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"Iraqi Refugees, UNHCR, and the State: Forced Displacement and the Reconfiguration of Sovereignty in the Middle East"

The 2003 war in Iraq and the internal security crisis that followed led to the forced displacement of 4 million Iraqis. Fleeing the ravages of war, the escalating violence of insurgency and counter-insurgency operations, and threats of ethno-sectarian "cleansing" campaigns, nearly 2 million sought refuge in Iraq's neighbouring states.[1] In the wake of the refugee crisis that ensued, the agency of the UN High Commissioner for Refugees (UNHCR) assumed a leading role in negotiating with host states in the Middle East to increase legal protection and access to public services for Iraqi refugees. However, this process was complicated as the increasing numbers of Iraqi refugees entering host state territories was accompanied by growing fears and restrictions enacted by these states who struggled to accommodate them.

This paper explores the tensions that emerged between state and UNHCR responses to the Iraqi refugee crisis in the Middle East and asks how they both produced and contested particular configurations of sovereignty. It first maps the exercise of sovereign power in refugee spaces by tracing in brief the politico-legal technologies enacted by Iraq's neighbouring states to contain and manage the refugee population, and also the strategies employed by UNHCR in its attempt to counter the devastating effects of these practices. It then considers how these interactions between state and UNHCR responses revealed new configurations of political space and forms of de-localised and contingent sovereignty, contesting the reach of both the sovereign power of the state and the authority of an international organisation within the international state system.

Policing and governing Iraqi refugees

While Iraq's neighbours were initially sympathetic to the humanitarian plight of Iraqi refugees, the sudden influx of refugees into their territories became increasingly construed as a burden threatening their internal security,[2] infrastructure, economic stability, and

[1] UNHCR (2007, September). *Statistics on displaced Iraqis around the world.*
[2] International Crisis Group (2008, July 10). *Failed Responsibility: Iraqi Refugees in Syria, Jordan and Lebanon*, pp. 11, 27. *See* Government of Lebanon, General Security, Visas – Entry of the Citizens of non-Gulf Arab Countries who are coming for purposes of Tourism"; Human Rights Watch (2007, November) *Rot here or die there: bleak choices for Iraqi refugees in Lebanon.* Vol. 19, No. 8(E)*;* Zaiotti, R. (2006). Dealing with non-

relationships with neighbouring states in the region.[3] Hence, state responses to these refugees ranged from welcoming to discouraging, as Iraqis, having no access to a domestic refugee protection regime, were at some times permitted entry to host states yet provided with only a limited form of residence and social and economic rights, and at other times effectively were barred from entry altogether or were arrested and deported to Iraq.

Although obligated as members of the UN to respect the Statute of the UNHCR,[4] most of Iraq's neighbours were not signatories to the 1951 Refugee Convention and claimed that they did not have a legal obligation towards Iraqi refugees. As Syria, Jordan, and Lebanon in particular were already host to large populations of Palestinians who remained without a durable solution since 1948, they were reluctant to accede to the Refugee Convention, fearing that they would be obligated to host future refugee populations such as the Iraqis remaining indefinitely on their territories, as well.[5] In keeping with this reluctance, none of these three States set out domestic refugee legislation in accordance with international instruments, mentioning asylum more as a matter of principle.[6] Given the lack of international legal obligation, these States enacted *ad hoc* measures towards Iraqi refugees not grounded in principles of human rights. They primarily treated them as illegal migrants while tolerating their presence to some extent out of political sympathy for their plight.

For example, while Jordan and Syria initially maintained a relatively open border policy for the first influxes of Iraqis, they soon began to impose more restrictive visa and residency rules. In October 2007, Syria restricted the entry of Iraqis to only certain categories of persons such as professionals and students.[7] In Jordan, the majority of Iraqi refugees were treated as any other foreigners under the Law for Aliens and Residency, meaning they were entitled to a three-month residency permit and were not permitted to engage in paid work.[8] In Lebanon, under the 1962 Law of Entry and Exit, Article 32, which stated that foreigners

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Palestinian refugees in the Middle East: policies and practices in an uncertain environment. *International Journal of Refugee Law*, 18 (2), 333-353, p. 343.

