 – 49.

Observers of the international legal system look to a number of sources in determining whether an international legal rule has emerged. The single most important source of modern international law is treaty law, including the charters of the UN and regional inter-governmental organizations, as well as issue specific treaties such as the 1966 International Covenant on Civil and Political Rights (ICCPR). A secondary source of international law is derived from the customary behavior of states (sometimes called *jus cogens*). General principles of law – including the declarations and practices of international organization – can also serve as a component of international law. The following analysis briefly discusses the evolution of the “right” of individuals to participate in the public life of their states and argues that the international community has come to accept the idea that democratic governance is an important element of international human rights law.³²

International Treaty Law

Although the United Nations Charter references the inherent right of “national self determination,” this language is generally interpreted to mean that states have an inherent right to be free from external domination and colonial occupation, rather than to imply an individual right to live in an open and participatory political system. The Charter does declare that the protection of fundamental human rights is one of the primary purposes of the organization and states party to the Charter undertake to cooperate in promoting that purpose. In addition, the Charter authorized the UN to administer trust territories slated for decolonization and it took an important role in organizing elections in countries emerging from colonialism (Cook Islands in 1965; Spanish Equatorial Guinea 1968; West New Guinea 1969).³³ In general, however, the Charter, with its extensive emphasis on non-interference in the internal affairs of member states, does not seem to directly concern itself with how states are governed, so long as they are free to choose their own system of governance.

The charters of several post-war regional inter-governmental organizations (the European Community/Union, OAU, and the Organization of American States (OAS)) expressly mandate that these IGOs promote human rights and democratic political institutions within the member states. The preamble to the 1948 Charter of the OAS declares that “representative democracy is an indispensable condition for the stability, peace, and development of the region,”³⁴ which suggests that the member states not only believe that democracy is a fundamental right, but also reflects the Liberal (Kantian) contention that democratic states are less inclined to go to war with one another.³⁵ Similarly, the preamble to the 1949 Statute of the Council of Europe refers to “the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.”³⁶ These organizations have actively embraced the promotion of democracy and participatory political institutions, and several important human rights treaties and agreements have emerged from their work.³⁷

³² As a basic system of rules, international human rights law appears to conflict with the long established and jealously guarded principle of absolute state sovereignty. Since 1945, however, the idea that governments can be held accountable to standards of behaviour towards their citizens has gained increasing currency. The rapid increase in international human rights instruments, combined with the practice of states and international organizations in the field of monitoring and even intervening in the internal affairs of other states in order to protect basic human rights, suggests that human rights considerations may even supersede the inherent sovereign rights contained in Articles 2(4) and 2(7) of the UN Charter.

³³ Gregory Fox, “The Right to Political Participation in International Law,” In *Democratic Governance and International Law*. Eds. Gregory H. Fox and Bred R. Roth, 48 -- 90. (Cambridge: Cambridge University Press, 2000): 72.

³⁴ *Charter of the Organization of American States*. 119 U.N.T.S. 3, entered into force December 13, 1951, amended 721 U.N.T.S. 324, entered into force Feb. 27, 1990. Available at: <http://www.oas.org/EN/PINFO/chartere.htm>.

³⁵ Originally conceived by Prussian philosopher, Immanuel Kant, the “Democratic Peace Hypothesis” has recently enjoyed a revived interest from international relations scholars. An excellent overview of the issues and debates surrounding the hypothesis can be found in: Michael E. Brown, ed, *Debating the Democratic Peace*. (Boston: MIT Press, 1996).

³⁶ Council of Europe, *Statute of the Council of Europe*, London, 1949, available from <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>; Internet accessed on 10 October 2002.

³⁷ See Richard Burchill. “International Law’s Contribution to Democratic Multi Level Governance: The Possibility of Regional Intergovernmental Organizations,” Paper prepared for the Conference on Multi Level Governance: Interdisciplinary Perspectives, 28 – 30 June 2001, University of Sheffield.

The first international statement that proclaims the right to democracy as a “fundamental” human right appears in Article 21 of the 1948 Universal Declaration of Human Rights (UDHR), which declares that:

“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives ... The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”³⁸

While UDHR is a General Assembly resolution and not a formal treaty, its near universal acceptance by states places it in a unique category among IGO declarations. Many states regard it as constituting an international “bill of rights” that is quickly approaching the formal status of international treaty law.

A more explicit statement of the right to participate in public life appears in Article 25 of the 1976 International Covenant on Civil and Political Rights (ICCPR), which states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free will of the electors...³⁹

This right is sharpened by the reference to Article 2 of the ICCPR, which prohibits governments from discriminating in the protection of rights enumerated based upon characteristics such as race, color, sex, language, religion, or other status. The “non-discrimination” principle is a central feature of almost all recent human rights instruments, including those related to electoral participation. The core idea is that all rights are to be equally enjoyed by each segment of a state’s population. As Article 2(1) of the ICCPR states: “Each state party to the present covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant.” This non-discrimination principle serves as the basis for subsequent human rights instruments that guarantee the right of political participation to specific social groups, particularly women and national minorities.⁴⁰ Thus, Article 25 appears to have influenced several instruments that obligate states to ensure that fundamental rights and freedoms are enjoyed by all segments of a state’s population, including:

- The Convention on the Elimination of All Forms of Racial Discrimination (CERD) – which obligates states to ensure that all groups within the state are provided “Political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service” (Article 5c);⁴¹
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – which requires that states party “shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and,

³⁸ *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), available at <http://www1.umn.edu/humanrts/instreet/b1udhr.htm>.

³⁹ *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976. Available at <http://www1.umn.edu/humanrts/instreet/b2esc.htm>.

⁴⁰ See Louis Henkin, et al, *Human Rights: University Casebook Series*. (New York: Freedom Press, 1999):

⁴¹ United Nations General Assembly, Resolution 2106 (XX): *Convention on the Elimination of All Forms of Racial Discrimination*, (21 December 1965) Available at www.osce.org/odihr/elections/standards/view.

in particular, shall ensure to women, on equal terms with men, the right ... to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies” (Article 7);

Several regional human rights instruments also establish the democratic entitlement. Article 23 of the 1978 American Convention on Human Rights restates the ICCPR language almost to a word, providing that:

“Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters...”⁴²

The Inter-American Commission on Human Rights, which reviews compliance with the provisions of the treaty, has noted that the right to participation is a fundamental component of international human rights law and that member states are duty bound to observe the right. In a 1990 review of elections in Mexico, the Commission argued that states party to the convention must respect the right to participate and that free and fair elections require “consistency between the will of the voters and the results of the election.”⁴³ Other important instruments in the inter-American human rights system include the *OAS General Assembly resolution 510*, which declares that democracy is the basis of a just human society; *General Assembly resolution 1080* (1991), which adopted mechanisms for the OAS to respond to situations where democracy is threatened or interrupted in the hemisphere;⁴⁴ and, perhaps most directly, the *Inter-American Democratic Charter* of 2001, which bluntly declares in Article 1 that, “The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it.”⁴⁵

In Europe, the *First Protocol to the European Convention on Human Rights* provides that “the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinion of the people in the choice of the legislature.”⁴⁶ While this language appears only to provide a guarantee for free elections, case law from the European Commission on Human Rights and the European Court of Human Rights implies that this language and subsequent decisions by the Commission and Court guarantee a right to universal and equal suffrage.⁴⁷ As Office of Democratic Institutions and Human Rights (ODIHR), a sub agency of the Organization for Security and Cooperation in Europe (OSCE) observes: “From the idea of an institutional right to the holding of free elections, the Commission

⁴² *American Convention on Human Rights*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). Available at: <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>.

