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**‘Safe Zones’: A Protective Alternative to Flight or a Tool of Refugee Containment?**

*Clarifying the international legal framework governing access to refugee protection against  
the backdrop of ‘safe zones’ in conflict-affected contexts*

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**Abstract**

*So-called 'safe zones', such as those established in northern Syria and elsewhere, pose an increasingly pressing threat to genuine and robust international legal protection for persons fleeing conflict. This paper aims to address the key challenges and risks of safe zones under international law and to provide some clarifications on the legal framework which must be respected by refugee-receiving states. Through assessing the intentions of preventing migration flows which underlies their creation, this paper will demonstrate that the existence of safe zones cannot be used to circumvent the obligations of refugee-receiving states under international law, specifically the right to leave and seek asylum and the prohibition of non-refoulement. This paper concludes that safe zones should only be created as an urgent response to humanitarian crises in order to ensure the immediate safety of civilians in conflict zones, and only under very strict conditions. In this respect, this paper will demonstrate that even if safe zones comply with certain minimum protective standards, the volatility and complexities of the conflict environment means that they should not and cannot act as a substitute for genuine refugee protection under international law.*

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**List of Abbreviations**

API	Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts
AU	African Union
CIDT	Cruel, Inhuman and Degrading Treatment
ECHR	European Convention on Human Rights
EU	European Union
EUQD	EU Qualification Directive 2011/95/EU
GCI	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GCIV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War
Hague Regulations	Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land
HRCttee	Human Rights Committee
IAC	International Armed Conflict
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IPA	International Protection Alternative
IRL	International Refugee Law
NIAC	Non-International Armed Conflict
OAU Convention	Convention Governing the Specific Aspects of Refugee Problems in Africa
OHCHR	Office of the United Nations High Commissioner for Human Rights
PoC	Protection of Civilians
Refugee Convention	1951 Convention relating to the Status of Refugees

SGBV	Sexual and Gender-based Violence
SNA	Syrian National Army
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	UN Security Council
US	United States

In November 2015, future US President Trump proclaimed his desires to build ‘a big beautiful safe zone’ in Syria to make Syrian refugees ‘happier’.<sup>1</sup> Turkish President Erdoğan has since acted upon similar aspirations to resettle two million Syrian refugees in safe zones through a series of military operations in northern Syria.<sup>2</sup> Despite assertions that this was in the interest of the civilian population, the establishment of a series of *de facto* safe zones in Syria has had worrying ramifications for displaced Syrians, including the risk of border closures, arbitrary and unfounded rejections of asylum claims, and coerced and forcible returns.

Safe zones are not a novel feature of the conflict landscape and numerous terms, including ‘safe zone’, ‘safe area’, ‘safe haven’, ‘demilitarised zone’ and ‘protected zone’, have been used to refer to these spaces in multiple prior contexts.<sup>3</sup> This paper will use the term ‘safe zone’ to broadly refer to designated spaces created to afford heightened physical and humanitarian protection to the civilian population by sheltering them from hostilities in an ongoing armed conflict.<sup>4</sup> In theory, safe zones have the potential to provide additional protection from attack and facilitate humanitarian assistance.<sup>5</sup> However, as will be shown in this paper, safe zones have become increasingly associated with the plight of refugees and have evolved into a tool preferred by some refugee-receiving states to avoid complying with their obligations under international law.

Prior safe zones, while outwardly aiming to provide protection to the civilian population, have been associated with underlying migration control strategies.<sup>6</sup> However, specifically in the

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<sup>1</sup> Bill Frelick, ‘Trump’s Syrian “Safe Area” Is Just Another Wall’ (*Open Democracy*, 21 March 2017) <<https://www.opendemocracy.net/en/north-africa-west-asia/trump-s-syrian-safe-area-is-just-another-wall/>> accessed 04 August 2021.

<sup>2</sup> Patrick Wintour, ‘Recep Tayyip Erdoğan Proposes “Safe Zone” for Refugees in Syria’ *The Guardian* (New York, 24 September 2019) <<http://www.theguardian.com/world/2019/sep/24/erdogan-proposes-plan-for-refugee-safe-zone-in-syria>> accessed 03 August 2021.

<sup>3</sup> For an overview of prior examples, see Mélanie Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge University Press 2012) 232-44.

<sup>4</sup> This follows the common definition in scholarship. See e.g., Wilson Chun Hei Chau, ‘Creating Refuge in Hell: The Coming of Age of Safe Areas for the Protection of Civilians in Armed Conflict’ (2012) 18 *Auckland University Law Review* 191, 192; Phil Orchard, ‘Revisiting Humanitarian Safe Areas for Civilian Protection’ (2014) 20 *Global Governance* 55, 55; Geoff Gilbert and Anna Magdalena Rüsç, ‘Creating Safe Zones and Safe Corridors in Conflict Situations: Providing Protection at Home or Preventing the Search for Asylum?’ (The Andrew & Renata Kaldor Centre for International Refugee Law, 2017) 3 <[https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy\\_brief\\_Creating\\_safe\\_zones\\_and\\_safe\\_corridors.pdf](https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_brief_Creating_safe_zones_and_safe_corridors.pdf)> accessed 11 August 2021.

<sup>5</sup> Gilbert and Rüsç (n4) 1.

<sup>6</sup> See e.g., Cécile Dubernet, *The International Containment of Displaced Persons: Humanitarian Spaces without Exit* (Ashgate Publishing Limited 2001) 122; Hikaru Yamashita, *Humanitarian Space and International Politics: The Creation of Safe Areas* (Ashgate Publishing Limited 2004) 3; Jacques (n3) 235.

Syrian context, renewed discussions around safe zones have been more explicitly accompanied by publicly asserted intentions to prevent migration flows.<sup>7</sup> Against this backdrop, the present author posits that safe zones are likely to become an increasingly common feature of contemporary conflicts that trigger mass displacement, requiring clarification of the legal framework governing their existence. While they raise a number of *jus ad bellum* and *jus in bello* issues which will be alluded to, due to the more limited attention in existing literature this paper will focus on the risks that safe zones pose to comprehensive and effective refugee protection.<sup>8</sup>

Through an assessment of the state of international law on this matter deriving from the complementary application of IRL, IHL and IHRL, this paper will emphasise that the illusion of safety that undercuts safe zones entails that they can never be a permissible alternative to robust refugee protection under international law. It will begin by outlining the core typologies of safe zones that have emerged in international practice and briefly discuss their legal basis and impact on the civilian population. Following this initial overview, in light of emerging containment strategies associated with safe zones and with specific reference to northern Syria, this paper will undertake a comprehensive analysis of the refugee protection issues which arise from their establishment. This will address the right to leave and seek asylum, the IPA as an impermissible basis for rejection of asylum claims, the importance of the principle of *non-refoulement* as well as broader matters of return in order to demonstrate the incompatibility of safe zones with the obligations of refugee-receiving states.

## **1. The Paradox of Safety: Ensuring the Robust Protection of Persons in Safe Zones**

This section will compare the legal basis and core features of two broad forms of safe zones, namely ‘conventional’ and ‘imposed’ safe zones.<sup>9</sup> Accordingly, it will demonstrate how

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<sup>7</sup> Sinem Adar, ‘Repatriation to Turkey’s “Safe Zone” in Northeast Syria: Ankara’s Goals and European Concerns’ (German Institute for International and Security Affairs, 13 January 2020) 2-3 <<https://www.swp-berlin.org/10.18449/2020C01/>> accessed 10 August 2021.

<sup>8</sup> Although the state where a safe zone is located has obligations towards IDPs, this paper will focus on the obligations of refugee-receiving states towards those who are able to, or desire to, cross international borders in search of protection. For the IDP framework, see e.g., Phuong C, *The International Protection of Internally Displaced Persons* (Cambridge University Press 2005).