[3] Zaiotti, R., ibid, p. 344; Harper, A. (2008). Iraq's refugees: ignored and unwanted. *International Review of the Red Cross*, 90, 169-190, p. 177.

[4] Statute of the Office of the United Nations High Commissioner for Refugees (3 December 1949) UN Doc. A/RES/428.

[5] Zaiotti, R. (*supra* note 2), p. 344.

[6] Chatelard, G. (2002, August). *Jordan as a transit country: semi-protectionist immigration policies and their effects on Iraqi forced migrants.* (Working Paper No. 61). Florence, Italy: Robert Schuman Centre for Advanced Studies, European University Institute, p. 2; *see* Article 34 of the Syrian Constitution, adopted 13 March 1973; Article 21(i) of The Constitution of the Hashemite Kingdom of Jordan, adopted 1 January 1952; and Art. 26 of *Loi réglementant l'entrée et le séjour des étrangers au Liban ainsi que leur sortie de ce pays* (Law Regulating the Entry and Stay of Foreigners in Lebanon and their Exit from the Country (Law of Entry and Exit)), Bulletin de Législation Libanaise (Journal Officiel), No. 28-1962, entered into force July 10, 1962.

[7] Syrian Arab Republic, Regulation Number 2260/K, October 2007.

[8] Government of Jordan, Law of Residency and Aliens' Affairs Act of 1973.

who illegally entered the country may be detained for one to three months, fined, and deported, Iraqi refugees were arrested under this provision.

In none of these countries did Iraqi refugees enjoy the full protection of their social and economic rights. They were largely prohibited from legal employment and had to seek work in the informal sector, where they were subjected to discrimination and exploitation without legal recourse.[9] Iraqi children also faced obstacles to enrolment in schools, due to their illegal residence in the country,[10] or because the associated costs or language requirements were prohibitive.[11] Access to public health care was generally available in host states, although this was often limited to primary or emergency health care only or required legal residence.[12]

In this environment, these governments tended to perceive UNHCR's role primarily as one of providing short-term humanitarian relief in times of emergency.[13] However, even prior to the Iraqi refugee crisis, UNHCR negotiated some forms of limited protection for refugees within these otherwise exceptional spaces by signing Memoranda of Understanding (MoU) with Jordan,[14] Lebanon,[15] and Turkey.[16] Such MoUs generally permitted refugees recognised by UNHCR to remain within these countries for a short period of time (ranging from six to twelve months) on the condition that UNHCR identify durable solutions (resettlement to a third state or repatriation to their country of origin) for them within that time frame.

By tying refugee recognition to resettlement or repatriation in the MoUs, there was an implied pressure upon UNHCR to prioritise refugee recognition for persons who met the resettlement criteria or could safely repatriate. However, durable solutions were nearly impossible to realise in the majority of cases of Iraqi refugees: UNHCR maintained a policy against refugee return to Iraq, and resettlement directly benefited less than 5% of the Iraqi refugee population. Failure to secure a solution in a timely manner could translate into renewed threats of detention and deportation for illegal residence in these host states.

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[9] *See for example* Amnesty International (2007, September) *Millions in flight: the Iraqi refugee crisis* (MDE 14/041/2007), p. 13.
[10] Ibid., pp. 22-23.
[11] UNHCR (2009, July) *Surviving in the city: a review of UNHCR's operation for Iraqi refugees in urban areas of Jordan, Lebanon and Syria* (PDES/2009/03), p. 40.
[12] Amnesty International (*supra* note 9), pp. 16, 23.
[13] Zaiotti, R. (*supra* note 2), p. 343.
[14] UNHCR (1998, April 5). Memorandum of Understanding between the Government of Jordan and UNHCR.
[15] UNHCR (2003, March 18). Memorandum of Understanding between the Directorate General of General Security and the Regional Office of the United Nations High Commissioner for Refugees Concerning the Processing of Cases of Asylum Seekers Applying for Refugee Status with the UNHCR Office (2003, September 9).
[16] Human Rights Watch (2003, February 13). *Iraqi refugees, asylum seekers, and displaced persons: current conditions and concerns in the event of war*.