⁴³ This ruling is particularly important. The Commission clearly enumerates a position that the right to political participation trumps state rights to sovereignty and self-determination. Gill notes that “The Government of Mexico argued that the Commission had no jurisdiction to give a decision on electoral processes, for reasons of national sovereignty and the right of self-determination. The Commission disagreed, holding that by having signed and ratified the Convention, Mexico had consented to certain aspects of its internal jurisdiction being subject to judgment by organs set up to protect the rights recognized...” See Guy S. Goodwin-Gill, *Free and Fair Elections: International Law and Practice*, Geneva: Inter-Parliamentary Union, 1994: 87. The ruling can be found at Organization of American States, Resolution 01/09, cases 9768, 9780, and 9828: *Annual Report of the Inter-American Commission on Human Rights, 1989-1990*, (17 May 1990).

⁴⁴ Roland Rich, “Bringing Democracy into International Law,” *Journal of Democracy* 12, no 3 (July 2001): 28.

⁴⁵ Organization of American States, *Inter-American Democratic Charter, Done at Lima, Peru, 11 September 2001*. Note, the Charter was signed by all OAS members except Saint Vincent and the Grenadines and the Commonwealth of Dominica.

⁴⁶ *Protocol to the European Convention on Human Rights*, Available at <http://www.hri.org/docs/ECHR50.html>.

⁴⁷ See *Mathieu-Mohin and Clayfert v. Belgium* (2 March 1987, Series A no. 113).

has moved to the concept of universal suffrage, and thence, as a consequence, to the subjective right to participation ...”⁴⁸

In Africa, the *African [Banjul] Charter on Human and Peoples' Rights* (1981) provides that “Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”⁴⁹

These widely ratified instruments indicate that the majority of the world's countries recognize that their legitimacy must in some way rest on the will of individual citizens. Whether through the UDHR, the ICCPR, or the regional instruments, a concrete human rights rule has emerged that individuals have a right to political participation, and that governments which deny this right lose a degree of legitimacy in the international system.⁵⁰ These declarations, formal rules, and instruments also provide mechanisms through which international organizations and other states can monitor and publicize compliance, and (as in the case of the European Convention in particular) even provide avenues through which individuals can challenge government actions that derogate the right to political participation.

The Practice of International and Regional Organizations

A second key source of international human rights law is the practice of states, either individually or working collectively through international organs. Since the early 1990s, the United Nations and regional organizations have increasingly viewed the promotion of democracy as a fundamental priority. This trend is reflected in several discrete areas. First, the declarations and the work programs of the UN General Assembly, specialized agencies, and working groups indicate that democracy is fundamental to human freedom and is a necessary pre-condition for all other human rights to be respected. Second, UN peacekeeping missions during the 1990s have nearly always included democratization and electoral assistance as a key component of peace building. Third, the UN and other IGOs have legitimated multilateral intervention into the internal affairs of states in support of democracy.⁵¹ Finally, it has become standard parlance in most IGOs to equate economic growth with good governance, and good governance with the rule of law, respect for basic human rights, and the accountability of governments to their people.

The promotion of democracy has become an important part of the work of the UN and various regional organizations. As Secretary General Boutros Boutros Ghali noted in his 1996 *Agenda for Democratization*, “the General Assembly has reasserted the foundation for a United Nations role in democratization by explicitly reaffirming the relevant principles, purposes and rights articulated in the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.”⁵² The work of the UN in this area has grown in scope in complexity and is too widespread for a comprehensive treatment here. Nevertheless, a few examples suffice to illustrate the emerging norm:

- The Vienna Declaration and Program of Action adopted by the 1993 World Conference on Human Rights declares that: “Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and

⁴⁸ OSCE/ODIHR, “International Standards and Commitments on the Right to Democratic Elections: A Practical Guide to Democratic Elections Best Practice.” OSCE/ODIHR Draft Paper, Submitted to Working Session on Election Standards at September 2002 OSCE Human Dimension Implementation Meeting:

⁴⁹ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986:

⁵⁰ A number of Scholars, most notably Thomas Franck and Gregory Fox, have argued that this norm now constitutes a “democratic entitlement.” From this entitlement flow a number of subsidiary processes and standards for ensuring that the elections actually reflect the will of the population. Professor Fox argues that these “participatory” rights include: universal and equal suffrage; a secret ballot; elections at reasonable intervals; and an absence of discrimination against voters, candidates and parties. Gregory Fox, “The Right to Political Participation in International Law,” In *Democratic Governance and International Law*, Eds. Gregory H. Fox and Brad R. Roth, 48- 90. (Cambridge: Cambridge University Press, 2000).

⁵¹ The U.S. Led Operation “Restore Hope” in Haiti is a key example.

⁵² Bouros Boutros Ghali, *An Agenda for Democratization*, UN Doc. A/51/761.

protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.” (Section 1; Paragraph 8)

- The preamble of the Human Rights Commission’s Resolution on the Right to Democracy (1999) Recalls “the large body of international law and instruments, including its resolutions and those of the General Assembly, which confirm the right to full participation and the other fundamental democratic rights and freedoms inherent in any democratic society.”⁵³ It further proclaims that legitimate democracies require the right of universal and equal suffrage via periodic and free elections and the right of citizens to choose their governmental system through constitutional or other democratic means.

The UN machinery has also provided direct support to democratization through technical assistance and monitoring of elections, both of which it undertakes under the larger rubric of the organization’s human rights system. The UN’s role is best reflected in the creation of the Electoral Assistance Division (EAD), located in the Department of Political Affairs.⁵⁴ EAD provides technical assistance to governments that request help in the implementation of elections and offers support to election observers. The unit has also designed strategies for electoral components of peacekeeping operations and coordinates the growing number of UN agencies that work on democratization. These agencies include the UNHCHR and the United Nations Development Programme (UNDP), which has taken a strong role in promoting democratization as part of an overall program of good-governance that UNDP links to the prospects for economic development. UNDP also played a key role assisting the Indonesian government’s 1999 elections, and provides technical and financial support to other states undergoing a democratic transition.