<sup>9</sup> Based on an assessment of literature, these are the most commonly used terms. For ‘conventional’ safe zones, see Yamashita (n6); Orchard (n4) 60. For ‘imposed’ safe zones, see Chau (n4) 198; Emanuela-Chiara Gillard, ‘“Safe Areas”: The International Legal Framework’ (2017) 99 *International Review of the Red Cross* 1075, 1088-93.

evolving forms of safe zones, as evidenced in northern Syria, do not fit into either of these typologies and its consequences for robust refugee protection.

### 1.1 ‘Conventional’ Safe Zones

The only explicit legal basis for the creation of safe zones can be found in IHL, which provides for the possibility of establishing numerous forms of so-called ‘protected zones’.<sup>10</sup> The premise of these ‘conventional’ safe zones is to enhance protection from the effects of hostilities as their exclusively civilian character prohibits deliberate attacks therein.<sup>11</sup> The most protective and comprehensively defined forms of safe zones in the IHL framework are demilitarised zones, which can be broadly understood as delineated areas in which belligerents agree not to conduct any hostile activities or military operations under specified conditions.<sup>12</sup> Although the Geneva Conventions and their Additional Protocols only explicitly foresee their establishment in IACs, the ICRC has recognised that the prohibition of directing an attack against safe zones is a customary rule equally applicable in NIACs,<sup>13</sup> in which zones could be established by special agreements under Common Article 3.<sup>14</sup>

The crucial protective benefit of ‘conventional’ safe zones is that they require the express consent of all parties to the conflict, which increases the likelihood that their neutral and civilian character will be respected.<sup>15</sup> However, this is also their biggest challenge, as obtaining the consent of belligerents has proven extremely difficult in practice, and is also likely to be withdrawn in the changing conflict environment creating further risks for the civilian population.<sup>16</sup> Notably, safe zones are typically established in response to repeated attacks

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<sup>10</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, art 23; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, arts 14 and 15; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, arts 59 and 60. See more on the IHL framework in Gillard (n9) 1077-87.

<sup>11</sup> Regardless of this additional protection, civilians cannot be targeted at any time except if and for such time as they directly participate in hostilities and must be factored into the proportionality assessment for attacks against legitimate targets. Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Elgar 2019) 241-42.

<sup>12</sup> API, art 60.

<sup>13</sup> ICRC, Customary IHL Database <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul)> accessed 7 August 2021, rule 35.

<sup>14</sup> Sassòli (n11) 242.

<sup>15</sup> Jacques (n3) 235; Gilbert and Rüsche (n4) 13; Rutger Birnie and Jennifer Welsh, ‘Displacement, Protection and Responsibility: A Case for Safe Areas’ (2018) 10 *Global Responsibility to Protect* 332, 337.

<sup>16</sup> Chau (n4) 194.



against the civilian population and parties who do not wish to respect IHL rules on the protection of civilians are unlikely to consent to a safe zone that is premised on their enhanced protection.<sup>17</sup> Thus, despite the conditions enshrined in IHL for the establishment of safe zones, which have the potential to provide a degree of safety, this framework is rarely applicable.<sup>18</sup>

## 1.2 'Imposed' Safe Zones

The next typology of 'imposed' safe zones refers to those established under the auspices of the UN. Particularly evident in the 1990s, the UNSC has previously authorised the creation of safe zones in order to maintain or restore 'international peace and security' under Chapter VII UN Charter, the impacts of which have been analysed extensively in existing literature.<sup>19</sup> For the purposes of this paper, it is sufficient to note that this form of safe zone has very rarely retained its promises of safety. Although UNSC authorisation means that its establishment is not in violation of the prohibition on the use of force,<sup>20</sup> it compromises its civilian character as parties are unlikely to refrain from hostilities in a safe zone that is imposed non-consensually by foreign military powers.<sup>21</sup>

The crucial difference between UN-sanctioned safe zones to the *jus in bello* regime is that they do not require the consent of belligerents, so can overcome the challenges addressed in the previous section.<sup>22</sup> However, they still require the consent or non-veto of the UNSC's permanent five members.<sup>23</sup> By consequence, the UNSC has not lent its authorisation to the creation of safe zones since the 1990s and it seems unlikely to in the near future.<sup>24</sup> The possible reasons for this are twofold. First, there is presumably a natural reluctance to authorise the

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<sup>17</sup> Jacques (n3) 241; Gillard (n9) 1088.

<sup>18</sup> Jacques (n3) 235.

<sup>19</sup> The first internationally sanctioned safe zone in Northern Iraq created following Turkey's border closure to Kurdish Iraqis offered immediate protection but was criticised due to its fragile legal basis. In 1993, the UNSC explicitly authorised a safe zone in Srebrenica. The concentration of civilians without sufficient protection ultimately led to the July 1995 massacre by Bosnian Serb forces. Other UN-sanctioned zones include Somalia (1992) and Rwanda (1994). Mainly attributed to a lack of consent and inability to ensure demilitarisation, prior safe zones have suffered from continued, and even heightened, large-scale attacks against civilians. See e.g., Jacques (n3) 235-44; David Keen, 'Anything But Safe: Problems with the Protection of Civilians in So-Called "Safe Zones"' (2017) London School of Economics and Political Science, Working Paper Series No. 17-187, 36 <<https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/Working-Papers/WP-187.pdf>> accessed 10 August 2021.

<sup>20</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(4).

<sup>21</sup> Jacques (n3) 240-41; Orchard (n4) 60; Birnie and Welsh (n15) 337.

<sup>22</sup> Chau (n4) 198-202.

<sup>23</sup> UN Charter, art 27.

<sup>24</sup> Yamashita (n6) 193.

creation of safe zones when they have ultimately failed in ensuring the long-term protection of the civilian population in almost all prior instances. The second and more pressing challenge is that the political interests and divergences of the permanent five has led to the exercise of the veto to block action in response to humanitarian crises. This is particularly evident in the Syrian context,<sup>25</sup> and has triggered a shift in practice towards the unilateral establishment of safe zones without the consent of all belligerents nor UNSC authorisation, as will now be discussed.

### 1.3 Emerging Practices and the Turkish Safe Zone in Northern Syria

Through a series of military offensives, Turkey has established a ‘patchwork of administrations’ within Syria’s northern regions.<sup>26</sup> Notably, following the removal of US troops from the Syrian-Turkish border in October 2019, Turkey began a military offensive into northern Syria, with the support of the SNA.<sup>27</sup> As it increased its control over Syrian territory, Turkey negotiated an agreement with Russia for the establishment of a 120km ‘safe zone’ under Turkish control between the Syrian towns of Tel Abyad and Ras Al-Ain.<sup>28</sup> The prominent narrative surrounding this safe zone reflects a clear containment policy, with Turkey’s administration stating its desires to prevent crossings into Turkey, as well as to facilitate the return of Syrian refugees.<sup>29</sup> In turn, this proclaimed safe zone seems to be an attempt to mitigate the effects of ongoing border closures and push-back practices employed in recent years across the Turkish border.<sup>30</sup> Turkey also established control over Afrin following a 2018 military

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<sup>25</sup> Russia and China have vetoed 16 draft UNSC resolutions aimed at improving protection for the Syrian civilian population and bringing an end to the conflict. Said Benarbia, ‘Syria and the UN Security Council: A Decade of Abysmal Failures’ (*Opinio Juris*, 28 April 2021) <<http://opiniojuris.org/2021/04/28/syria-and-the-un-security-council-a-decade-of-abysmal-failures/>>accessed 08 August 2021.

<sup>26</sup> Asli Aydintaşbaş, ‘A New Gaza: Turkey’s Border Policy in Northern Syria’ (European Council on Foreign Relations, 28 May 2020) 2 <[https://ecfr.eu/wp-content/uploads/a\\_new\\_gaza\\_turkeys\\_border\\_policy\\_in\\_northern\\_syria.pdf](https://ecfr.eu/wp-content/uploads/a_new_gaza_turkeys_border_policy_in_northern_syria.pdf)>accessed 12 August 2021.