In the wake of the growing humanitarian crisis that ensued, UNHCR mobilised resources in response, with the goal of increasing human rights protection space for displaced Iraqis in the Middle East.[17] UNHCR recognised that in the context of the Iraqi refugee crisis, consolidating protection space through advocating that the host States sign the 1951 Refugee Convention might prove counterproductive in the short-term and undermine the goodwill and positive political relationships it attempted to forge with government authorities. However, acknowledging that a purely pragmatic approach would also undermine its mandate to uphold international standards of refugee protection, UNHCR adopted an approach combining diplomacy, training and capacity building with outreach and advocacy to civil society and refugees; increasing the definition of protection to address social and economic vulnerabilities; and mobilising international solidarity through increased resettlement, bilateral support, and humanitarian assistance.[18]

To ensure greater legal protection, in February 2007, UNHCR began recognising all Iraqis from southern and central Iraq as *prima facie* refugees,[19] thereby obviating the need for individual refugee status determination.[20] Also recognising that as an urban refugee population, Iraqi refugees faced issues that differed from refugees who lived in camp contexts,[21] UNHCR used mobile registration, media communications, and community organisations to reach out to refugees in dispersed locations throughout the cities of Damascus, Aleppo, Amman, Beirut, and Cairo, where they often faced difficulty accessing UNHCR's offices due to distance, health issues, economic limitations, or family or work commitments.[22] In Lebanon, UNHCR negotiated agreement with the government to regularise the status of Iraqi refugees over the course of three months in 2008, which resulted in the release Iraqi refugees in detention upon the payment of a fine.[23] In Syria, UNHCR

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[17] Barnes, A. (2009, January) *Realizing protection space for Iraqi refugees: UNHCR in Syria, Jordan, and Lebanon* (Research Paper No. 167, New Issues in Refugee Research); Benchmarks for measuring and delimiting protection space for Iraqi refugees were identified as: "(a) access to safety and *non-refoulement*; (b) nonpenalisation for illegal entry; (c) permission for temporary stay under acceptable conditions; (d) registration and the identification of protection vulnerabilities; (e) access to durable solutions, including resettlement; (f) availability of humanitarian assistance to persons with specific needs; and (g) access to essential services and opportunities for self-reliance". UNHCR, (*supra* note 11), pp. 14-15. In 2007, UNHCR convened the International Conference on Addressing the Humanitarian Needs of Refugees and Internally Displaced Persons inside Iraq and in Neighbouring Countries at the Palais de Nations in Geneva to obtain financial commitments of member states to the Iraqi refugee operation.

[18] UNHCR, ibid., pp. 18-19.

[19] Ibid., p. 21.

[20] However, in order to prevent the recognition of Iraqis who may have committed acts in the past that would render them excludable under Article 1F of the 1951 Refugee Convention, UNHCR devised a regional exclusion strategy aimed at the early identification of such persons at the point of registration and to direct these cases through channels where they could be properly assessed. Ibid., pp. 24-25.

[21] Ibid., p. 4.

[22] Ibid., p. 27.

[23] UNHCR (2008, February 20). *UNHCR welcomes Lebanon's recognition of Iraqi refugees*.

participated in border monitoring to gauge the treatment of Iraqi refugees attempting to cross the borders.[24]

In order to increase Iraqi refugees' access to social services and economic assistance, UNHCR funded a number of projects in concert with the host state governments, including school-building and improvement projects that would benefit both host society and refugee children and also health care services. In 2007, UNHCR made an agreement with the Ministry of Health in Syria in which Iraqi refugees who had serious illnesses could receive medical treatment at the Syrian Red Crescent Society clinics,[25] and it also negotiated with the Jordanian Red Crescent to provide limited health care to Iraqis not registered with UNHCR.[26] UNHCR in Jordan and Syria further developed systems of providing ATM cards to refugees who could then more easily access their cash assistance.[27]

Resettlement emerged as a critical durable solution and tool of protection, one which the UNHCR acknowledged became a significant driver of the Iraqi refugee operation. 100,000 submissions for resettlement of Iraqi refugees were made by 2010.[28] The resettlement program was envisioned as an example of the strategic use of resettlement, which was a policy crafted to use resettlement strategically to alleviate burdens on host states and to encourage them to increase protection for refugees remaining on their territories in return.[29]