The UN has also been tasked with the overall organization and implementation of elections (i.e. where UN personnel actually administer every element of the election program). Notable examples of these experiences include operations in Cambodia, East Timor, and the currently stalled referendum process in Western Sahara. The responsibilities associated with these missions require that the UN develop and implement best practices and procedures that are in conformance with the international legal mechanisms related to free and fair elections. As a consequence, the UN has been able to draw on these experiences in promulgating standards to ensure that the elections procedures meet recognized international standards and are transparent.

At the regional level, two key inter-governmental institutions promoting democracy are the OAS and the Organization for Security and Cooperation in Europe (OSCE). Both these organizations have actively sought to promote democratic practices and standards (although only applicable to their member states). The OAS includes democracy promotion as one of its fundamental goals. In 1990, the organization established a Unit for the Promotion of Democracy,⁵⁵ which provides member states with technical support and advice in strengthening democratic political structures and even observes elections in member states. In 1991, the OAS General Assembly adopted the *Santiago Commitment to Democracy and the Renewal of the Inter-American System (Resolution 1080)*,⁵⁶ which provides for emergency sessions of the hemisphere’s foreign ministers when any democracy in the region is interrupted. Resolution 1080 has been invoked on four occasions:

⁵³ Commission on Human Rights. *Resolution on the Right to Democracy*. Resolution 1995/57. 27 April 1999. Available at <http://www.humanrights-usa.net/2000/DEMRES.htm>; Internet accessed on 6 August 2002.

⁵⁴ See United Nations General Assembly, *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, (9 March 1992), Available at <http://www.un.org/Depts/dpa/ead/2res92.htm>; Internet accessed on 10 August 2002.

⁵⁵ Organization of American States General Assembly, Resolution 1063. *Unit for the Promotion of Democracy*. (8 June 1990). Available at <http://www.upd.oas.org/documents/basic/1063%20eng.htm>; Internet accessed on 5 September 2002.

⁵⁶ Organization of American States General Assembly, Resolution 1080, *Representative Democracy*, (5 June 1991), Available at <http://www.oas.org/assembly2001/assembly/GAassembly200/resolucion1080.htm>; Internet accessed on 5 August 2002.

Haiti (1991), Peru (1992), Guatemala (1993) and Paraguay (1996). In each case, the organization went significantly farther than most observers anticipated by immediately and unconditionally demanding a restoration of legitimately elected leaders and even agreeing on sanctions against political actors who acted in an extra-constitutional fashion.

In Europe, the OSCE, and in particular its affiliate, the Office for Democratic Institutions and Human Rights (ODIHR) has also been active in promoting the rights of individuals to participate in public life.⁵⁷ The OSCE's work builds upon the Copenhagen Document of 1990, which provides that the participating states recognize that:

“pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms, the development of human contacts and the resolution of other issues of a related humanitarian character. They therefore welcome the commitment expressed by all participating States to the ideals of democracy and political pluralism as well as their common determination to build democratic societies based on free elections and the rule of law.”⁵⁸

The Copenhagen Document is unique in a number of respects. First, it is the first OSCE document that speaks not only of human rights, but of the critical role that democracy plays in creating a political environment in which human rights can be guaranteed. It is thus a logical extension of the European Convention on Human Rights, but with more teeth due to its specificity and the fact that it represented an early and forceful commitment on the part of the Eastern European States to democratic political institutions. Second, it is the first time that states undertook explicit commitments regarding the modalities of how the broader concept of the right to political participation should operate. The Document sets specific criteria and guidelines for how states go about enfranchising their citizenry, and specifically commits the signatories to allow independent international observers to monitor electoral activities. As a consequence, states in the OSCE region now find themselves subject to strict scrutiny in meeting the commitments contained in the document. Member states have found themselves being publicly admonished when elections do not meet the criteria laid out in Copenhagen.

The OSCE and ODIHR⁵⁹ have been the leading force for promoting democracy in Eastern Europe. In the cases of Bosnia and Kosovo, the OSCE actually implemented every aspect of the multiple elections mandated by the Dayton Agreements and Security Council Resolution 1244 respectively. Meanwhile, ODIHR has engaged in intensive election monitoring and the provision of technical assistance and analysis of electoral codes in member states. ODIHR reports have become an important statement on the transparency of elections in the OSCE region, providing or denying international legitimacy to the results.

The OAU has also steadily increased its role in promoting democracy and has developed a series of mechanisms for consultation and coordination in the event of interruptions of democracy within the region. OAU sponsored observers played an integral role in elections in Eritrea, Liberia, Western Sahara and elsewhere during the 1990s. In addition, the July 2002 *Declaration of Lomé* provides for a series of sanctions that can be invoked in the event of an interruption of constitutional rule. These sanctions include “suspension from the OAU, denial of visas to *coup* plotters, commercial restrictions, and restrictions on government contacts.”⁶⁰ The Declaration

⁵⁷ Much of this discussion on the OSCE relies heavily on Simon Bagshaw, “Internally Displaced Person and Political Participation: The OSCE Region,” The Brookings Institution Project on Internal Displacement. September 2000.

⁵⁸ Conference for Security and Co-Operation in Europe, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, (5 June-25 July 1990); Available at <http://www.osce.org/docs/english/1990-1999/cope90e.htm>; Internet accessed on 5 September 2002.

⁵⁹ ODIHR was established by the OSCE Permanent Council in 1990 as the Office for Free Elections. It was renamed as ODIHR in 1992 in order to reflect its expanded mandate (stemming from the 1992 Helsinki Summit) to include the process of democratization and a greater emphasis on basic human rights.

⁶⁰ Community of Democracies, “The Role of Regional and Multinational Organizations in the Promotion and Defense of Democracy,” Final Report of the Community of Democracies’ Conference. (Washington, D.C. 20-21 February 2001); Available at http://www.demcoalition.org/pdf/oas_report.pdf; Internet accessed on 1 September 2002: 15.

allows a country six months to address its problems internally before the mechanisms are activated.

One notable exception to this trend of increasing activism in support of democracy on the part of regional organizations is in Asia. For a variety of historic and cultural reasons, many Asian states have been hesitant to support institutions that entail external monitoring or supervision of their human rights practices. The only significant regional inter-governmental organization in the area is the Association of Southeast Asian Nations (ASEAN), which was created to promote economic liberalization and linkages between the member-states. ASEAN, however, has been notably reluctant to engage in human rights or democratization work. According to a former Thai Foreign Minister, ASEAN is in the “challenging position of pushing democracy, human rights and security in a region with different structures, values, and systems and where the principle of non-intervention in national internal affairs holds strong.”⁶¹ Thus, compared with other areas, Asia still lacks a regional organization with a specific focus on spreading democratic principles or establishing minimum standards for free and transparent elections.

In sum, international treaty law and the practice of states and inter-governmental organizations have led a number of scholars to argue in favor of the “democratic entitlement” as a fundamental human right.⁶² The remainder of this section addresses the extension of this right to conflict forced migrants.