<sup>27</sup> European Asylum Support Office, ‘Country of Origin Information Report - Syria: Security Situation’ (European Asylum Support Office, November 2019) 39-40 <<https://data.europa.eu/doi/10.2847/267982>>accessed 10 August 2021. The SNA is a Turkish-backed non-state armed group. See e.g., Ömer Özkizilcik, ‘The Syrian National Army (SNA): Structure, Functions, and Three Scenarios for Its Relationship with Damascus’ (Geneva Centre for Security Policy, 19 November 2020) <<https://dam.gcsp.ch/files/doc/sna-structure-function-damascus>>accessed 6 August 2021.

<sup>28</sup> European Asylum Support Office (n27).

<sup>29</sup> Doga Eralp, ‘The Safe Zone for Undesirables on the Turkey-Syria Border’ (2020) 32 *Peace Review: A Journal of Social Justice* 181, 182.

<sup>30</sup> Human Rights Watch, ‘Turkey: Mass Deportations of Syrians’ (*Human Rights Watch*, 22 March 2018) <<https://www.hrw.org/news/2018/03/22/turkey-mass-deportations-syrians>>accessed 10 August 2021.

offensive, which was equally accompanied by declared intentions to prevent large-scale migration and return Syrian refugees to this so-called safe zone.<sup>31</sup>

As it stands, these safe zones have failed to ensure the protection of the civilian population, despite Turkey's promises. Notably, Turkey claimed it would build comprehensive infrastructure to facilitate return, including hospitals, schools, homes and sites of worship.<sup>32</sup> However, the safe zone established between Tel Abyad and Ras Al-Ain has been shrouded in violence, including allegations of summary executions and other abuses against civilians.<sup>33</sup> In Afrin, while Turkey established a police force and provided basic services including medical care and, according to some observers, education and employment,<sup>34</sup> this has been tainted by reports highlighting numerous abuses including arbitrary detention and sexual violence by SNA forces with the involvement of Turkish officials.<sup>35</sup>

The legality of these zones' establishment raises numerous issues beyond the scope of this paper.<sup>36</sup> In particular, while Syria has not provided explicit consent to the safe zones and has publicly condemned Turkey's prior actions, Russia has claimed that it was acting with Syrian support when agreeing to the safe zone in 2019.<sup>37</sup> In light of Turkey's factual control and direct administration of Tel Abyad, Ras Al-Ain and Afrin,<sup>38</sup> this paper will adopt the position that Turkey occupies the territory where the proclaimed safe zones are located as it established

<sup>31</sup> Geneva Academy, 'Military Occupation of Syria by Turkey' (*RULAC*, 15 April 2021) <<https://www.rulac.org/browse/conflicts/military-occupation-of-syria>>accessed 14 August 2021.

<sup>32</sup> Adar (n7) 3.

<sup>33</sup> Human Rights Watch, 'Syria: Civilians Abused in "Safe Zones"' (*Human Rights Watch*, 27 November 2019) <<https://www.hrw.org/news/2019/11/27/syria-civilians-abused-safe-zones>>accessed 10 August 2021.

<sup>34</sup> Carlotta Gall, 'In Turkey's Safe Zone in Syria, Security and Misery Go Hand in Hand' *The New York Times* (16 February 2021) <<https://www.nytimes.com/2021/02/16/world/middleeast/syria-turkey-erdogan-afrin.html>>accessed 04 August 2021.

<sup>35</sup> Amnesty International UK, 'Syria: Turkish Occupation of Afrin Has Led to Widespread Human Rights Violations - New Findings' (Amnesty International, 1 August 2018) <<https://www.amnesty.org.uk/press-releases/syria-turkish-occupation-afrin-has-led-widespread-human-rights-violations-new>>accessed 04 August 2021; UNGA, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (14 August 2020) UN Doc A/HRC/45/31, paras 37-69.

<sup>36</sup> Turkey did not receive authorisation from the UNSC and asserted their right to self-defence against Kurdish forces under Article 51 UN Charter. For a detailed assessment, see Bríd Ní Ghráinne, 'The Syrian Safe Zone and International Law' (Institute of International Relations, Prague, 28 July 2020) 2 <<https://www.iir.cz/brid-ni-ghrainne-the-syrian-safe-zone-and-international-law>>accessed 12 August 2021.

<sup>37</sup> Syria voiced strong opposition to initial US-Turkey plans for a safe zone in northern Syria as a "blatant attack" on the country's sovereignty, Al Jazeera, 'Blatant Aggression: Syria rejects US-Turkey Safe Zones Deal' *Al Jazeera* (8 August 2019) <<https://www.aljazeera.com/news/2019/8/8/blatant-aggression-syria-rejects-us-turkey-safe-zones-deal>>accessed 14 August 2021. Reports also state that the Syrian administration 'raised concern about foreign interference in Syria' despite Russia's later contentions, BBC News, 'Turkey Syria Offensive: Erdogan and Putin strike deal over Kurds' *BBC News* (23 October 2019) <<https://www.bbc.com/news/world-middle-east-50138121>> accessed 13 August 2021.

<sup>38</sup> Aydıntaşbaş (n26) 5.

effective control over Syrian territory without clear or express consent.<sup>39</sup> Where relevant, analysis will also consider the alternative possibility that Syria explicitly consented to a safe zone. Nevertheless, without identifiable agreement from all belligerents guaranteeing its demilitarisation, these safe zones cannot be considered as meeting the strict requirements to be protected under the IHL framework. In turn, Turkey's actions signify an emerging typology of safe zone, neither governed by IHL nor authorised by the UNSC. The degree of stability and protection varies amongst these areas; however, all have been positioned as spaces where Turkey can both return Syrian nationals and prevent their flight. Their particular characteristics will inform the subsequent discussion which aims to demonstrate the risks for refugee protection of creating safe zones which have, at best, a fragile basis in international law.

## **2. Safe Zones and Refugee Protection**

This paper will take a holistic approach to refugee protection in armed conflict, and views IRL, IHL and IHRL as sources of mutually reinforcing and complementary, rather than conflicting, protection.<sup>40</sup> IRL will be considered due to the focus on refugee protection. Additionally, both IHL and IHRL are crucial reinforcing sources of protection that are applicable in the context of armed conflict in which safe zones are typically established.<sup>41</sup> With this in mind, this section will consider the varying features of the safe zone typologies that have been presented in order to challenge three prominent arguments that risk being associated with their existence. First, that they can justify the denial of access to asylum. Second, that their 'safety' can ground the rejection of asylum applications. Third, that persons can be returned to safe zones.

### **2.1 Safe Zones and Access to Asylum**

The first danger is that safe zones are relied on by states to justify the closure of borders and denial of access to asylum, forcing persons to settle in spaces which are misrepresented as safe.

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<sup>39</sup> See support for this conclusion in Geneva Academy, 'Military Occupation of Syria by Turkey' (n31).

<sup>40</sup> This is in line with the HRCttee's complementarity approach and the position of Professor Vincent Chetail. Vincent Chetail, 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 700-34; Vincent Chetail, 'Moving towards an Integrated Approach of Refugee Law and Human Rights Law' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 210-12.

<sup>41</sup> For the applicability of IHRL in armed conflict, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106; HRCttee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 11.

Although safe zones are an arguably protective alternative to the dangers of irregular border crossings,<sup>42</sup> relying on them to prevent persons from seeking protection is clearly incompatible with international law, particularly the right to leave and to seek asylum and the principle of *non-refoulement*.

### **2.1.1 The Right to Leave**

Firstly, the right to leave in the Refugee Convention obliges state parties to permit ‘refugees lawfully staying in their territory’, namely the state of asylum, to travel outside the state.<sup>43</sup> This considerably limits its relevance for the present discussion as safe zones are premised on being established in the state of origin rather than the state of asylum, and this provision does not offer any protection to those who remain in their home state. Therefore, the right to leave under IHL and IHRL must be considered as they provide more comprehensive protection to persons wishing to leave a territory where a safe zone is located.