UNHCR also adopted a strategy aimed as safe and voluntary repatriation to Iraq. The first part of the strategy was the UNHCR's call upon host states to refrain from forcibly returning Iraqi refugees to situations where they may continue to face threats to their human rights and safety or may overburden and destabilise the fragile infrastructure in Iraq, and UNHCR often interceded in instances of threatened deportation. The second part of the strategy was to promote safe conditions of return by increasing UNHCR's presence and activities within Iraq. The third part involved providing Iraqi refugees who wished to voluntarily return with counselling, assistance packages of US$500, and monitoring the safety and dignity of the repatriation process.[30] The Iraqi government also initiated a separate voluntary repatriation program.[31] However, Iraqi refugees were slow to take advantage of these repatriation

[24] UNHCR-Iraq (2009). *October 2009 factsheet*.
[25] Amnesty International, (*supra* note 9), p. 16.
[26] Ibid., p. 23.
[27] UNHCR, (*supra* note 11), p. 37.
[28] UNHCR (2010, June 18). *UN chief announces 100,000 landmark in resettlement of Iraqi refugees*.
[29] UNHCR (2010, June 4). *Strategic use of resettlement*.
[30] UNHCR, (*supra* note 11), pp. 52-53.
[31] Ibid., p. 53.

programs, primarily only doing so when economic hardship in the host country led them to take this decision.[32]

Although growth in protection space largely was not accompanied by any institutional changes or commitments,[33] UNHCR concluded that its protection activities did result in increasing protection space for Iraqi refugees, for example, in decreases in rates of *refoulement*, the fact that Iraqis continued to access neighbouring territories in spite of visa restrictions, the increased ability of Iraqis to access education and health care, the limited tolerance of Iraqi employment in the informal sector, decreases in detentions for visa overstays or violations of immigration laws, increased recognition by state authorities of UNHCR documentation provided for refugees, willingness of states to allow UNHCR to conduct monitoring and outreach, the creation of a resettlement program, and the absence of widespread serious conflicts between Iraqi refugees and their neighbours.[34]

De-localising and contesting sovereign power in refugee spaces

The successes in obtaining such protection, however, were hard-won in an environment of restrictive state policies derogating from principles of refugee protection and revealed how the exercise of sovereign power became contested, appropriated, and delimited. The protection strategies employed by UNHCR were facilitated by the constructions of the Iraqi refugee situation as a crisis and an emergency, one which was more easily managed by UNHCR, was temporally limited, had vast donor State support, and would permit state governments in the region to assume greater authority upon the cessation of the crisis. Although the UNHCR has continuously emphasised the primacy of state responsibility for refugees,[35] this construction of the crisis both enabled the entry of UNHCR as a humanitarian organisation to govern the refugee population and legitimised the increasingly state-like functions that it assumed.

However, as the agency's mandate to promote protection and durable solutions for refugees was not always in keeping with state interests in containment and policing, this process was heavily politicised and contested. These tensions revealed how sovereignty was no longer confined to state authority, but was contingent and delocalised as UNHCR began playing a state-like role,[36] at times in concert with, in challenge to, or parallel to host states. UNHCR

[32] Ibid.
[33] Ibid., p. 17.
[34] Ibid., p. 15.
[35] UNHCR (2009, September). *Policy on Refugee Protection and Solutions in Urban Areas*, para. 6.
[36] *See* Kagan, M. (2011, February). 'We live in a country of UNHCR: the UN surrogate state and refugee policy in the Middle East (UNHCR, New Issues in Refugee Research, no. 201).

as an international organisation not only negotiated with states, but overlapped with governments in the provision of services and protection for refugees, and states continued to assert their sovereign authority by constraining the scope of UNHCR's actions.