Building a Bridge: Conflict-Forced Migrants and the Right to Political Participation

Given that the right to political participation has become a fundamental rule, to what extent does that right apply to persons who are not residing inside their country or municipality of origin for whatever reason? No universally accepted legal principle holds that citizens residing outside of their home state have a right to participate in national political life. While many states allow their nationals abroad to cast ballots, many others do not, and the issue has received little attention in the international human rights machinery or amongst electoral practitioners.

The first task in answering this question is to distinguish a conflict forced migrant from individuals outside their country or municipality for other (primarily economic, although sometimes fleeing justice) reasons. In general, this study defines “Conflict Forced Migrant” as any person who meets the criteria of a “refugee” as defined by the 1951 Refugee Convention and the expanded definitions provided by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration on Refugees. In addition, the definition of IDP provided by the Guiding Principles extends this coverage to those who have not crossed an international border. These definitions help distinguish refugee and IDP populations from economic migrants. However, clear criteria on this distinction are difficult to come by. Any definition of who is “displaced” by conflict and thus eligible for electoral participation must also address the following issues and questions:

- Reasons for leaving the home country/territory (i.e., should a distinction be made between those fleeing persecution/conflict and those fleeing justice?)⁶³;

⁶¹ Community of Democracies, “The Role of Regional and Multinational Organizations”: 15.

⁶² Some scholars argue that the democratic entitlement can also be construed from the occasional practice of using outside military force in defense of democracy. If, as is argued above, the right to participate in the political affairs of ones’ state has become a putative norm, the logical next question is whether and to what degree it is an “enforceable” right by. Non-intervention in the internal affairs of other states has long been the dominant normative fact of international politics. Yet this right has been eroded to a significant degree by the emergence of human rights obligations. The Genocide Convention, for example, significantly intrudes into state sovereignty by binding contracting parties to take action against state leaders that commit gross human rights violations against their own populations. Nevertheless, this position is far more controversial than the discussion above, and thus is not considered in detail in this report.

⁶³ This is a critically important issue. As noted above, refugee protections contained in the 1951 Refugee Convention specifically do not apply if there is sufficient cause to believe that the person has committed a crime against the peace, a

- Date of leaving the home country/municipality;
- Status if the individual (i.e., have they been granted asylum by a host-state? Are they under the protection of the UNHCR? Are they “Convention Status” refugees? Have they acquired citizenship in the host state and what impact would this have on their electoral eligibility?);
- Should they be required to demonstrate a clear intent to return to the home country/municipality⁶⁴

As a basic principal, individuals who have been forced from their homes against their will yet intend to return cannot and should not be discriminated against in the realization of their basic human rights – including the right to electoral participation. As Gallagher and Schowengerdt note:

“Refugees have not in any way relinquished their citizenship by seeking asylum, but rather cannot avail themselves of the protection of their country of origin because current conditions therein pose a threat to either their lives or livelihood. As citizens, therefore, they have the right to participate in the electoral processes of their country.”⁶⁵

Yet countries continue to run elections that discriminate against conflict forced migrants. While some recent elections have included CFM participation (i.e.; Eritrea, Bosnia, East Timor, and Kosovo), other elections have earned the seal of approval from international observers and monitors even though large numbers of displaced persons were disenfranchised. In some cases, the disenfranchisement stems from financial, transparency, and logistical constraints associated with reaching a displaced population. In other cases, the disenfranchisement resulted from a determination that either the displaced population was too small to make a difference in the election outcome or that the displaced population was subject to political control that would result in their inability to exercise freedom of choice in the balloting.

Almost always, however, this disenfranchisement serves the interests of political actors. Technical and logistical constraints can then become an excuse to provide political cover to those who prefer to exclude certain categories of eligible voters. This tension will continue as long as the international community continues to accept the results of elections that do not meet the criteria of full participation. As a consequence, better standards are required in order to de-legitimate and prevent exclusion as a political strategy.

The remainder of this paper examines the existing international legal framework surrounding the voting rights of conflict forced migrants. Discussion Paper No. 2 examines the particular technical issues of absentee voting and proposes a strategy for action to ensure the development and implementation of CFM voting standards.

International Conventions and the Human Rights Machinery

The formal instruments and mechanisms of international human rights law address the political rights of conflict forced migrants only indirectly. Aside from a few specific references, the right to political participation must generally be deduced by extending the non-discrimination principles of UDHR, ICCPR, and the regional instruments to these persons. As a consequence, there is a

war crime or crime against humanity, has committed a serious non-political crime in another country prior to seeking asylum, or is guilty of acts committed that are contrary to the purposes or principles of the United Nations.

⁶⁴ These questions have all played a central role in status and eligibility determination in recent elections in Bosnia and Herzegovina, Kosovo, and East Timor and are further addressed in Section II of this study, “Refugee and IDP Voting: Issues, Standards, and Best Practices.”

⁶⁵ Dennis Gallagher and Anna Schowengerdt, “Participation of Refugees in Postconflict Elections.” in Kumar, Krishna, ed. *Postconflict Elections, Democratization, and International Assistance*, (Boulder: Lynne Rienner Publishers, 1998): 199. It should be noted, however, that the Refugee Convention does facilitate the acquisition of citizenship in the receiving state. This raises the issue of “dual nationality” and corresponding debate on whether individuals should be allowed to vote in both countries. Given the technical difficulties states face in tracking dual nationality, however, it is unlikely that standards could be adopted related to this issue.

clear need for international action to directly codify and support the extension of voting rights to conflict forced migrants.

IDPs

The international human rights system appears to provide stronger protections to the political rights of IDPs than to refugees. The 1951 Refugee Convention does not address the right of refugees to participate in the political life of their country of origin, whereas work in the UNHCHR (particularly the work of the Special Representative on Internal Displacement and rights contained in the Guiding Principles) directly addresses this fundamental right as applied to IDPs. One of the reasons for this discrepancy may lie in the fact that many states do not recognize the right of expatriate nationals to vote,⁶⁶ whereas most democracies have undertaken direct and formal commitments to guarantee the franchise to all eligible persons resident inside the state's territory, with any denial of the right to vote requiring objectively verifiable criteria prescribed by law and limited to certain categories of persons such as minors, the mentally unsound or to those incarcerated.⁶⁷ Reflecting the diversity of practice vis-à-vis expatriate voting rights, the international legal system has yet to directly address the issue of refugee voting.