The right to leave under IHL stipulates an entitlement to voluntarily leave a territory at the start of, and during, an IAC.<sup>44</sup> However, this is subject to several caveats. Firstly, it only benefits protected persons, as defined by Article 4 GCIV, which broadly requires that an individual is in the hands of a party of which they are not nationals. While Article 73 API recognises that refugees can be protected persons regardless of their nationality, this is equally limited because they must have been recognised as a refugee prior to the outbreak of hostilities and both parties must have ratified API.<sup>45</sup> Secondly, the right to leave is predominantly foreseen for individuals on own, rather than occupied, territory as the right to leave occupied territories only benefits third-country nationals.<sup>46</sup> Thirdly, individuals can be prevented from leaving if their departure would be contrary to ‘national interests’, which has been interpreted as broader than the state’s security interests and can also encompass economic considerations.<sup>47</sup>

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<sup>42</sup> Gilbert and Rüsç (n4) 3; Bríd Ní Ghráinne, ‘Safe Zones and the Internal Protection Alternative’ (2020) 69 *British Institute of International and Comparative Law* 335, 336.

<sup>43</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Art 28.

<sup>44</sup> GCIV, Art 35.

<sup>45</sup> Chetail, ‘Armed Conflict and Forced Migration’ (n40) 706-10.

<sup>46</sup> GCIV, Art 48; Sassòli (n11) 336.

<sup>47</sup> Sassòli (n11) 297.

Applying the right to leave under IHL to the specificities of safe zones, the picture becomes complex. Using the Syrian safe zone as an example, although they would be protected persons, Syrian nationals in Turkish-occupied territory would not benefit from the right to leave. Conversely, if Syria had consented to the safe zone and IHL was still applicable, or if persons were outside of the safe zone, then Syrian nationals in the power of Syria would not be protected persons. Article 73 API would not afford any additional protection because these persons would not be recognised as refugees by their own country of nationality. Therefore, hypothetically, the right to leave under IHL would only benefit Syrian nationals in a safe zone in Turkey who wished to return to Syria or another country. This is not foreseeable. Firstly, Turkey wishes to prevent the entry of Syrian nationals and so would not establish a safe zone on its own territory, and secondly these individuals are seeking protection, rather than wishing to return to their state of persecution.

In light of these limitations, recourse must be had to the right to leave under IHRL, which applies to all individuals regardless of their nationality.<sup>48</sup> In this respect, as well as the state's obligation to secure the rights of all persons on its territory including those arriving at its border, the extra-territorial application of IHRL has been recognised where a state has effective control over territory, namely occupation, or physical control and authority over persons.<sup>49</sup> As demonstrated by northern Syria, a state imposing a safe zone will foreseeably be occupying the territory where it is established. In the alternative, even if the territorial state consents to their presence, it is still likely that the safe zone would be administered by the imposing state's forces. For example, even if Turkey was not strictly considered to be an occupying power, Turkish forces directly administering the safe zones would still have extra-territorial IHRL obligations based on the degree of control and authority exercised over their inhabitants.<sup>50</sup> In sum, the occupying power, or those administering the safe zone, are responsible for respecting the rights of persons therein, including the right to leave.

Despite its broad applicability, the right to leave is not absolute. Firstly, in times of 'public emergency which threatens the life of the nation', under certain treaties states can derogate

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<sup>48</sup> See e.g., International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art 12(2). The right to leave has been reaffirmed in numerous treaties and argued as customary in nature, see Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 82-92.

<sup>49</sup> Gillard (n9) 1097. See also HRCttee, *General Comment No 31* (n41) para 10: 'anyone within the power or effective control' of a state party.

<sup>50</sup> Gillard (n9) 1098-99; Chau (n4) 210-14.

from the right to leave, provided measures are strictly required by the situation, not discriminatory, nor inconsistent with other international obligations.<sup>51</sup> This has been restrictively interpreted as requiring more than the existence of an armed conflict.<sup>52</sup> Specifically, when a state is involved in an extraterritorial conflict in which hostilities take place outside its territory, the extent to which there is a legitimate ‘threat to the life of a nation’ permitting derogation is debated.<sup>53</sup> Under a similar approach, it has been argued that if a refugee-receiving state imposes a safe zone in another state where there is an ongoing conflict to which they are not party, then it could not derogate from the right to leave because of the lack of a ‘threat’ on its own territory.<sup>54</sup> This reasoning could even be extended to a situation where the imposing state is party to the conflict and is engaged in hostilities both within and beyond the safe zone, such as in northern Syria, provided hostilities remain confined to the foreign territory. Nevertheless, Chetail has also importantly observed that the right to leave has been recognised in some IHRL treaties without the possibility of derogation.<sup>55</sup>

Secondly, the right to leave can be restricted on the basis of the legitimate aims of national security and public order, among others, as long as measures are provided by law and necessary, which entails that they must be the ‘least intrusive’ measure and ‘proportionate to the interest to be protected’.<sup>56</sup> These conditions significantly limit a state’s ability to prevent flight, and were notably drafted as the ‘exception’ rather than the ‘rule’.<sup>57</sup> In particular, a state could not ground a limitation of the right to leave on the mere existence of a safe zone as any restriction must be based on the individual circumstances of the case rather than the general conditions in the country of origin.<sup>58</sup> In this respect, the individual seeking protection is likely fleeing persecution or serious harm in an ongoing conflict, and only in the exceptional instance of serious criminality can they be considered as posing any kind of ‘threat’ to the receiving

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<sup>51</sup> See e.g., ICCPR, Art 4.

<sup>52</sup> HRCttee, *General Comment No. 29: Article 4: Derogations During a State of Emergency* (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 3.

<sup>53</sup> For detailed analysis, see Marko Milanovic, ‘Extraterritorial Derogations from Human Rights Treaties in Armed Conflict’ in Nehal Bhuta (ed), *The Frontiers of Human Rights* (Oxford University Press 2016).

<sup>54</sup> Gilbert and Rüsç (n4) 5.

<sup>55</sup> Chetail, ‘Armed Conflict and Forced Migration’ (n40) 716.

<sup>56</sup> ICCPR, Art 12(3); HRCttee, *General Comment No. 27: Article 12 (Freedom of Movement)* (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.13, paras 14-16.

<sup>57</sup> Chetail, *International Migration Law* (n48) 80.

<sup>58</sup> *ibid* 84-5.

state.<sup>59</sup> Therefore, in virtually all instances, the exposure to continued danger through restricting their right to leave is neither necessary nor proportionate to any legitimate aim.

### 2.1.2 *The Right to Seek Asylum and Non-Refoulement*

The right to leave is reinforced by the right to ‘seek and enjoy asylum’ as enshrined in the UDHR,<sup>60</sup> which has been argued as implicit in the Refugee Convention and an emerging customary norm.<sup>61</sup> However, on its own, this is limited in effect as it does not oblige states to actually grant asylum and is therefore only made operable through the principle of *non-refoulement*.<sup>62</sup>

*Non-refoulement* is a crucially important norm enshrined in IRL, IHRL and IHL. Under IRL, this principle applies to both asylum-seekers and formally recognised refugees and prohibits return ‘in any manner whatsoever’ to a state where they face persecution on five limitative grounds – nationality, political opinion, race, religion and membership of a particular social group.<sup>63</sup> Similarly, under IHL, parties to an IAC are prohibited from transferring protected persons from their own territory to another state where they fear persecution, on more limited grounds of political opinion or religious belief.<sup>64</sup> On occupied territory, regardless of any threat of harm, IHL prohibits the forced transfer of protected persons within a state, including within occupied territory, and deportation to another state.<sup>65</sup>

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<sup>59</sup> This analysis focuses on the obligations of refugee-receiving states to respect the right to leave as practice has shown that safe zones are established with the intention to prevent individuals from entering the asylum state, rather than by the home state to prevent the flight of its nationals.