UNHCR's decision-making with regards to refugee recognition, for example, was a parallel system for international legal protection in the absence of domestic mechanisms. Decisions normally enacted by sovereign states as to who qualifies as a refugee under international and state law and who will be permitted to remain protected on state territory largely fell to UNHCR, thus shifting the exercise of sovereign authority from the state to an international organisation. UNHCR played the state role of exercising the sovereign decision on inclusion or exclusion from legal protection. In this sense UNHCR had the power to decide upon life – whether one would have access to legal recognition of the state or would remain in a state of what Agamben termed "bare life", living at the political margins of the state, unprotected by its law, but subject to the violence of its power.[37] UNHCR further implicitly challenged the limits imposed by its former MoUs with governments by recognising all Iraqis from southern and central Iraq who were now in these host states as *prima facie* refugees, despite that resettlement as a durable solution would hardly be realised for the majority and that many would have to wait to determine whether voluntary repatriation would become a safe or feasible option.

However, the decision on refugee status implied only a limited temporal form of protection – a right to remain for a short period of time with limited or no rights of employment. UNHCR's recognition of refugees required that the agency secure the political and legal protection of these refugees by a state other than the host state in which they were residing. Therefore, this parallel system of sovereign decisionism was complicated by conditions placed upon the organisation by the state through the MoUs and subsequent agreements. While playing a state-like role as an adjudicator, UNHCR was also constrained by the political requirements of the host states following the refugee status determination process, thus relying upon diplomatic efforts to secure its protection activities.

As a part of its strategy to address urban refugee needs by providing funding for development of schools and health care that would benefit both the local populations and the Iraqi refugees, UNHCR moved from governing separately from the state (in camps) [38] to governing

[37] Agamben, G. (1998). *Homo Sacer: sovereign power and bare life* (D. Heller-Roazen. Trans.). Stanford, California: Stanford University Press (Original work published 1995), p. 183; Dean, M., Four theses on the powers of life and death. *Contretemps*, 5 Dec 2004, 16-29, p. 24.

[38] Slaughter, A. & Crisp, J. (2009, January). 'A surrogate state? The role of UNHCR in protracted refugee situations', *New Issues in Refugee Research*, No. 168.

in concert with (or even merging governance in some local instances) the state.[39] The host states in the Middle East decided that refugees would be treated as guests and provided with access to public services, rather than being provided with services dedicated only for refugees.[40] UNHCR hence engaged more intensively with state structures and state development projects to increase their capacities to accommodate refugees, a strategy that had also to address issues where states and the organisation had divergent views or interests.[41] UNHCR's funding of services was often tied to requirements that Iraqi refugees be registered with UNHCR, thereby making UNHCR a de facto quasi-governmental institution and gatekeeper that managed and coordinated refugee access to certain public services.

This expanding and increasingly state-like role of UNHCR as it operated in environments where legal protection frameworks for refugees were largely absent, and protection was based upon state discretion and goodwill, revealed the emergence of new forms of transnational governance, as a de-localised and processual form of sovereignty migrated to this new site of crisis.[42] The strategies employed by UNHCR in the Iraqi refugee crisis demonstrated how state sovereignty is simultaneously both shored up and eroded by humanitarian governance in the name of emergency.[43]

The mobilisation of strategies by UNHCR to increase the protection space for Iraqi refugees revealed how its assumption of some constrained forms of sovereign power was focused primarily upon shoring up the state system by re-instating refugees through resettlement, integration, or repatriation, thus ensuring their legal recognition and countering the existential threats that they symbolically pose to the myth of closure within the state system. However, in using funding, resettlement, and diplomacy strategically to counter state restrictions imposed on refugees on their territories, these new powers of governance may also have created opportunities for contesting and influencing the exercise of state sovereignty in these contexts, as it encouraged greater inclusivity and flexibility and countered the normalcy of sovereign exceptionalism towards refugees in the region.

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[39] The UNHCR 1997 urban refugee policy specifically noted the preference of providing assistance to national service structures in order to increase their capacity to serve refugees as well as their own nationals rather than creating parallel services only for refugees. UNHCR (1997). *UNHCR policy on refugee protection and solutions in urban areas*.
[40] UNHCR, (*supra* note 11), p. 45.
[41] Ibid., pp. 46-47.
[42] Pandolfi, M. (2003). Governance and the humanitarian apparatus. *Indiana Journal of Global Legal Studies*, 10, 369-381, pp. 369-370.
[43] Ibid., pp. 372-373.