The case in favor of IDP political participation can be extracted from the legal principles and state practice discussed above in the context of the "right to democracy." In particular, the non-discrimination principles contained in the UDHR, ICCPR, and other instruments extend the right of franchise to all segments of a state's population, including those forced from their homes against their will. Unfortunately, the extension of universal human rights to specific vulnerable groups has been a difficult process to achieve in practice. Some governments have proved unwilling or unable to extend protections to important social groups, including national minorities, women, children, and migrants. As a consequence, these groups have been the subject of several dedicated treaties and conventions such as the CERD and the CEDAW. Article 5(c) of the CERD, for example, declares that:

"States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service..."⁶⁸

While the convention does not directly address IDP voting rights, one of the chief causes of internal displacement is racial discrimination and consequent human rights abuses. IDPs almost always represent national or ethnic minorities, indicating that the CERD clearly applies. Unfortunately, the Committee on Elimination of all forms of Racial Discrimination, which monitors state compliance and discusses issues related to the Convention, has not been clear on whether the right to political participation extends to those who are currently displaced. According to the Committee's General Recommendation XXII, "... refugees and displaced persons have, *after their return to their homes of origin* (emphasis added), the right to participate fully and equally in public affairs at all levels and to have equal access to public services and to receive rehabilitation assistance." This language clearly works against IDP political rights *during* their displacement, suggesting a need for an additional clarification.

The Guiding Principles on Internal Displacement, although not treaty law, directly addresses this issue. Principle 1 declares that: "Internally displaced persons shall enjoy, in full equality, the same

⁶⁶ For a comprehensive discussion on the issue of external voting, including examples of state practice and discussion of the political and technical issues surrounding expatriate voting programs, see International IDEA, External Voting Handbook, Forthcoming from International IDEA.

⁶⁷ In addition, any derogation of the right of franchise in these instances must comply with the non-discrimination principles contained in the ICCPR. See the Issue Focus section of this report.

⁶⁸ See Committee on the Elimination of Racial Discrimination, General Recommendation XXII "Article 5 and refugees and displaced persons," (Fortyninth session, 1996) U.N. Doc. A/51/18.

rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.”⁶⁹ This language is strengthened in Principle 22, which declares that:

“Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights: (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression; (b) The right to seek freely opportunities for employment and to participate in economic activities; (c) The right to associate freely and participate equally in community affairs; (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right...”

In the *Compilation and Analysis of Legal Norms*,⁷⁰ a document assembled by Deng's team that details the specific human rights instruments relevant to IDPs and forms the background to the Guiding Principles, Deng identifies the right to political participation as being non-derogable. According to the *Compilation*:

“Amidst the many deprivations they face, internally displaced persons often are stripped of the opportunity to participate in government on a local or national basis. This denial may be enhanced by the fact that they have lost their identification papers and/or property. The ability to participate in governmental or public affairs can enable internally displaced persons to influence or possibly ameliorate their own situation of displacement.”⁷¹

The *Compilation* then outlines the core human rights documents related to political participation and concludes that: “A future international instrument should stress that internally displaced persons do not lose their right to political participation because they had to leave their homes, and the means for their participation, including access to voter registration procedures, must be safeguarded.”⁷²

As discussed above, however, a considerable debate has emerged regarding whether the Guiding Principles have the status of binding international law. On the one hand, the Principles seek to protect IDP rights not through a new convention but through the application of the pre-existing human rights norms and rules contained in human rights, refugee, and humanitarian law directly to IDPs. The approach reflects a position that international conventions can be politically difficult and lengthy to negotiate, draft, and ratify. Thus, a better solution lies in clarifying and publicizing pre-existing rights and applying them directly to IDPs. On the other hand, some have argued that the Guiding Principles do not command the respect of international treaty law and make it harder to hold governments accountable for their actions.⁷³ A number of governments, particularly former colonies and trusteeships believe that matters of internal displacement are exclusively the prerogative of the national state, and suggest that the Guiding Principles are intrusive into their domestic autonomy. This has complicated the efforts of international organizations, particularly the OCHA and UNHCR, to take a strong role in monitoring compliance with the principles or even working on their further development or application.

⁶⁹United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2, (11 February 1998), Available at <http://www.unhcr.ch/html/menu2/7/b/principles.htm>; Internet Accessed on 1 June, 2002.

⁷⁰ Francis Deng, “*Internally Displaced Persons: Compilation and Analysis of Legal Norms*,” Report of the Representative of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1995/57.

⁷¹ *Compilation* at Paragraph 350.

⁷² *Compilation* at Paragraph 353.

⁷³Walter Kalin, “*How Hard is Soft Law? The Guiding Principles of Internal Displacement and the Need for a Normative Framework*,” Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, CUNY Graduate Center. 19 December 2001.

Refugees

In terms of refugees, no global instrument directly addresses their right to political participation in their home states. The only statement even remotely relevant is the 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families,⁷⁴ which declares that: "Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation." (Article 41) While the Convention specifically addresses "migrant workers and members of their families," its provisions could be interpreted to protect the rights of all migrants, including refugees and those who are in irregular situations. The Convention places binding obligations on states, and would provide an avenue through which migrants could challenge their exclusion from the political process, provided the state concerned was party to the Convention. On the other hand, despite ten years of NGO mobilization in support of ratification, the Convention has been ratified by only 21 states as of June 2003 (The Convention required 20 signatories to enter into force, which it will in July 2003).⁷⁵ Furthermore, many states have explicitly stated that they do not intend to sign or ratify the Convention, arguing that their domestic legal provisions on the treatment of migrant workers are already in compliance with the UDHR and ILO Conventions on Migrant Workers. Thus, this instrument is of marginal importance at best.

International and Regional Organizations

A more explicit linkage between conflict forced migrants can be found in the work and declarations of international organizations, particularly the UN and OSCE. Where the UN system has taken an overall role in the conduct of an election (Namibia, Cambodia, Western Sahara, and East Timor), the organization has strived to include displaced populations, either through direct external registration and balloting, or through cooperative programs with the UNHCR where the repatriation of refugees and displaced persons is directly linked to in-country elections operations.⁷⁶ Similarly, the OSCE organized elections in Bosnia and Herzegovina and in the Yugoslav province of Kosovo that included major efforts to ensure that IDPs and refugees were able to participate in all elements of the elections program. These cases, and the issues and standards that flow from them, are discussed in later sections of this report.

Reflecting the OSCE experience, the 1999 Istanbul Summit Declaration of the OSCE declares: "With a large number of elections ahead of us, we are committed to these being free and fair, and in accordance with OSCE commitments and principles ... We are committed to secure the full right of persons belonging to minorities to vote and to facilitate the right of refugees to participate in elections in their countries of origin."⁷⁷

The Residency Requirement

The primary legal obstacle to refugee participation stems from the issue of "residency requirements." Electoral codes frequently condition the right to participate in electoral events on factors such as age, nationality, competence, and residence. The residency requirement can take many forms, sometimes limiting and other times extending the right to vote, but it is almost always referenced in a states' electoral codes. Common justifications for restricting the right to vote to current residents only include:

⁷⁴ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990). Available at <http://www1.umn.edu/humanrts/instreet/n8icprmw.htm>.