<sup>60</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), art 14.

<sup>61</sup> Alice Edwards, ‘Human Rights, Refugees, and The Right “To Enjoy” Asylum’ (2005) 17 *International Journal of Refugee Law* 293, 301.

<sup>62</sup> Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014) 31.

<sup>63</sup> Refugee Convention, art 33. See also Rebecca MM Wallace, ‘The Principle of Non-refoulement in International Refugee Law’ in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Elgar 2014) 418.

<sup>64</sup> GCIV, art 45. According to this provision, transfer is also prohibited if the destination state is not party to GCIV or is not willing or able to respect it.

<sup>65</sup> GCIV, art 49(1). Art 49(6) GCIV is not discussed as there is no indication that the occupying power intends to transfer its own nationals into a safe zone. Forced return in NIACs will not be considered as safe zones usually involve foreign states, in most cases triggering an IAC or occupation. For analysis of *non-refoulement* under IHL on both own and occupied territory, see Vincent Chetail, ‘The Transfer and Deportation of Civilians’ in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 1187-89, 1198-209.



Under IHRL, the principle of *non-refoulement* proscribes return where there are ‘substantial grounds’ to consider that an individual faces a ‘real risk of irreparable harm’ owing to a serious human rights violation.<sup>66</sup> This traditionally encompasses harm amounting to torture or CIDT but has also been interpreted to include other core rights, including the right to life and right to a fair trial, namely in situations of armed conflict.<sup>67</sup> Moreover, as argued by Chetail, it is not necessarily limited to specific rights and will be engaged when there is a serious violation amounting to degrading treatment.<sup>68</sup> Therefore, this prohibition is broader than under IRL and IHL, especially in its application to all individuals including those who are not protected persons under IHL, or who fall under Article 33(2) Refugee Convention or do not otherwise meet the refugee definition under Article 1A(2).<sup>69</sup>

The application of *non-refoulement* to safe zones will be considered in 2.3. At this stage, it is important to emphasise that *non-refoulement* is at the core of international refugee protection and is particularly significant in light of the emerging practices of states in response to safe zones. Taken together with the right to leave and to seek asylum, this provides a crucial layer of protection that precludes states from preventing admission to their territory for individuals in need of protection.

### **2.1.3 State Practices: Push Backs and Border Closures**

Past practice has indicated that safe zones are often associated with border closures and other push-back practices, as refugee-receiving states argue that they mitigate the need for individuals to seek refuge elsewhere due to their apparent safety.<sup>70</sup> This is clearly incompatible with the international legal framework protecting the right to leave, as well as the principle of

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<sup>66</sup> HRCttee, *General Comment No 31* (n41), para 12. *Non-refoulement* has been explicitly endorsed in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3. It is also recognised as implicit in the ECHR, see *Soering v UK* App no 14038/88 (ECtHR, 7 July 1989) and a customary norm, arguably amounting to *ius cogens*. See Chetail, ‘Are Refugee Rights Human Rights?’ (n62) 29-39.

<sup>67</sup> See e.g., *Sufi and Elmi v United Kingdom* App nos 8319/07 and 1149/07 (ECtHR, 28 June 2011) in Chetail, ‘Transfer and Deportation’ (n65) 1204. For analysis of the scope of *non-refoulement*, see Emanuela-Chiara Gillard, ‘There’s No Place like Home: States’ Obligations in Relation to Transfers of Persons’ (2008) 90 *International Review of the Red Cross* 703, 716-23; Chetail, ‘Are Refugee Rights Human Rights?’ (n62) 34-39.

<sup>68</sup> Chetail, ‘Are Refugee Rights Human Rights?’ (n62) 35.

<sup>69</sup> For an assessment of art 33(2), see Aoife Duffy, ‘Expulsion to Face Torture - Non-Refoulement in International Law’ (2008) 20 *International Journal of Refugee Law* 373, 374-7. For the application of the refugee definition to conflict situations, see Chetail, ‘Armed Conflict and Forced Migration’ (n40) 722-27.

<sup>70</sup> Katy Long, ‘In Search of Sanctuary: Border Closures, “Safe” Zones and Refugee Protection’ (2013) 26 *Journal of Refugee Studies* 458, 462-67.

*non-refoulement* which is settled as applying to rejection at the frontier.<sup>71</sup> The expansion of this principle to include interception on the high seas is also crucial in protecting individuals who make the crossing across international waters to reach protection in Europe.<sup>72</sup>

Beyond these instances, a pertinent consideration is whether *non-refoulement* protects persons who remain in their home state. This is particularly relevant when push-back practices, such as on the Syrian-Turkish border, become commonplace.<sup>73</sup> In this scenario, the state of asylum is arguably constructively *refouling* persons to a place of persecution or harm by indirectly forcing them to seek protection in a safe zone rather than travel to the border where they know their asylum claim will be unsuccessful.<sup>74</sup> In this respect, it has been argued that *non-refoulement* under IRL is exclusively territorial and will not protect those who remain in their country of origin.<sup>75</sup> However, as affirmed by the UNHCR and supported in scholarship, there is ‘growing consensus’ that Article 33(1) Refugee Convention applies to all persons who fall under the jurisdiction of a state, even if on another state’s territory.<sup>76</sup> The core argument supporting this conclusion is that given their similar object and purpose, there should not be a discrepancy between the geographical scope of application of *non-refoulement* under IRL and IHRL.<sup>77</sup> While this is still somewhat debatable, it is clear that based on the extraterritorial application of IHRL outlined at 2.1.1, the principle of *non-refoulement* under IHRL must be respected when the individual falls under the jurisdiction of the state, and this would include a safe zone on occupied territory or controlled and administered by foreign or peacekeeping forces.<sup>78</sup>

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<sup>71</sup> UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’ (26 January 2007) para 7 <<https://www.unhcr.org/4d9486929.pdf>> accessed 13 August 2021.

<sup>72</sup> *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012), paras 180-81.

<sup>73</sup> Turkey has previously closed its border with Syria and suspended registration of arrivals in response to the safe zone. See Human Rights Watch, ‘Turkey: Syrians Being Deported to Danger’ (*Human Rights Watch*, 24 October 2019) <<https://www.hrw.org/news/2019/10/24/turkey-syrians-being-deported-danger>> accessed 10 August 2021.

<sup>74</sup> Bríd Ní Ghráinne, ‘Internally Displaced Persons and International Law’ in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Elgar 2019) 37-38.

<sup>75</sup> This derives from the wording of the definition of a refugee as ‘outside the country of his nationality’ and was affirmed in *R v Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55. See Chetail, ‘Are Refugee Rights Human Rights?’ (n62) 36.

<sup>76</sup> This is based on the ordinary meaning of the Refugee Convention, in light of its object and purpose, taking into account subsequent practice under art 31 VCLT. Thomas Gammeltoft-Hansen, ‘Extraterritorial Migration Control and the Reach of Human Rights’ in Vincent Chetail and Céline Bauloz (eds) *Research Handbook on International Law and Migration* (Elgar 2014) 116; UNHCR, ‘Extraterritorial Application of Non-Refoulement’ (n71), paras 23-24.

<sup>77</sup> UNHCR, ‘Extraterritorial Application of Non-Refoulement’ (n71) paras 42-43.

<sup>78</sup> Chetail, ‘Are Refugee Rights Human Rights?’ (n62) 36-37.

Given the rhetoric surrounding their creation, it is also possible that safe zones will be associated with arguments of mass influx. While there are remaining controversies, Chetail has convincingly argued that based on the ‘inclusive’ wording of the Refugee Convention, mass influx cannot be a permissible exception to *non-refoulement* under IRL.<sup>79</sup> Taken together with the absolute nature of *non-refoulement* under IHRL, persons cannot be *refouled* to a place where they face persecution or serious irreparable harm regardless of the ‘burden’ on the state of asylum.<sup>80</sup> Additionally, the prohibition of collective expulsion requires that all individuals benefit from an individual assessment in their asylum claim, including in mass influx.<sup>81</sup> Therefore, any collective decision to refuse entry to a state due to the existence of a safe zone is clearly prohibited.

In sum, under the reinforcing protections of IHL, IRL, and IHRL, particularly the right to leave, the principle of *non-refoulement* and the prohibition of collective expulsion, it is clear that regardless of the existence or apparent safety of a safe zone, individuals must still be able to leave their country of origin and access asylum procedures in another state.

## 2.2 Safe Zones and Determination of Asylum Claims

The next barrier for refugee protection posed by safe zones is that their existence in the applicant’s country of origin could justify the refusal of an asylum claim on the grounds of the IPA. This section will address this notion in the alternative instances that a safe zone is administered by the military powers of the home state, a foreign state, or a UN peacekeeping operation.

### 2.2.1 *The Internal Protection Alternative*

The IPA is subject to controversy as it was not initially envisaged by the system of refugee protection and is not mentioned in the Refugee Convention.<sup>82</sup> It is clear that the IPA cannot be invoked by AU member states who have ratified the OAU Convention as its definition of a refugee explicitly includes persons compelled to leave their country of origin owing to a

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<sup>79</sup> As affirmed by the UNHCR, Chetail ‘Armed Conflict and Forced Migration’ (n40) 719-20.

<sup>80</sup> See e.g., *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), para 223.

<sup>81</sup> The prohibition of collective expulsion is explicit in some regional treaties, acknowledged by the HRCttee as implicit in Art 13 ICCPR and is arguably a customary norm. Chetail, ‘Armed Conflict and Forced Migration’ (n40) 720-21; Chetail, *International Migration Law* (n48) 139-42.

<sup>82</sup> Jessica Schultz, *The Internal Protection Alternative in Refugee Law* (Brill Nijhoff 2019) 2.

number of specified scenarios taking place in part of the country.<sup>83</sup> However, beyond this region, the matter is not so clear-cut and states frequently rely on the IPA as an implicit part of the assessment of a well-founded fear of persecution and whether the applicant is ‘able or willing’ to avail themselves of protection under Article 1A(2) Refugee Convention.<sup>84</sup>

The UNHCR has acknowledged the possibility of the IPA but has specified a two-fold test of ‘safety’ and ‘reasonableness’ to limit its scope.<sup>85</sup> This entails that in the applicant’s particular circumstances, there is an area of the country of origin where they do not have a well-founded fear of persecution or can receive protection from it, and which they can safely access and ‘lead a relatively normal life without...undue hardship’.<sup>86</sup> These conditions are explicitly endorsed by the EUQD which enshrines a clearer legal basis for the IPA and crucially specifies the minimum standards required for there to be adequate protection from persecution.<sup>87</sup> Although the EUQD is not applicable to persons seeking asylum outside of the EU, such as at the Syrian-Turkish border, its provisions can shed light on the evolving content and substance of the IPA, including beyond the EU system, and provide more specificity on a relatively vague notion. In addition, while they have not explicitly supported the Syrian safe zone, EU states have cooperated with Turkey on migration control.<sup>88</sup> Thus, it is not unforeseeable that in the future these states would rely on the IPA to circumvent their obligations in response to a safe zone that promoted some form of safety, in Syria or elsewhere.

Under normal circumstances, the IPA is reserved for cases of persecution by non-state actors, as a state is presumed to be able to exercise its power everywhere on its territory.<sup>89</sup> Under this reasoning, if the territorial state consents to the establishment of a safe zone, then the scope of the IPA is limited as the safe zone would be administered either directly or with the acquiescence of the state, which would be able to continue to persecute its inhabitants.

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<sup>83</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, Art I (2).

<sup>84</sup> Jessica Schultz, ‘The Internal Protection Alternative and its Relation to Refugee Status’ in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Elgar 2019) 129.

<sup>85</sup> *ibid.*

<sup>86</sup> UNHCR, ‘Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A (2) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees’ UN doc HCR/GIP/03/04 (23 July 2003), paras 6-7.

<sup>87</sup> Art 8 EUQD defines the IPA and explicitly refers to Art 7 which defines actors of protection. Council Directive 2011/95/EU of 13 December 2011 [2011] OJ L 337/9-337/26.

<sup>88</sup> The 2016 EU-Turkey deal aimed to control irregular migration into Europe with Syria acting as a ‘gatekeeper’ for Syrian refugees. Aydıntaşbaş (n26) 9.

<sup>89</sup> UNHCR, ‘IPA Guidelines’ (n86) para 13.

However, as presented in section 1, safe zones are often not explicitly consented to and, instead, are controlled and administered by external actors, specifically a foreign power or a UN peacekeeping operation. In this respect, it has been recognised that a state's ability to persecute can be refuted in the exceptional circumstance that it does not have control over the whole territory.<sup>90</sup> This creates a risk of the expansion of the IPA to reject asylum claims based on false narratives of safety as refugee-receiving states could argue that the individual is able to receive protection from persecution stemming from both state and non-state actors in a safe zone administered by an external actor. However, this argument can be clearly dismantled as the realities of safe zones have shown that even minimal safety, let alone comprehensive protection from persecutory harm, is unrealistic.

### ***2.2.2 Actors of Protection: UN Peacekeeping Forces***

This paper contends that, based on international practice, future safe zones will increasingly be non-consensually established by foreign states without UNSC authorisation. However, as has been endorsed by some authors,<sup>91</sup> a UN peacekeeping force could still be deployed to an existing safe zone to ensure its safety, thus requiring consideration of how this would affect an IPA assessment. This is even more pertinent in light of the role of peacekeeping forces in PoC sites, a form of safe zone coined following the spontaneous large-scale arrival of civilians at a UN peacekeeping base in South Sudan.<sup>92</sup> PoC sites differ from the more common understanding of safe zones presented in section 1 due to their unplanned character and raise several issues, related to jurisdiction and supervision, beyond the scope of this paper.<sup>93</sup> However, analysing the conditions in the PoC site in South Sudan can importantly inform the present assessment of whether peacekeeping operations have the capacity to ensure the protection of persons in safe zones.

The EUQD recognises at Article 7(1)(b) that 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State', such as UN peacekeeping operations, are potential actors of protection against persecution. Article 7(2)

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<sup>90</sup> *ibid.*

<sup>91</sup> Orchard (n4) 68.

<sup>92</sup> Gillard (n9) 1093.

<sup>93</sup> See e.g., Caelin Briggs, 'Protection of Civilians Sites: Lessons From South Sudan for Future Operations' (Norwegian Refugee Council, 31 May 2017) <[https://www.nrc.no/globalassets/pdf/reports/poc-sites\\_lessons-from-south-sudan-copy.pdf](https://www.nrc.no/globalassets/pdf/reports/poc-sites_lessons-from-south-sudan-copy.pdf)> accessed 10 August 2021.

further provides that protection must be ‘effective’ and ‘non-temporary’, and the actor must take steps to prevent persecution, such as through operating an ‘effective legal system’ for the punishment of persecutory acts. The UNHCR has similarly accepted the possibility of non-state actors of protection in exceptional circumstances where they have a high degree of control and the capacity to provide comprehensive protection.<sup>94</sup> Thus, both within and outside of the EU system, there is a relatively high threshold which is beyond the typically limited mandate of UN peacekeepers to protect against imminent physical harm.

Although it is possible that they could provide physical protection from hostilities in a safe zone, it is clear from the shortcomings of PoC sites that UN peacekeeping operations do not have the capacity to provide sufficient protection for the IPA.<sup>95</sup> Indeed, in South Sudan, despite the prominent protection needs, only basic medical assistance and water was provided and there was no functioning judicial or administrative system.<sup>96</sup> This was notably due to the limitations in their mandate, which did not grant powers of law enforcement or judicial authority, preventing the ability to detain or try individuals.<sup>97</sup> In this respect, in order for a peacekeeping operation to be a competent actor of protection in a safe zone, it must have a mandate that allows for the detention and prosecution of persons in a manner that respects fair trial guarantees. This is unlikely given the already evident resistance of the UNSC to lend support to safe zones, as discussed in 1.2.