⁷⁵ Of the states that have either signed or ratified the Convention (as of August 2002), the following have significant refugee populations abroad: Azerbaijan, Bosnia and Herzegovina, Colombia, Sierra Leone, Sri Lanka, and Tajikistan.

⁷⁶ These mechanisms have taken a variety of forms, but generally include either full participation while in asylum or facilitated repatriation efforts linked with opportunities for voter registration. Even where the UN has not been formally mandated with the conduct of an election but has played an provided technical assistance or monitoring, it has frequently sought to include conflict forced migrants to election authorities by linking UNHCR repatriation activities to the election calendar.

⁷⁷ Organization for Security and Co-Operation in Europe, *Istanbul Summit Declaration*, (18-19 November 1999); Available at <http://www.osce.org/docs/english/1990-1999/summits/istadec99e.htm>; Internet accessed on 10 October 2002.

- Non-residents may not be directly affected by policy decisions and therefore might not vote as responsibly as residents;
- Non-residents may not have access to the information necessary to make an informed decision when casting a ballot;
- The difficulty of presenting candidate platforms and positions to non-residents;
- The costs associated with reaching a voter who has voluntarily chosen to reside abroad may be prohibitive or place an undue burden on those who remain;
- Ballot secrecy and transparency issues, including the problem of “judicial review of elections held in a foreign territory.”⁷⁸

Even the commitments and standards on electoral practices enumerated by regional organizations such as OSCE/ODIHR and the European Commission for Democracy through Law (the Venice Commission) have yet to set forth clear standards on residency requirements. In July of 2002, for example, the Venice Commission issued a document entitled “Guidelines on Elections,” which sought to clarify standards regarding free and fair elections. The Guidelines note:

The five principles underlying Europe's electoral heritage are *universal, equal, free, secret and direct suffrage* ... Universal suffrage means in principle that all human beings have the right to vote and to stand for election. This right may, however, and indeed should, be subject to certain conditions (including) ... Residence.⁷⁹

According to “*General Comment 25*” of the Human Rights Committee,⁸⁰ however, states have limited latitude in applying these restrictions:

“The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. ... States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. ... If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote.”⁸¹

What constitutes a “reasonable” restriction, however, is not further defined, and governments have wide latitude in applying residency requirements. While the use of the word “homeless” could easily be interpreted loosely to include “refugee” or “displaced person,” the Commission does not address the issue directly, leaving it to member states to interpret the language as they choose. The Commission has yet to hear a case involving the denial of voting rights to non-resident nationals, either voluntary or forced.

In fact, the only multilateral human rights organ to have issued specific ruling related to an expatriate’s right to vote is the European Commission of Human Rights,⁸² an adjudicative institution created by the *European Convention on Human Rights* to hear cases brought by individuals against government policies that violate the Convention. In two separate cases involving British nationals, the Commission ruled that states retain broad authority to limit the

⁷⁸ Deiter Nohlen and Florian Grotz, “Legal Framework and Overview of Electoral Legislation,” Draft Chapter for International IDEA: External Voting Handbook. Forthcoming, International IDEA.

⁷⁹ Venice Commission, *Guidelines on Elections*, (Venice: 5-6 July 2002), available from <http://www.venice.coe.int/site/interface/english.htm>; Internet accessed on 10 October 2002.

⁸⁰ “The Human Rights Committee monitors the implementation of the Covenant and the Protocols to the Covenant in the territory of State parties. The Committee convenes three times a year for sessions of three weeks’ duration, normally in March at United Nations headquarters in New York and in July and November at the United Nations Office in Geneva.” From: <http://www.unhchr.ch/html/menu2/6/a/introhrc.htm>

⁸¹ Human Rights Committee. *General Comment 25* (57). General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

⁸² Protocol No. 11 of the ECHR, which came into force on 1 November 1998, folded the Commission and Court into a single institution, now referred to as the European Court of Human Rights.

franchise of nationals residing abroad.⁸³ In both cases, the petitioners, expatriates nationals of the United Kingdom, alleged that their exclusion from voting in United Kingdom elections violated both the guarantees for universal suffrage and the non-discrimination principles contained in the European Convention and Protocol. The Commission reasoned, however, that “this right [universal suffrage] was neither absolute nor without limitations but subject to such restrictions imposed by the Contracting States as are not arbitrary and do not interfere with the free expression of the people’s opinion.”⁸⁴ As a consequence, the fact that the United Kingdom did not allow absentee voting was interpreted as a function of practical expediency, and the European Convention and Protocol could not be interpreted to guarantee expatriate electoral rights.

The petitioners had also argued that allowing certain categories of expatriates (such as members of the armed forces stationed abroad or diplomats) to vote but not other categories of expatriates violated the non-discrimination principles in Article 14 of the European Convention and Article 3 of the First Protocol. The Commission found, however, that the fact that some nationals abroad were provided franchise while others were not did not violate the principle of non-discrimination. The Commission noted that:

“...servicemen and diplomats are not living abroad voluntarily but have been sent to a country other than their own by their government in the performance of services to be rendered their country. They therefore remain closely linked to their country and under the control of their government, and this special situation explains that they are not regarded as being non-residents although physically outside their country. As a consequence of the control referred to above there is also no risk of electoral fraud in their use of postal votes.”⁸⁵

This language raises two significant and inter-related issues. First, the Commission clearly indicates that it is concerned with the issue of persons who are outside of their home state by their own free will, concluding that these persons do not have a substantive right to political participation. In the case of servicemen and diplomats, however, it is a function of government or policy that they find themselves abroad, and thus the Commission indicates that governments ought to provide them with an opportunity to vote. One could reasonably posit that refugees and other conflict forced migrants also find themselves in a situation where government policies or the action of state-backed or opposition military forces have resulted in their inability to satisfy residency criteria, and that they therefore ought not to be denied the franchise as well.

Second, the Commission argues that one of the key justifications for limiting external voting has to do with transparency. According to the decision, since a government “controls” servicemen and diplomats while abroad, governments should be able to ensure that the external vote does not result in fraud. By this logic, an electoral process that guaranteed transparency to the external vote would not face this problem, and this might help overcome the Commission’s concern that external voting is more difficult to regulate and monitor, thus compromising electoral transparency. Unfortunately, similar cases have not been raised in front of the Commission since this ruling.⁸⁶

⁸³ See “X v. United Kingdom,” Secretariat of the European Commission of Human Rights, Decisions/Reports of the Council of Europe by the European Commission on Human Rights, App. Nos. 7730/76 (1979) and 7566/76 (1976) and “Mathews v. United Kingdom,” Secretariat of the European Commission of Human Rights, Decisions/Reports of the Council of Europe by the European Commission on Human Rights, App. No. 24833/94.

⁸⁴ “X v. United Kingdom.”

⁸⁵ “X v. United Kingdom.”