### ***2.2.3 Actors of Protection: Foreign Military Powers***

When safe zones are neither consented to by the territorial state nor UN administered, they would foreseeably be controlled by foreign forces as the occupying power. Although these forces can provide physical protection to individuals through military enforcement activities, their capacity to provide comprehensive and effective protection from persecution in the manner required by the IPA is significantly limited. There are a number of factors that could be considered here regarding the limitations of an occupying power to establish courts, pass

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<sup>94</sup> UNHCR, ‘IPA Guidelines’ (n86) para 17. ‘Protection must be effective and of a durable nature ... provided by an organised and stable authority exercising full control over the territory and population in question.’

<sup>95</sup> The limited capacity of international organisations to offer protection has been recognised by the UNHCR. Ibid, para 16.

<sup>96</sup> Damian Lilly, ‘Protection of Civilians Sites: A New Type of Displacement Settlement?’ (*Humanitarian Exchange*, September 2014) 31-33 <<https://odihpn.org/magazine/protection-of-civilians-sites-a-new-type-of-displacement-settlement/>> accessed 01 August 2021.

<sup>97</sup> Gillard (n9) 1095.

laws and prosecute persons under IHL.<sup>98</sup> However, the principal issue is that the control and administration of territory by foreign military actors will likely take place in the context of an armed conflict with a constant risk of the resurgence of active hostilities, and very limited safety. In particular, it is not an environment where individuals can reasonably be expected to settle in a long-term or durable manner, the final component of the IPA that will now be considered.

#### 2.2.4 ‘Reasonably Expected to Settle’

In addition to the challenges already presented, even if the applicant could receive immediate protection from persecution in the safe zone, they must also be able to safely and legally travel there and be ‘reasonably expected to settle’.<sup>99</sup> These are the strongest arguments in favour of this section’s conclusion that, in almost all instances, safe zones cannot be invoked as an IPA.

With regard to the condition of safe and legal travel, the traditional premise of safe zones under the IHL framework outlined in 1.1 foresaw their establishment in the midst of intense fighting to protect civilians unable to flee hostilities, rather than as a space for persons in distant areas to travel to. Expecting persons to travel through an active war zone is clearly problematic and precludes the possibility to invoke the IPA for those not in proximity to the safe zone.<sup>100</sup> Moreover, the fundamental condition of settlement entails that the safe zone must guarantee more than protection from hostilities and be a ‘habitable’ and ‘safe’ environment, in which the individual can comprehensively and freely enjoy civil and political as well as economic, social and cultural rights.<sup>101</sup> This must also take into account the risk of indirect *refoulement*, namely the return of persons to a safe zone where the socio-economic conditions are insufficient for them to remain indefinitely, driving return to the original place of persecution or other areas where they face harm.<sup>102</sup>

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<sup>98</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910), art 43; GCIV, arts 47 and 64 on the ability of the occupying power to legislate in occupied territory.

<sup>99</sup> EUQD, art 8(1). Similar notions of reasonableness and settlement have been endorsed by UNHCR. See UNHCR, ‘IPA Guidelines’ (n86) 24-30.

<sup>100</sup> Ní Ghráinne, ‘Safe Zones and the Internal Protection Alternative’ (n42) 363.

<sup>101</sup> UNHCR, ‘Interpreting Article 1 of the 1951 Geneva Convention Relating to the Status of Refugees’ (April 2001), para 13.

<sup>102</sup> Ní Ghráinne, ‘Safe Zones and the Internal Protection Alternative’ (n42) 350.

Beyond the specific context of the IPA, a number of standards have been suggested by Gilbert and Rüsç in order for a safe zone to provide genuine and robust protection to its inhabitants, which can also be relied on to establish some possible benchmarks for when a safe zone could be sufficiently safe for the IPA. In particular, at the absolute minimum, there must be respect for the right to life, freedom from torture and CIDT, freedom from SGBV, and unimpeded humanitarian access. In addition, the safe zone must secure an adequate standard of living, through providing, at least, medical care, food, water and shelter.<sup>103</sup> If these conditions were met, then it could be argued that the IPA would be engaged. However, it is relatively unrealistic given that the vast majority of safe zones are located in a conflict environment with ongoing hostilities and wider abuses against civilians.<sup>104</sup> Safe zones struggle to maintain a modicum of physical safety, let alone to actively secure the rights of its inhabitants.

Even if a safe zone could foreseeably meet the conditions of the IPA, there is still the risk that refugee-receiving states will misinterpret it as ‘safe’ for every individual and reject all cases without any consideration of their merit.<sup>105</sup> However, as enshrined in the EUQD, affirmed by the UNHCR and reinforced by the prohibition of collective expulsion, there cannot be automaticity in this assessment.<sup>106</sup> Therefore, any rejection based on the IPA must be following an individualised assessment that takes into account the applicant’s circumstances.

### 2.3 Safe Zones and Returns

Both IHL and IHRL recognise the right of return.<sup>107</sup> However, as highlighted throughout this paper, states have been capitalising on the premise of safe zones in order to promote illusory notions of safety and justify the forced return of persons to their country of origin where a safe zone is located.<sup>108</sup> As will be demonstrated in this section, safe zones have offered false guarantees of safety in the midst of a conflict situation, precluding the return of persons in almost all instances.

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<sup>103</sup> Gilbert and Rüsç (n4) 2.

<sup>104</sup> See e.g., HRW, ‘Syria: Civilians Abused in “Safe Zones”’ (n33).

<sup>105</sup> Ní Ghráinne, ‘Safe Zones and the Internal Protection Alternative’ (n42) 344.

<sup>106</sup> EUQD, art 8(2); UNHCR, ‘IPA Guidelines’ (n86) para 4.

<sup>107</sup> See e.g., UDHR, art 13(2); ICCPR, art 12(4). See also ICRC, Customary IHL Study (n13) rule 132 which recognises a right to return in IAC and NIAC; GCIV, arts 35, 45 and 49(1) implicitly permit the voluntary return of civilians. For analysis, see Chetail, ‘Armed Conflict and Forced Migration’ (n40) 728-29.

<sup>108</sup> Long, ‘Border Closures’ (n70) 471.



### 2.3.1 *The Application of Non-Refoulement to Safe Zones*

As outlined in 2.1.2, the principle of *non-refoulement* prohibits return to a safe zone where there is an immediate and apparent danger of either persecution or ‘irreparable harm’ to the individual. In light of the conflict environment, it is more than foreseeable that an individual would face persecution on their return to a safe zone. Using the Syrian context as an example, it has been considered that men who had refused to fight for the Syrian government or a militia could face persecution on return, a serious risk of harm that would not be alleviated by the Turkish-controlled safe zone.<sup>109</sup> Therefore, the principle of *non-refoulement* under IHL and IRL would prohibit return in many instances. Firstly, under IHL, Syrian nationals in safe zones on Turkish-occupied territory would be protected from forcible transfer within the territory, such as from their homes into the safe zone, as well as deportation to Turkey or another state.<sup>110</sup> Additionally, Syrian nationals in Turkey are protected persons who cannot be forcibly returned to a place where they face persecution on the grounds of their political or religious beliefs. Despite these important protective benefits, this will not cover all scenarios due to the more limited grounds of persecution, its restriction to protected persons, and the arguable exception of deportation.<sup>111</sup> It would also only apply to returns from states who are party to an IAC and therefore bound by IHL. Nevertheless, persons falling outside the scope of IHL due to these limitations would likely be protected by *non-refoulement* under IRL, which would cover more instances of persecution and prohibit all forms of return.