⁸⁶ In a somewhat similar 1999 case, the European Court of Human Rights ruled that a British citizen resident in Gibraltar had been discriminated by the British policy of not implementing elections for the European Parliament in that territory. The Court found that since legislation European Community legislation affected Gibraltar and thus directly affected its citizens. As a consequence, UK nationals were eligible to vote. This ruling does not seem to directly apply to refugees, however, as they would not be resident in a territory directly affected by national legislation. See Mathews v. United Kingdom App. No 28433/94 (1999)

Residency requirements do not only affect refugees. IDPs may also be excluded from participation in sub-national elections if they are outside of their original electoral district. In the Republic of Georgia, for example, IDPs are permitted to vote only for the nationwide list, and are specifically precluded from voting for representatives in either the district from which they were displaced and the district in which they are currently residing. As a consequence, they have been largely disenfranchised and are unable to exercise a political voice in the process of finding a solution to their displacement. This issue has been brought to the attention of the Human Rights Commission, which requested in 2002 that Georgia clarify and improve the access of IDPs to the political process (See the Georgia Case study for more information). In general, however, the core human rights standards appear, on the surface, to provide greater protections to IDP populations, in theory, if not always in practice.

The technical issues surrounding residency requirements, along with examples from recent practice are further explored in Section II of the research package.

Individuals not Considered Refugees under Article 1(F) of the Refugee Convention

The second major issue confronting the rights of conflict forced migrants is how to make determinations whether an individual is fleeing their home state due to valid fears of political persecution and/or civil violence or whether the person is simply a fugitive from justice. In the latter case, there is a strong moral and legal argument against their participation in elections. As noted above, Article 1.F of the Refugee Convention holds that the provisions of the Convention do not apply to persons where there are “serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity
...
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He is guilty of acts contrary to the purposes and principles of the United Nations.

Given the nature of mass population movements during recent civil conflicts, however, it is often difficult to make these distinctions. In Rwanda, for example, the refugee flows into Zaire and Tanzania in the summer of 1994 were mostly comprised of ethnic Hutus, some of whom would clearly have been denied refugee status based on the above exceptions. However, many of the Hutu refugees were innocent of these crimes, and fled under intimidation and pressure from the Hutu militias. In terms of conducting a fully participatory post-conflict election, how would election organizers (had there been an election in this case) distinguish between the two? Furthermore, given the control exerted on this population by the militia groups, would their participation have been free from external influence?⁸⁷

Negotiators have two options in this case. First, a blanket determination could be made about the electoral eligibility of the displaced population. However, if the scale of displacement is large, it is almost impossible to argue that election results would be genuine if the decision is taken to exclude the displaced population. In Kosovo, for example, many of the Serbs left the province for fear of Albanian retribution. Some were guilty of the above crimes; but many others were not. Obviously any election that disenfranchised this entire population (20% of the electorate) would not contribute to peace-building and reconciliation in the province. Furthermore, to use this argument as a basis for exclusion would in effect promote two separate standards. Those in country could be denied franchise based on a formal/legal procedure that convicted them of crimes and thus stripped them of the vote. Those outside the country, however, would not have access to due process. In effect, they would be presumed collectively guilty, an unattractive notion.

⁸⁷ This problem also confronted organizers of the East Timor elections following the popular consultation. Many persons were driven from East Timor to West Timor where they remained largely under the control of the militias. As a consequence, a decision was taken not to enfranchise these refugees.

The second option is to make a status determination for each individual. This option is also problematic. First, negotiators would have to establish a system providing a fair hearing for each individual. These are inherently legalistic proceedings and far beyond the jurisdiction or capacity of election management bodies to conduct. Given the tight time frames and often limited window of opportunity during post-conflict elections, this process would not be feasible. Second, given the emergence of temporary protection systems, election organizers could not rely on host-state governments to have already made this determination. TPS status generally precludes a formal asylum process. As a result, individuals might be granted TPS who would otherwise not be granted asylum based on the Article 1(F) exceptions.

As a general rule, conflict forced migrants should be enfranchised. However, further work is needed on how best to confront the status determination issue.

Conclusion

Protecting the electoral rights of conflict forced migrants should be an urgent priority for those interested in ensuring that elections contribute to peace-building and facilitate the return of displaced populations. Unfortunately, the lack of consistent standards, guidance and practice, has resulted in a situation where elections often proceed (and are certified by observers) without the participation of those displaced by conflict.

One important problem stems from the differing human rights protections afforded to refugees and IDPs as a result of their status. In terms of IDPs, states that are party to the core human rights treaties (ICCPR etc.) are compelled to protect the political rights of all citizens within their territory. Since IDPs are almost always displaced as a result of their ethnic or political affiliations, the non-discrimination principle contained in human rights treaties obligates governments to take positive actions to ensure equal protection. Nevertheless, this obligation is not always met. The reasons for this are complex, but generally revolve around either the political interests at work in the country or the technical difficulties associated with absentee balloting. Universal standards, combined with better monitoring of implementation, would contribute to ensuring that IDPs are not disenfranchised in future elections.

In terms of refugees, the above discussion demonstrates a striking lack of consensus regarding whether governments must enfranchise nationals outside their borders. Nevertheless, the fundamental distinction between economic migrants and those fleeing violence implies that refugee populations should not be excluded from political participation. However, the problem associated with refugee status (and the distinction between those fleeing persecution and those fleeing justice) requires further consideration. Clarification of the human rights norms should be a priority. Possible avenues include:

- A “General Comment” from the Human Rights Committee elucidating the problem and re-affirming the right of refugee political participation;
- The appointment of a “Special *Rapporteur*” by the Commission on Human Rights with a mandate to further investigate and publicize the issue;
- Work in the regional organizations (Particularly the IPU, OSCE/ODIHR, CoE, and OAS) to promote baseline standards at the regional level and provide technical assistance to governments in meeting their commitments under the regional human rights instruments and mechanisms;
- Focus the attention of international agencies involved in refugee and IDP protection on the issue. Key actors include the UNHCR, the High Commissioner for Human Rights (particularly the Special Representative of the Secretary General on Internal Displacement), and the OCHA Unit on Internal Displacement;
- Ensuring that both governmental and non-governmental election observation and monitoring missions include detailed analysis of the degree of conflict forced migrant enfranchisement in elections.

Of course any of these avenues should also include attention to the issues surrounding IDP participation.

It would also be useful to explore the possibility of a specific human rights instrument detailing state obligations vis-à-vis the political rights of conflict forced migrants. This, ultimately, is an avenue for governments to pursue, although a coalition of groups and individuals could help to put the issue on the international agenda.

The Participatory Elections Project will continue to work on these issues. First, Discussion Paper No. 2, "Refugee and IDP Voting: Issues, Standards, and Best Practices," provides a compendium of practical advice on the technical implementation of absentee voting programs based on recent experiences. These standards, if implemented, will increase the transparency (and manageability) of elections that enfranchise conflict-forced migrants. Universal standards will also eliminate the fig-leaf of transparency concerns, financial constraints, or logistical difficulties as an excuse for conducting non-participatory elections. Second, the project is compiling detailed "Action Plans," which examine specific upcoming electoral events through the lens of ensuring CFM participation. The Action Plans highlight the international, constitutional, and statutory requirements that compel governments to enfranchise displaced communities as well as the operational requirements on how such a process should be conducted. The first Action plan on Angola has already been completed (available at www.iom.int/pep) and others will be forthcoming.

Finally, IOM remains committed to the proposition that denying franchise to those forced from their homes violates basic human rights norms and will not contribute to creating the conditions necessary for peace-building and the repatriation of displaced populations. Through continued work on the Participatory Elections Project, IOM will seek to raise awareness and strengthen international commitments to ensure that conflict-forced migrants are able to exercise their fundamental human right to political participation.

Annex 1: Overview of Human Rights Provisions Related to Electoral Rights

<p>The Right to Political Participation</p>	<p>UDHR Art 21: (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country.</p> <p>Human Rights Commission Resolution on the Right to Democracy, Preamble: <u>Recalling</u> the large body of international law and instruments, including its resolutions and those of the General Assembly, which confirm the right to full participation and the other fundamental democratic rights and freedoms inherent in any democratic society,</p> <p>Migrant Workers Convention Art 41(1): Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.</p> <p>ICCPR Art 25: (1) To take part in the conduct of public affairs, directly or through freely chosen representatives; (2) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (3) To have access, on general terms of equality, to public service in his country.</p> <p>Human Rights Committee, General Comment 25 Para 1: Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. As well as Para 10-11: The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote... States must take effective measures to ensure that all persons entitled to vote are able to exercise that right... If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote.</p> <p>CERD Art 5: States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights...(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;</p> <p>CEDAW Art 7: States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.</p> <p>Vienna Declaration Art 1(8): Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.</p> <p>European CHRR First Protocol, Art 3: The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which</p>
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	<p>will ensure the free expression of the opinion of the people in the choice of the legislature.</p> <p>African CHPR Art 13 (1): Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law</p> <p>American CHR Art 23 (1): Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of his country.</p> <p>OAS AG/RES 1080: In view of the widespread existence of democratic governments in the Hemisphere, the principle, enshrined in the Charter, that the solidarity of the American states and the high aims which it pursues require the political organization of those states to be based on effective exercise of representative democracy must be made operative</p> <p>Inter-American Democratic Charter Art 1: The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it...Democracy is essential for the social, political, and economic development of the peoples of the Americas.</p> <p>Copenhagen Preamble: They recognize that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms, the development of human contacts and the resolution of other issues of a related humanitarian character. They therefore welcome the commitment expressed by all participating States to the ideals of democracy and political pluralism as well as their common determination to build democratic societies based on free elections and the rule of law and 7: To ensure that the will of the people serves as the basis of the authority of government, the participating States will ... (3) guarantee universal and equal suffrage to adult citizens;</p> <p>IPU Declaration on Criteria for Free and Fair Elections Art 1: In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage. Art 2: (1) Every adult citizen has the right to vote in elections, on a non-discriminatory basis... (5) Every voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote. (6) Every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others.</p> <p>Venice Commission Guidelines I Art 1(1a): The five principles underlying Europe's electoral heritage are <i>universal, equal, free, secret and direct suffrage</i>. Furthermore, elections must be held at regular intervals. a. Universal suffrage means in principle that all human beings have the right to vote and to stand for election. This right may, however, and indeed should, be subject to certain conditions</p>
<p>The right to periodic elections</p>	<p>UDHR Art 21(3): The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.</p> <p>ACEEEO Draft Convention on Election Standards Art 3 Sec 1: The Parties believe that elections must be held at reasonable intervals established by the constitution and/or law so that election of elective bodies and elective officials should be always based on the free will of the people (voters).</p> <p>Copenhagen Para 6: The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes.</p>

<p>Refugees and Internally Displaced Persons shall have an absolute right to political participation and shall not be discriminated against in the realization of any fundamental electoral rights</p>	<p>Guiding Principles Sec I Prin 1: Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.</p> <p>Istanbul Summit Declaration Para 26: With a large number of elections ahead of us, we are committed to these being free and fair, and in accordance with OSCE principles and commitments. This is the only way in which there can be a stable basis for democratic development...We are committed to secure the full right of persons belonging to minorities to vote and to facilitate the right of refugees to participate in elections held in their countries of origin.</p>
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ANNEX 2: PARTICIPATORY ELECTIONS PROJECT TEAM

Jeff Fischer

Jeff Fischer is the Senior Coordinator for PEP. In this role, he is responsible for the conduct of the project modules and the direction of the research. Mr. Fischer is currently Senior Advisor for Elections at the IFES for which he has conducted numerous assignments. In 2000, Mr. Fischer was the Director of Election Operations for the Organization for Security and Cooperation in Europe (OSCE) and Head of the Joint Registration Task Force of United Nations (UNMIK) and OSCE in Kosovo. He served in 1999 as Chief Electoral Officer for the United Nations in East Timor (UNAMET) and Director General of Elections in 1996 for the OSCE in Bosnia and Herzegovina. Each of these electoral processes involved major initiatives to assure that refugees and displaced persons were able to register and cast their ballots.

Jeremy Grace

Jeremy Grace is the Research Coordinator for PEP, responsible for organizing and conducting the research modules of the study. Mr. Grace is currently visiting professor in international politics, law, organization, and European politics at State University of New York at Geneseo. In 1998, he directed the IOM out-of-country voting program for Bosnian refugees residing in Croatia and was, in 1999, the IOM Deputy Director for the registration and polling of East Timorese displaced persons in Indonesia. He also authored an evaluation of IOM's role in the 2000 Kosovo elections. From 1996 to 2000, Mr. Grace had multiple assignments with the OSCE in Croatia, Bosnia and Herzegovina and Kosovo. He is also a consultant for the World Bank.

Bruce Hatch

As the Technical Coordinator for PEP, Bruce Hatch is responsible for examining the logistical and other technical issues that must be managed in order to conduct out-of-country registration and voting. In 2002, Mr. Hatch acted as elections operations advisor to the State Election Commission of the Republic of Macedonia. In 2001, Mr. Hatch was the operations advisor to the Out-of-Kosovo voting program conducted by IOM for the OSCE. From 1999 to 2000, he served as operations and logistics advisor to the Joint Registration Task Force (UN and OSCE) in Kosovo and as operations advisor to the OSCE Mission in Kosovo. Mr. Hatch was an operations and logistics consultant for IFES, Elections Canada, the Canadian International Development Agency (CIDA), and the United Nations Electoral Assistance Division (UNEAD), working in such elections as East Timor, Cambodia, Haiti, Sierra Leone, and Tanzania.

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