Given the challenges of safety identified in this paper, it is difficult to conceive of a situation where a safe zone would be free from the threat of harm to justify return in accordance with *non-refoulement* under IHRL. In particular, practice has shown that when belligerents have not agreed to a safe zone, a credible military presence is needed in order to deter activities which compromise its safety.<sup>112</sup> In turn, the safe zone is immediately established in a space prone to

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<sup>109</sup> Caelin Briggs and Rebecca Barber, ‘Proposed Refugee Resettlement into Syrian “Safe Zone” Carries Significant Risks’ (*Devpolicy Blog*, 25 October 2019) <<https://devpolicy.org/proposed-refugee-resettlement-into-syrian-safe-zone-carries-significant-risks-20191025/>>accessed 12 August 2021.

<sup>110</sup> Chetail ‘Transfer and Deportation’ (n65) 1197. Reports suggest that Turkey has forcibly transferred Syrian nationals, see e.g., Human Rights Watch, ‘Illegal Transfers of Syrians to Turkey’ (*Human Rights Watch*, 3 February 2021) <<https://www.hrw.org/news/2021/02/03/illegal-transfers-syrians-turkey>>accessed 11 August 2021.

<sup>111</sup> Chetail ‘Transfer and Deportation’ (n65) 1190-202.

<sup>112</sup> Jérémie Labbé, ‘Are Safe Areas a Viable Way Out of the Humanitarian Deadlock in Syria? - Syrian Arab Republic’ (*IPI Global Observatory*, 30 August 2012) <<https://theglobalobservatory.org/2012/08/are-safe-areas-a-viable-way-out-of-the-humanitarian-deadlock-in-syria/>>accessed 23 July 2021; Birnie and Welsh (n15) 339.

hostilities between those ensuring the zone's 'safety' and non-consenting belligerents, giving rise to the risk of serious harm against the civilian population and engaging the IHRL principle of *non-refoulement* to preclude return to safe zones in almost all other instances.<sup>113</sup>

### 2.3.2 *Return as Voluntary, Safe, Dignified and Durable*

Although not explicit in the Refugee Convention, a correlative of *non-refoulement* is that return must always be voluntary.<sup>114</sup> In recent years, emphasis has also increasingly been placed on the 'objective conditions' in the country of origin grounded in the language of safety and dignity on return.<sup>115</sup> Consequently, this requires more than just freedom from hostilities in the safe zone but comprehensive 'physical, legal and material safety', in which returning individuals can fully enjoy their rights, including economic, social and cultural rights, and access services without discrimination.<sup>116</sup> In a similar vein to the IPA, active steps must be taken to secure the livelihood of persons, including the provision of education, comprehensive medical care and employment opportunities.<sup>117</sup> Authors have also increasingly argued that return must be durable, a somewhat undefined term associated with indirect *refoulement*, which requires that return is sustainable and does not lead to further displacement.<sup>118</sup> In this respect, there must be identifiable longevity in safety, which could be demonstrated by a process of post-conflict reconstruction.<sup>119</sup>

Taking these factors together with the principle of *non-refoulement*, it is clear that, given the volatility of the conflict environment, a safe zone can rarely be considered as durably safe to

<sup>113</sup> Human rights violations amounting to torture and CIDT are well-documented in the Syrian context. See e.g., Peter Stubley, 'Turkish-Backed Militias Fighting in Syria Raping and Torturing Kurds, UN Finds' *The Independent* (18 September 2020) <<https://www.independent.co.uk/independentpremium/syria-war-crimes-turkey-kurds-un-commission-sna-b471878.html>> accessed 13 August 2021.

<sup>114</sup> Vincent Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Contents' (2004) 23 *Refugee Survey Quarterly* 1, 19; UNHCR, *Handbook on Voluntary Repatriation: International Protection* (January 1996) <<https://www.unhcr.org/3bfe68d32.pdf>> accessed 10 August 2021, Ch 2. The 'voluntary character of repatriation' is also endorsed in the OAU Convention, art 5.

<sup>115</sup> Chetail, 'Voluntary Repatriation' (n114) 17-18. This is affirmed by Objective 21 of UNGA 'Global Compact for Safe, Orderly and Regular Migration' (19 December 2019) 73<sup>rd</sup> Session UN Doc A/RES/73/195, para 37.

<sup>116</sup> UNHCR, 'Global Consultations on International Protection/ Third Track: Voluntary Repatriation' (25 April 2002) UN Doc EC/GC/02/5, para 15; UNHCR, *Handbook on Voluntary Repatriation* (n114) 11.

<sup>117</sup> Norwegian Refugee Council and others, 'Dangerous Ground: Syria's Refugees Face an Uncertain Future' (Norwegian Refugee Council, 5 February 2018) 6 <<https://www.nrc.no/globalassets/pdf/reports/dangerous-ground---syrias-refugees-face-an-uncertain-future.pdf>> accessed 28 July 2021.

<sup>118</sup> Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation* (Oxford University Press 2013) 174.

<sup>119</sup> NRC (n117) 14-15.

justify return.<sup>120</sup> For example, Tukey's intentions to build infrastructure and provide medical care and other services in the Syrian safe zones indicate a potentially conducive environment for return.<sup>121</sup> However, in reality, these guarantees have not been fulfilled in the midst of continued insecurity.<sup>122</sup> Despite this, Turkey has detained Syrians and forced them to sign 'voluntary' agreements to return to safe zones.<sup>123</sup> As well as being manifestly unlawful, this highlights the concerning reality that the discourse around return has become entangled with the perception that safe zones are an automatic place of safety and is a clear warning of the danger of their existence in the refugee protection landscape.

### **Safe Zones as an Immediate, Ad-hoc and Short-term Humanitarian Response**

By taking into account emerging practices related to their creation, this paper has provided some clarity on the legal framework governing safe zones and demonstrated their illegality as alternatives to refugee protection under international law. In this conclusion, the present author wishes to make some final qualifications. Primarily, it is not necessarily the concept of safe zones *in abstracto* that is problematic but their evolution into a tool used to conceal a state's anti-migration interests. Indeed, given the increasingly protracted nature of armed conflict and the serious risks this entails for the civilian population, the potential of a safe zone to ensure the provision of humanitarian assistance and enhanced physical protection is not something to be overlooked.

While it may be somewhat idealistic in light of the complexities of safe zones that have been discussed throughout this paper, properly constituted and respected safe zones, overseen by an impartial humanitarian agency such as the UNHCR or ICRC, can provide vital protection for those trapped in conflict and do have the potential to lessen excessive loss of civilian life.<sup>124</sup> They can also be particularly beneficial for the protection of IDPs who for either voluntary or coercive reasons do not leave their home country.<sup>125</sup> However, the establishment of safe zones

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<sup>120</sup> Ní Ghráinne, 'Syrian Safe Zone' (n36) 4.

<sup>121</sup> Adar (n7) 3.

<sup>122</sup> From January-September 2020, at least 116 civilians were killed, and 463 injured in Turkish-controlled areas, including Afrin, Ras al-Ain, and Tel Abyad. See OHCHR, 'Syria: Violations and Abuses Rife in Areas under Turkish-Affiliated Armed Groups' (Geneva, 18 September 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26258>> accessed 4 August 2021.

<sup>123</sup> HRW, 'Turkey: Syrians Being Deported to Danger' (n73).

<sup>124</sup> Keck T, 'What You Need to Know About "Safe Zones"' (*Intercross*, 27 February 2017) <<https://intercrossblog.icrc.org/blog/what-you-need-to-know-about-safe-zones>> accessed 07 August 2021.

<sup>125</sup> Birnie and Welsh (n15) 332.

must form part of a genuinely humanitarian strategy focused on the immediate protection of civilians to complement, rather than substitute, robust refugee protection. Crucially, any safe zone must be accompanied by complete respect of the international legal framework governing refugee protection that has been elucidated throughout this paper. In this respect, to have any chance of success, the essential shift that must occur in the discourse and practice surrounding safe zones is their disentanglement from the problematic refugee containment strategies of states and the migration context altogether.

**Word Count: 10,000**

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